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EDITOR
Chirag Bhanu Singh
Director,
H.P. Judicial Academy,
Shimla.

ASSISTANT EDITOR
Avinash Chander
Deputy Director,
H.P. Judicial Academy,
Shimla.

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INDIAN LAW REPORTS

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in the dismissal of the suit by the learned Trial Court- **Held-** No- The lacuna in the suit cannot be permitted to be rectified in appeal by way of an application under Order 1 Rule 10, without adjudicating the appeal on merits, more particularly when the plaintiff has been non-suited on the grounds of non-joinder of necessary parties only- It was incumbent on the Learned 1st Appellate Court to first have returned a finding as to whether the suit was maintainable or not for want of necessary parties.

Title: Shashi Pal Vs. Desh Raj and others Page-87

Code of Civil Procedure, 1908- Order 1 Rule 10- Application filed by the petitioner to be impleaded as defendant in the main suit before the learned 1st Appellate Court- Application dismissed and hence the present petition- High Court while dismissing the petition **Held-** That in case the documents on the basis of which impleadment is sought seemingly are not genuine and the said fact has been duly considered by the Lower Court, application for impleadment need not be allowed- On facts, further Held- that application for impleadment had only been filed during the pendency of the appeal and that too without any explanation as to what prevented the petitioner from filing the same during the pendency of the suit in the trial Court- Consequently, CMPMO dismissed.

Title: Pritam Singh Vs. State of H.P and others Page-218

Code of Civil Procedure, 1908- Order 1 Rule 10- Order 22 Rule 10- Suit for declaration claiming therein that plaintiff has become absolute owner qua the share of defendant No.1 (sister) in consequence of exchange whereby plaintiff relinquished his property at Goa, Panji in favour of defendant No.2, son of defendant No.1- The agreement of sale entered by the defendant No.1 with applicant and with one Shri Anil Kumar qua the suit property during the pendency of the suit, records that sale shall be executed only after the disposal of the present suit- applicant sought to be impleaded as co-defendant- **Held**- that agreement to sell does not confer any title or right in the suit property- Applicants have no interest in the suit property as per aforementioned condition incorporated in the agreement as well as provisions contained in Section 52 of the Transfer of Property Act- They cannot claim to be impleaded as independent defendants having right to file the written statement- Further held- that order 22 Rule 10 CPC has to be read supplementing the provision of Order 1 Rule 10 CPC, a party if not necessary party under Order 1 Rule 10 CPC cannot be impleaded by invoking the provision contained in Order 22 Rule 10 CPC- No merits in the application - application disposed of accordingly.

Title: Raja Ashok Pal Sen Vs. Raj Kumari Indira Mahindra and others Page-153

Code of Civil Procedure, 1908- Order 39 Rule 1 and 2 readwith Section 151 CPC- The petitioner seeking ad-interim mandatory injunction against the defendants, for theirs, unlocking the suit premises- The learned Trial Court allowed the plaintiff's application, which on appeal was reversed by the Learned 1st Appellate Court- The Hon'ble High Court while reversing the order passed by the Learned 1st Appellate Court **Held-** that the relief of interlocutory mandatory injunction are generally granted to preserve and restore the last non-contested status, immediately preceding the controversy- On facts, the misdoings of locking the suit premises by the defendant held to be untenable, moreso as the property in question was contradistinct from the one owned by Sukh Ram, against whom proceedings under the "SARFAESI" Act were initiated by the defendant- Consequently, orders passed by the learned Trial Court upheld.

Title: Sandeep Kapila Vs. State Bank of India & another Page-190

Code of Civil Procedure, 1908- Order 6 Rule 17 read with Section 151 CPC- An amendment of pleadings sought on the ground that written statement filed earlier in the suit by one Advocate Shri A.K. Saini had not been filed by the petitioner/defendant as he had never engaged Shri A.K. Saini as an Advocate- Apparently, a fresh written statement and a counter claim also had been filed by the petitioner/defendant through one Shri P.C. Sharma, Advocate- However, oblivious of

the said fact learned Trial Court vide an order dated 11.2.2014 had dismissed an application, seeking to take off the record the written statement filed earlier by Shri A.K. Saini, Advocate- In fact, the aforesaid order was never challenged by the defendant- Nevertheless issues had come to be framed on 22.11.2012, taking into consideration the fresh written statement filed by the petitioner/defendant through Shri P.C. Sharma, Advocate- **Held**- That the entire proceedings from that stage i.e. the stage of framing of issues in the suit stood vitiated – Further Held- that once the petitioner/defendant had disputed the question of the engagement of Shri A.K. Saini, Advocate to defend him in the suit and also vis-à-vis the filing of the written statement, the best available course to the learned Trial Court was to have accorded the permission to take off such written statement from the record and allow the petitioner/defendant to file fresh written statement – petition disposed of accordingly.

Title: Jiwan Singh Vs. Saroj Bala Page-150

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for decree of possession- The late husband of the defendant had taken the suit land from the plaintiff in exchange and had agreed to give the plaintiff the land comprised in other khasra numbers- The late husband of the defendant had not handed over the possession of the land and as such plaintiff wants his land back- The defendant while contesting the suit had enter alia raised a plea that her husband had been in adverse possession of the suit land- The learned Trial Court had dismissed the suit, which was upheld by the learned 1st Appellate Court- On second appeal the High Court reversed the findings and **Held**- That the hostile animus possedendi has to be borne out from the written statement- defendant with a hostile animus, began possession vis-a-vis the suit land – It was also essential to submit from when and how the possession became hostile – Adverse possession was only thereupon imperatively reckonable- On facts held that the same was amiss in the present case- Moreover, in view of Ex.DW-4/A, a recital showing deed of conveyance qua the suit land- The defendant was estopped from raising a plea of adverse possession- Consequently, judgment of the courts below set aside and quashed qua the said findings.

Title: Bala Nand & others Vs. Shakuntla Devi Page-175

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Section 53-A of the Transfer of Property Act- Doctrine of Part Performance- Defendant in alternative had sought the protection of Section 53-A of the Transfer of Property Act based on Ex.DW-1/A- **Held-** that the learned Trial Court had erred in not framing issue in respect of the alternate plea raised by the defendant vis-à-vis Section 53A resulting in prejudice to the parties- A specific issue in this behalf framed by the High Court - Consequently, matter remanded back to the learned Trial Court to seek evidence of both the parties on the aforesaid issue alone- the learned Trial Court directed to decide the same within five months from the date of the order.

Title: Bala Nand & others Vs. Shakuntla Devi Page-175

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for specific performance of contract, further seeking permanent prohibitory injunction- Dismissed by the learned Trial Court- Findings affirmed by the learned 1st Appellate Court – One biswa of land on 25.1.1992 was agreed to be sold by the defendant No.1 for a sale consideration of Rs.10,000/- to the plaintiff- The consideration thereof was already paid and possession delivered to the plaintiff- Plaintiff had already constructed his residential house over this one biswa of land- On 25.8.2000 defendant No.1 had sold 2-12 bighas of the land to the defendant No.2 vide registered sale deed for a sale consideration of Rs.30,000/-, by ignoring the agreement to sell arrived between the plaintiff and defendant No.1 – In Regular Second Appeal **Held-** that the findings recorded by the courts below were gripped with grave infirmities as it was crystal clear from the evidence on record that the entire sale consideration had been paid by the plaintiff to defendant No.1, authorities issuing notices to defendant No.2 for raising unauthorized construction clearly showing non execution of the registered deed of conveyance – The plaintiff was entitled to the

relief claimed by him- Further held- that the cause of action arose to the plaintiff in the year 2000 when the defendant No.1 sold the land to defendant No.2 and the suit was not barred by limitation- Consequently, the sale affected in the year 2000 not validated- However, while setting aside the judgments and decrees passed by the learned courts below defendant No.1 directed to execute a registered sale deed within three months in support of one biswa of land only, strictly, in consonance with Ex.PA on record- Appeal allowed accordingly.

Title: Raghubir Singh Vs. Taro Devi & Anr. Page-181

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for permanent prohibitory injunction and mandatory injunction- Challenge to the concurrent findings of the trial Court and 1st Appellate Court allowing the relief of permanent prohibitory injunction and mandatory injunction- Plaintiffs claimed that defendant encroached upon the suit land and encroachment identified by way of demarcation- Demarcation had taken place in the presence of defendant and his family members- Record suggests that the evidence brought by the plaintiffs to the establish his cause is genuine and inspiring confidence- **Held**- that concurrent findings of the fact cannot be upset by the High Court in Regular Second Appeal, unless the findings so recorded are shown to be perverse- also held that power of attorney cannot depose in respect of the matter in which the principal may have exclusive knowledge and in respect of which the principal is liable to be cross-examined – Testimony of power of attorney cannot be thrown away, if he has personal knowledge of the facts deposed- no perversity in the judgment and decrees under challenge and same is based upon the correct appreciation of the evidence - no merit in the appeal- Appeal dismissed.

Title: Sushila Devi Vs. Ankur Dutt and another Page-38

Code of Civil Procedure, 1908- Section 115- Order 23 Rule 1 read with Section 151 C.P.C. - Plaintiff filed an application under the aforesaid provisions seeking permission to withdraw the suit- Same came to be rejected by the learned Trial Court- Hence, the revision petition- **The High Court held-** that it is true that plaintiff can, at any time, after the institution of the suit, abandon the suit or abandon any part of his claim but that is always subject to the satisfaction of the Court- the proceeding cannot be used to fill up the lacuna or defects occurring in the suit.

Title: Basanti Vs. Dhian Singh and Ors. Page-179

Code of Civil Procedure, 1908- Section 151- Civil Revision- Order 11 Rule 12- Rent Control Act- Petitioner filed an application under Order 11 Rule 12 seeking to permit discoveries of an agreement dated 27.7.1992, purportedly executed inter-se the deceased husband of the non-applicant and the petitioner herein- Application dismissed by the learned Rent Controller- Hence, the present revision- **Held-** that an original agreement inter-se the party relating to the demised property was essential for the effective adjudication of the lis – Oblivious of the family settlement agreement inter-se the parties had to be evaluated by the learned Rent Controller, especially vis-à-vis the comparative evidentiary worth of both the documents and their comparative probative worth had to be assessed to clinch the issue- Consequently, the impugned order set aside- Revision allowed.

Title: Vivek Ummatt Vs. Surinder Kaur Page-164

Code of Civil Procedure, 1908- Section 24- Transfer of the civil suit sought on the ground that the defendant is a practicing lawyer in Palampur and as such no advocate is coming forward to appear for the petitioner- Application dismissed by the Learned District Judge - While allowing the petition- The High Court **Held-** the possibility of the members of the bar not willing to appear against the respondent cannot be ruled out- Justice should not only be done, but look like to have been done- Consequently, petition allowed.

Title: Anil Sood Vs. Rajinder Kumar Sood & Another Page-173

Code of Criminal Procedure, 1973- Appeal under Section 378 Cr.P.C.- Sections 354, 325 and 341 of IPC- The respondent/accused convicted by the learned Trial Court and acquitted by the Learned Sessions Court- On appeal while reversing the judgment of the learned 1st Appellate Court High Court **Held-** that identification by the complainant and her husband, even though declared hostile was sufficient and unequivocal and proves the presence of the accused on the spot and his involvement in the offence- Further Held**-** that non-association of the independent witnesses was also not fatal to the prosecution as the occurrence had taken place at 8:00 AM and none could have been available in the market place, moreso, as there is no evidence or suggestion in cross-examination that at the time of incident, large number of people were present at the spot- Consequently, conviction and sentence passed by the learned Trial Court upheld, however, benefit of probation extended to the accused.

Title: State of Himachal Pradesh Vs. Kehar Chand Page-234

Code of Criminal Procedure, 1973- Criminal Appeal- Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 29- Appellants challenged their conviction and sentence passed by the learned Special Judge, whereby accused have been convicted and sentenced to undergo simple imprisonment for 15 years each along with fine of Rs.15,000/- each and in default to further undergo simple imprisonment for 8 months each under the aforesaid offences- On completion of the investigation, the Narcotics Control Bureau (NCB) had filed a complaint against one accused Nilmani, followed by a supplementary complaint against accused Khekh Ram- **High Court Held-** that supplementary complaint can only be filed after obtaining the leave of the Court- Since, in the present case, no permission had been sought- The trial held to have been vitiated against accused Khekh Ram- Complaint held to be not maintainable- Consequently, conviction and sentence based on such complaint set aside.

Title: Khekh Ram Vs. Narcotics Central Bureau & Anr. (D.B.) Page-103

Code of Criminal Procedure, 1973- Criminal Appeal- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 42- Further held- that compliance of Section 42 of the NDPS Act mandatory in nature, non-compliance is fatal to the prosecution- High Court reiterated the law laid down in State of Punjab vs. Balbir Singh- The other accused also acquitted.

Title: Khekh Ram Vs. Narcotics Central Bureau & Anr. (D.B.) Page-103

Code of Criminal Procedure, 1973- Criminal Appeal- Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 29- Further held- that non-association of independent witnesses despite availability deprecated- Further held- that in a case of chance recovery, non-association of independent witnesses cannot be undermined and brushed aside lightly- accused acquitted.

Title: Khekh Ram Vs. Narcotics Central Bureau & Anr. (D.B.) Page-103

Code of Criminal Procedure, 1973- Criminal Appeal- Section 138 of Negotiable Instruments Act- Case dismissed for non-prosecution as the complainant failed to put up appearance on the date fixed- High Court in appeal **Held-** that Section 256 Cr.P.C. provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper – Magistrate can also dispense with the attendance of the complainant and proceed for the day in case he is represented by a pleader- Further Held- that when the Court notices that the complainant is absent on a particular day, the Court must consider whether the personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date.

Title: Dole Raj Thakur Vs. Pankaj Prashar Page-193

Code of Criminal Procedure, 1973- Criminal Appeal- Section 138 of Negotiable Instruments Act- Section 397 Cr.P.C- Held- that there is difference between filing of second revision after adjudication of the first revision on merits and filing of a successive revision after withdrawing the first revision.

Title: Dole Raj Thakur Vs. Pankaj Prashar Page-193

Code of Criminal Procedure, 1973- Section 397- Section 319 of Cr.P.C.- Public prosecutor had preferred an application under Section 319 Cr.P.C seeking to array one Nanak Chand and his employees as co-accused- Application came to be dismissed by the Learned Sessions Judge- **High Court Held-** that if during the course of trial, offence appears to have been committed, such persons could be tried together with the accused already facing trial as per the provision of Section 319 Cr.P.C.- The contention of the respondents that a de novo trial be instituted against the newly arrayed respondents as it will jeopardize the right of speedy trial of the other accused negated- Further Held- that the acceptance of the request for de novo trial would further infringe the provision of Section 223 of the Cr.P.C.

Title: Sakshi Sharma Vs. State of H.P. & others Page-186

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail- Section 379 IPC and Sections 32 and 33 of the Indian Forest Act- Petitioner found to be in possession of approximately 7200 liters of cedar wood oil without any valid permit/permission from the Forest Department - had illegally and unauthorisedly stored cedar wood oil – Pre-arrest bail sought- **High Court Held-** that freedom of an individual is of utmost importance and cannot be allowed to be curtailed for indefinite period, especially when guilt of the petitioner is yet to be proved in accordance with law- Further Held**-** that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the Court while exercising its discretion and one of the test to be applied while granting bail is whether the party will be present during the course of trial.

Title: Ramesh Kumar Vs. State of Himachal Pradesh Page-265

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Petitioner alleged to have committed offences punishable under the aforesaid provisions of the N.D.P.S. Act- Bail application under Section 439 Cr.P.C filed before the Hon'ble High Court- **The High Court Held-** that the other co-accused from whose conscious possession the contraband was recovered already released on bail and the present petitioner having been implicated on the statement of the said accused and only a case under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 having been made out against the present petitioner, he requires to be released on bail.

Title: Pawan Dixit Vs. State of Himachal Pradesh Page-137

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Further held- that even otherwise the quantity allegedly recovered from the co-accused was less than commercial and as such, the rigors of Section 37 would not apply even in the case of the petitioner- Moreso because he has been booked only for having committed offences punishable under Sections 21 and 29 of the N.D.P.S. Act- Petitioner held entitled to bail.

Title: Pawan Dixit Vs. State of Himachal Pradesh Page-137

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 302, 330, 331, 348, 323, 326, 218, 195, 196 and 201 readwith Section 120-B of I.P.C.- Petitioner a Senior IPS Officer, IG Police - alleged to have entered into a criminal conspiracy to commit the aforesaid offences resulting in the death of one Suraj while in the custody of the police- Petitioner had approached

the Special Judge, CBI for bail- Petition was dismissed- Hence, bail application under Section 439 Cr.P.C. filed before the Hon'ble High Court- **High Court Held-** that no doubt freedom of an individual cannot be curtailed for indefinite period and Gravity alone cannot be a decisive ground to deny bail, but at the same time the Court is required to consider the reasonable apprehension of the petitioner tempering with the evidence or threatening the complainant- On facts held that in the present case several materials witnesses were from the police department and there was a possibility of the petitioner interfering with the trial.
Title: Zahur Haidar Zaidi Vs. Central Bureau of Investigation Page-247

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 302, 330, 331, 348, 323, 326, 218, 195, 196 and 201 readwith Section 120-B of I.P.C.- Further held- that the personal liberty of an individual is not absolute- It can be withdrawn when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves - Court cannot abandon its sacrosanct obligation and pass an order at its own whims or caprice- Since, it was a case of custodial death, which occurred due to the high handedness of the police officials who are otherwise expected to protect life and liberty of its citizens, discretion of bail cannot be exercised in favour of the petitioner- Custodial death is a heinous crime and even the persons involved in the crime being highly placed, such crime needs to be dealt with severely.
Title: Zahur Haidar Zaidi Vs. Central Bureau of Investigation Page-247

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 505(2), 124A, 419, 420, 511 and 201 IPC- Petitioner alleged to have committed offences punishable under the aforesaid provisions of the I.P.C.- Bail application under Section 439 Cr.P.C filed before the High Court- **The High Court Held-** that the gravity of the offence alone cannot be a ground to deny bail to the petitioner, rather competing factors are required to be balanced by the Court while exercising its discretion in this behalf, as the guilt of the petitioner is yet to be proven by the prosecution by leading cogent and convincing evidence- Freedom of the bail petitioner cannot be curtailed merely on the apprehension of the Investigating Agency.
Title: Sachin Datta Rathod Vs. State of Himachal Pradesh Page-144

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 8, 20, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act- Petitioner charged under the aforesaid offences, for having been found in possession of 4.272 kg. charas from one of the rooms of the Hotel allegedly owned by the petitioner – Bail petition preferred- **Held-** that though the quantity of the contraband allegedly recovered from the hotel owned by the petitioner was commercial in nature, but that cannot be a sole ground to deny bail to him and that too for an indefinite period, especially when lease agreement placed on record suggests that at the time of search/ recovery of contraband, Hotel was in the occupation and possession of the other co-accused- Bail granted.
Title: Yashpal Vs. Narcotics Control Bureau Page-95

Code of Criminal Procedure, 1973- Section 439- Indian Penal Code, 1860- Sections 376 and 506- Accused sexually exploited complainant on the false promise of marriage- Record suggests that the complainant and bail petitioner were well known to each other – They had been meeting frequently during the last 6 months- Complainant is 30 years old lady- She was knowing the consequences of physical relationship before marriage- The allegation of sexual exploitation under the promise of marriage does not stand in the way in allowing the bail application as while considering bail application Court needs to see the circumstances in which alleged offences are committed, besides seeing whether the bail applicant would be available for trial and possibility of bail applicant tempering the evidence, threatening the witnesses and repeating of the offence- Bail applicant being local resident would be available for investigation and trial- **Held**- that gravity alone cannot be decisive ground to deny bail, rather entirety of facts needs to be seen by the Court- Bail granted- Petition allowed.
Title: Anil Kumar Vs. State of Himachal Pradesh Page-5

Code of Criminal Procedure, 1973- Section 439- Section 302 read with Section 120-B of I.P.C.- Bail petitioner in custody for the last nine months for allegedly having committed offences under the aforesaid provisions of the I.P.C.- Bail application moved before the High Court – **Held** – Gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the Court while exercising its discretion- No evidence forthcoming during examination of witnesses, suggesting direct involvement of the petitioner- Moreso the other accused already enlarged on bail- Bail allowed.

Title: Preet Kumar Vs. State of Himachal Pradesh Page-129

Code of Criminal Procedure, 1973- Section 482- After passing of the judgment an application for recalling the judgment filed as the matter was stated to have been amicably settled inter se the parties- While dismissing the same- **Held-** There is no provision in the Cr.P.C conferring powers on the Court to recall or review the judgment- Review or recall even cannot be exercised under Section 482 of the Cr.P.C. – Rather, Section 362 Cr.P.C. envisage that once a judgment is signed it cannot be altered and reviewed except to correct clerical or arithmetical errors.

Title: Pushap Raj Vs. Ram Dhan Page-77

Code of Criminal Procedure, 1973- Section 482 Cr.P.C.- Sections 451, 323, 341, 382, 147, 149, 504 and 506 IPC- Quashing of FIR in pursuance to a compromise between the parties- **Held-** that since the parties had resolved their disputes amicably inter se them, the FIR as well as consequential proceedings arising out of the same- ordered be quashed and set aside, reiterating the decision of the Hon'ble Supreme Court in ***Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466***- The guidelines formulated in the aforesaid judgment reiterated to hold that powers conferred under Section 482 of the Code is different than the powers under Section 320 of the Code- The guiding factors for quashing criminal proceedings, if the parties have entered an amicable settlement enumerated:- (i) to secure the ends of justice (ii) to prevent abuse of the process of the any court (iii) such powers not to be exercised in prosecution involving heinous and serious offences (iv) Criminal cases having overwhelming and predominants civil character particularly those arising out of commercial transactions or arising out of matrimonial relationship can be considered for quashing (v) the High Court may also examine whether the possibility of conviction is remote and bleak (vi) while exercising power under Section 482 Cr.P.C., timing of settlement would also play a crucial role- In the facts and circumstances of the case, FIR quashed.

Title: Jumman and Ors. Vs. State of Himachal Pradesh and Anr Page-240

Code of Criminal Procedure, 1973- Section 482- Quashing of Criminal FIR- Complainant (petitioner No.2) lodged an FIR against petitioner No.1- Sister of the complainant is sister-in-law of the accused (petitioner No.1)- Accused used to go frequently to the house of the complainant- they fell in love and also developed physical intimacy- Complainant got pregnant- Accused solemnized marriage with the complainant- **Held** - that to allow the criminal proceedings to continue in such circumstances would amount abuse process of law as respondent/State shall not get any evidence against the accused during the trial- Trial would also affect the married life of the petitioners- proceedings quashed- Petition allowed.

Title: Hardeep Singh & anr. Vs. State of H.P. Page-1

Constitution of India, 1950- Article 226- Civil Writ Petition- Petitioner seeking admission to M.Sc. Physics as her name was reflected at serial No.2 of the waiting list and since the seats belonging to SC and ST categories were lying vacant, petitioner sought admission to the aforesaid vacant seats, based on her eligibility, as per the merit secured by her in the entrance examination- **Held-** that in case of admission to academic institutions left over seats cannot be "carried forward", and the vacant seats, remains unfilled for the entire duration of the course, seats reserved for SC and ST candidates which remain unfilled can be allowed to be filled from

amongst open category candidates, in case eligible candidates are available, on the strength of the merit so secured by them in the entrance examination- Further Held- that vacant seats belonging to reserve category cannot be allowed to remain unfilled- petition disposed of in the aforesaid term.

Title: Archana Thakur Vs. State of Himachal Pradesh and others (D.B.) Page-225

Constitution of India, 1950- Article 226- Court took suo motu cognizance of news item published in Amar Ujala qua non existence of motorable road to villages namely Dakolu, Odi, Bagain, Chagaintu, Larki and Jummuthach - people are facing hardship in their day to day life in absence of road- During the pendency of the petition, Affidavits filed by the HP PWD and respondent-State suggests that efforts are being made to lay the road – it was directed that every efforts should be made to construct road within one year from the date of passing of order- petition disposed of.

Title: Court on its own motion Vs. State of H.P. & Others (D.B.) CWPIL No.15 of 2016 Page-84

Constitution of India, 1950- Article 226- Letter petition by the residents of village Honda Kundi, Tehsil Nalagarh, District Solan alleging that the effluents being discharged from the unit of M/s Fuzikawa Power likely to increase diseases, including cancer- During the pendency of the present public interest litigation, the grievance of the letter petitioner redressed- It was however directed that Principal Secretaries of Health and Irrigation & Public Health, to the Government of Himachal Pradesh shall ensure the concerned area be inspected at least once every quarter and any signs of increase in the disease, directly related to the discharge of effluents, be properly addressed- further Chairman and the Member Secretary of the H.P. State Pollution Board shall ensure the inspection of all industrial units in the area, especially discharging effluents be inspected every quarter for ensuring compliance of environmental laws- District Legal Services Authority also directed to get the area inspected to ensure that directions are complied with by getting the site inspected periodically from the Secretary of the District Legal Services Authority- petition disposed of.

Title: Court on its own motion Vs. State of H.P. & others CWPIL Nos.11 & 45 of 2017 (D.B.) Page-78

Constitution of India, 1950- Article 226- Letter petitioner informed the Court that there is no appropriate shelter for the horses at the Ridge Shimla during the rains effecting adversely the horses - **Held-** that animals have also fundamental rights of life and same does not mean mere survival or existence or instrumental value for human beings, but also some intrinsic worth, honour and dignity - pony ride is an intrinsic part of heritage of the Shimla town- Authorities (Deputy Commissioner, Shimla and Commissioner, Municipal Corporation, Shimla) to ensure that owners and stakeholders do not cause any cruelty to horses- Petition stands disposed of

Title: Court on its own motion Vs. The Deputy Commissioner, Shimla And another (D.B.) Page-215

Constitution of India, 1950- Article 226- Letter petitioner informed about the various lapses in filling up promotional posts of the officers of the Forest Department- Most of the Officers and officials serving in the offices than in the field- mal-handling of the resources by the Forest Department resulting in increase of burden on the state exchequer- it is directed that Forest Development society be constituted and ensure maximum participation of the civil society including the Panchayati Raj Institutions – Promotions and postings be done strictly as per rules governing the service condition of the Forest Guards- Forest Guards be equipped with necessary weapons and Senior Forest Officers be provided with vehicles- State is further directed to consider the proposal to adequately equip the field forest staff with all gazettes and infrastructure

– Government is also directed to adhere to the transfer policy- Accordingly petition stands disposed of.

Title: Court on its own motion Vs. State of H.P. & others CWPIL No. 18 of 2017 (D.B.)
Page-228

Constitution of India, 1950- Article 226- Letter petitioner informed the Court about the illegal mining in District Mandi and inaction on the part of authorities in this behalf- **Held**- that grievance of letter petitioner stands addressed from the steps taken by respondent State during the pendency of the petition- Court, however, directed that State to adhere to the calendar of carrying out surveys and inspection of site- further directed that Government should consider taking action against erring government officials along with wrong doers for checking illicit mining and also consider on revising mining policy, 2013 within 6 months from the disposal of the petition- petition disposed of.

Title: Court on its own motion Vs. State of Himachal Pradesh & others (D.B.) CWPIL No. 10 of 2017 Page-207

Constitution of India, 1950- Article 226- Petitioner Gram Panchayat, Thunag, District Mandi prayed for quashing the decision of establishing office of Sub-Divisional Magistrate-cum-Sub-Divisional Officer (Civil) at Janjehli instead of Tehsil Thunag and also for quashing the notification establishing the Sub-Tehsil at Chhatri- **Held-** that while issuing notification for establishment of offices in question the aspect of public interest has not taken care of as getting reflected from the record- Janjehli is not suitable place for establishing the office of Sub-Divisional Officer as it comprised only 14 Patwar Circles and during winter season it remains covered by snow making thereby things difficult from the view point of the administration, whereas, Thunag is geographically well connected- Further held- that public action has to be exercised in good faith- it should not be based on extraneous factors and arbitrariness- Petition allowed - notifications regarding creation of office of Sub-Divisional Officer at Janjehli, District Mandi and creation of new Sub Tehsil at Chhatri are quashed- petition disposed of.

Title: Gram Panchayat, Thunag Vs. State of H.P. & others (D.B.) Page-170

Constitution of India, 1950- Article 226- Petitioner sought writ of prohibition to the respondent authorities against acquiring land for the purpose of construction of Subji Mandi and against its construction at Chindi and also sought direction for full utilization of existing Subzi Mandi at Karsog- **Held-** that large number of Deodar & Kail trees need to be felled for construction of the Subzi Mandi at Chindi affecting adversely the environment – The sufficient land is available for the construction of Subzi Mandi at Chaar-kufri/Parga Gali- Further directed that respondent board shall not set up Subzi Mandi at Chindi, rather, identify alternate land during the financial year itself and also temporary Subzi Mandi being run at Chindi shall not be functional any further- It is further directed that Subzi Mandi at Karsog be completed at the earliest – petition disposed of.

Title: Inder Sharma Vs. State of H.P. & others (D.B.) Page-220

Constitution of India, 1950- Article 226- Principal Secretary (Ayurveda) Government of Himachal Pradesh issued No Objection Certificate/ Letter of Intent in favour of the petitioner Trust for establishment of Himachal Ayurvedic Medical College and Hospital, Nalagarh to start 60 seats of BAMS Course, in private sectors on 20th February, 2017- The NOC/LOI was withdrawn vide communication dated 14th March, 2017 under the pretext that Hon'ble Chief Minister has desired that the matter be placed before the Cabinet- **Held**- that record suggests that NOC/LOI was issued by the Department of Ayurveda in haste in violation of rules after withdrawing the file from the office of Chief Minister, when Hon'ble Chief Minister was seized with the matter and had directed to list the matter before Cabinet for discussion as per Rules 14 and 16 governing the business- Further held that no NOC/LOI could have been granted by the department without the

approval from the office of Hon'ble Chief Minister/Cabinet and as such the order passed by the department was ex-facie illegal- It could be withdrawn without issuing notice to the petitioner - Hon'ble Chief Minister was well within his competence to list the matter before the Cabinet for discussion before according the permission to establish the College- No merits in the petition- petition dismissed accordingly.

Title: Jagdish Chand Memorial Trust Vs. State of H.P. (D.B.) Page-45

Constitution of India, 1950- Article 226- Public Interest Litigation- A letter petition by the students of Government College, Rampur mentioning therein that the premises of the College being used for holding the activities and functions other than those related with the academics and same is causing inconvenience to the students- **Held**- that authorities need to be very strict in maintaining high academic standards – Further held, that it is the responsibility of the students union organizing functions in the college premises that persons who are not members of student body or of the faculty do not attend such functions- Further directed that function be held with the prior permission of the Principal - Further directed that for the purpose of holding international affairs, a part of premises of the institution is being used, then the Deputy Commissioner concerned shall ensure that studies in the campus do not suffer, no loss be caused to the property of the institution and maintenance of law and order in the premises - petition disposed of.

Title: Court on its own motion Vs. State of H.P. and others (D.B.) CWPIL No.: 146 of 2017

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Constitution of India, 1950- Article 226- Public Interest Litigation- Letter petitioner informed the Court about the illegal mining at Village Kothi on Sunni-Luhri Road- Authorities responsible for checking the illegal mining did not take action despite repeated requests of the petitioner and other residents of the area- **Held**- that District Mining Officer and police should conduct raids regularly to check illegal mining – petition disposed of.

Title: Court on its own motion Vs. State of H.P. & Others (D.B.) CWPIL No.200 of 2017

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Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 7 Rule 14 readwith Section 151 C.P.C.- Application under Order 7 Rule 14 preferred seeking permission to place on record a copy of Misal Hakiyat Bandobast Jadid and copy of a judgment and a decree passed in a previous suit- Application dismissed by the trial Court and hence the petition- **High Court Held-** that such an application at a belated stage and that too in respect of documents which are not necessary for the adjudication of the controversy cannot be taken on record if they are not in consonance with the pleadings on record- Consequently, CMPMO dismissed.

Title: Prem Lal Vs. Rajinder Kumar Page-152

'E'

Employees Compensation Act, 1923- Section 4- The appellant/Insurance Company was burdened with liability of paying compensation to the tune of Rs. 10,07,233/- on behalf of the owner to the claimants on account of death of Parveen Kumar, driver of the ill-fated truck- the deceased driver had no effective and valid driving licence - Owner of the vehicle had not pleaded that he had taken due care in verifying the validity of the licence of the deceased at the time of engaging him as driver on the vehicle in question - vehicle was being driven in violation of the terms and conditions of the insurance policy- Insurance Company cannot be saddled with burden of paying compensation– **Held** - that deceased indisputably died during the course of the employment, therefore, owner of the vehicle is liable to pay compensation- Further held that daily diet money paid to the driver besides salary also forms the part of the salary for the purpose of computing compensation- Further held that in the accidents having taken place prior to the

amendment dated 30.5.2010, in the Act maximum salary/ wages of an employee can be taken as Rs.4,000/- per month only- further held that when owner of the vehicle was having knowledge of the accident and did not deposit the amount of compensation as per requirements of Section 4-A of the Act within 30 days, he is liable to pay penalty along with interest- Accordingly, appeal allowed.

Title: ICICI Lombard General Insurance Company Limited Vs. Anjana Devi and others

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'I'

Indian Forest Act, 1927- Section 41 and 42- Accused persons apprehended transporting Morchella (Guchhi) in a Maruti Car without any valid licence or permit- The learned trial Court acquitted the accused persons- It is held that prosecution has to connect all links of the evidence pointing towards guilt of the accused persons- link evidence in the present case missing- sample seals with which case property was sealed not produced- No evidence produced to establish who took the samples of seized articles to Divisional Forest Office who certified that the substance recovered was Morchella (Guchhi)- Certificate issued by the Divisional Forest Officer was also silent to this effect – evidence lacks inherent consistency - No illegality in the judgment passed by the learned trial Court – appeal dismissed. (Para-11, 12 and 14) Title: State of Himachal Pradesh Vs. Gian Chand Sharma and another Page-89

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Hardeep Singh & anr. .....Petitioners.
Versus
State of H.P. .....Respondent.

Cr.MMO No. 393 of 2017.
Date of decision: December 05, 2017.

Code of Criminal Procedure, 1973- Section 482- Quashing of Criminal FIR- Complainant (petitioner No.2) lodged an FIR against petitioner No.1- Sister of the complainant is sister-in-law of the accused (petitioner No.1)- Accused used to go frequently to the house of the complainant- they fell in love and also developed physical intimacy- Complainant got pregnant- Accused solemnized marriage with the complainant- **Held** - that to allow the criminal proceedings to continue in such circumstances would amount abuse process of law as respondent/State shall not get any evidence against the accused during the trial- Trial would also affect the married life of the petitioners- proceedings quashed- Petition allowed. (Para-4)

Case referred:
Jitender Kumar Sharma versus State of Another, 2010 (4) Civil Court Cases 432 (Delhi) (DB)

For the petitioners : Mr. Vijender Katoch, Advocate.
For the respondent : Mr. M.A. Khan, Addl. AG.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

The present again is a case where both petitioners are now husband and wife. As a matter of fact, elder sister (Sandeep Kaur) of petitioner No. 2-complainant is real sister-in-law (Bhabhi) of -petitioner No.1-accused. Since the two families i.e. of petitioner No. 1-accused and petitioner No.2-complainant were closely related, therefore, petitioner No. 1-accused was visiting the house of the parents of petitioner No.2-complainant well before their marriage. The record available at this stage also reveals that they both were in love and their love affairs ultimately matured into physical relations well before their marriage. The petitioner No.2-complainant is now pregnant. The pregnancy is at an advance stage. Better sense has prevailed upon petitioner No. 1-accused as he has now solemnized marriage with petitioner No.2-complainant at Delhi. They also got registered the marriage. The registration certificate is Annexure P-2. Yesterday on 4.12.2017, while recording the statement of Nisha Devi petitioner No.2-complainant noting her demeanour and on being asked as to whether she is making the statement voluntarily or without any threat and pressure she started crying and disclosed further that she is living at the place of her parents and not in that of her in-laws. The Court suspected that she may not be happily married with petitioner No. 1-accused. Therefore, in order to ascertain the factual position the petitioners were directed to produce their parents in the Court.

2. Consequently, Shri Amar Nath Singh, father of petitioner No. 1-accused Hardeep Singh and Shri Sohan Lal, father of petitioner No. 2-complainant are present in person. Shri Sohan Lal is fully satisfied with this marriage. However, Shri Amar Nath Singh aforesaid had certain reservations and grievances against both the petitioners as according to him they have solemnized marriage alone at Delhi whereas he was in favour of solemnization of marriage with all Hindu rites and customary ceremonies. Anyhow, being pacified with the assistance of learned Counsel representing the petitioners in open Court and also apprised that now they have solemnized marriage and petitioner No. 2-complainant is carrying an advance pregnancy he pardoned them and also granted his approval to this marriage.

3. It is in this backdrop, further statement of petitioner No. 2-complainant has been recorded. In view of the changed circumstances and her marriage with petitioner No. 1-accused Hardeep Singh she is now no more interested to prosecute either the FIR registered against him at her instance or the criminal proceedings, if any, pending in this case. Petitioner No. 1-accused in his statement recorded separately while admitting the statement of his wife Nisha Devi to be true and correct has further undertaken to make her absolutely comfortable in the matrimonial home. Being so, in the changed circumstances, no fruitful purpose is likely to be served to allow the criminal proceedings launched against petitioner No.1-accused to continue. Any such efforts rather would tantamount to misuse of process of law.

4. Interestingly enough, petitioner No. 1 and 2 both are major being 26 years of age. In the changed circumstances and they have solemnized marriage with each other allowing the criminal proceedings initiated against petitioner No. 1-husband neither is in his interest nor in the interest of petitioner No.2-complainant. They both are major, hence competent to take decision for them. The FIR Annexure P-1 is upshot of opposition of petitioner No. 1-accused to marry with her. This Court in ***Shishu Pal*** versus ***State of H.P. & others*** and its connected petition in a situation when the complainant –prosecutrix was minor, while placing reliance on the judgment of Delhi High Court in ***Jitender Kumar Sharma*** versus ***State of Another, 2010 (4) Civil Court Cases 432 (Delhi) (DB)*** has held that on solemnization of the marriage by the complainant with the accused allowing the criminal proceedings to continue would be nothing but an abuse of process of law. This judgment reads as follow:

> *"9. In the light of the given facts and circumstances, irrespective of the prosecutrix was below 18 years of age on the day of her elopement in the company of accused petitioner Shishu Pal and solemnization of marriage with him, in the considered opinion of this Court the present is a case where the FIR registered against the accused-petitioner and his co-accused and also consequential criminal proceedings deserves to be quashed for the reasons that no useful purpose is likely to be served by allowing the same to continue as the prosecutrix and the accused-petitioner Shishu Pal are happily married with each other and living in complete harmony and peace in the matrimonial home. The complainant is also satisfied with the cordial relations of the couple. Initial anguish was somewhat natural for the reason that in our society inter-caste marriages are still not accepted. The present, in the given facts and circumstances, is a case, where allowing the criminal proceedings against the accused petitioner to continue would amount to abuse of process of law for the reason that if the investigation conducted in the matter and evidence collected is taken as it is, the criminal case is not going to end with the conviction of the accused-petitioner because the prosecutrix and for that matter her father, the complainant may also not support the prosecution case. While arriving at such conclusion, this Court finds support from the judgment of a Division Bench of Delhi High Court in* ***Jitender Kumar Sharma*** *versus* ***State & Another, 2010 (4) Civil Court cases 432 (Delhi) (DB)****. As a matter of fact, the facts in* ***Jitender's*** *case were identical to that before this Court because in that case also the age of the prosecutrix was 16 years whereas that of the accused 18 years. They having fallen in love, eloped together and got married, as per Hindu rites and customs in a temple. After registration of the case, the custody of the prosecutrix was entrusted to an NGO, namely* ***'Nirmal Chhaya'****, however, the Division Bench seized of the matter deemed it appropriate to hand over her custody to her husband, the accused, irrespective of he was also minor aged 18 years. The Division Bench in that case had also taken into consideration the fundamental right to 'life' and 'liberty' guarnted by Article 21 of the Constitution of India and also the provisions contained under the Hindu Marriage Act 1955 as well as Child Marriage Restraint Act, 1929 and the provisions contained under Section 6 of Hindu Minority and Guardianship Act, 1956 and held as under:-*

"22. A reading of the 1890 Act and the 1956 Act, together, reveals the guiding principles which ought to be kept in mind when considering the question of custody of a minor Hindu. We have seen that the natural guardian of a minor Hindu girl whose is married, is her husband. We have also seen that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor.

23. In the present case, Poonam is a minor Hindu girl who is married. Her natural guardian is no longer her father but her husband. A husband who is a minor can be the guardian of his minor wife. No other person can be appointed as the guardian of Poonam, unless we find that Jitender is unfit to act as her guardian for reasons other than his minority. We also have to give due weight and consideration to the preference indicated by Poonam. She has refused to live with her parents and has categorically expressed her desire and wish to live with her husband, Jitender. Coming to Poonam's welfare which is of paramount importance, we are of the view that her welfare would be best served if she were to live with her husband. She would get the love and affection of her husband. She would have the support of her in-laws who, as we have mentioned earlier, welcomed her. She cannot be forced or compelled to continue to reside at Nirmal Chhaya or some other such institution as that would amount to her detention against her will and would be violative of her rights guaranteed under article 21 of the Constitution. Neetu Singh's case (supra) is a precedent for this. Sending her to live with her parents is not an option as she fears for her life and liberty.

24. As regards the two FIRs which have been registered are concerned, we are of the view that continuing proceedings pursuant to them would be an exercise in futility and would not be in the interest of justice. Poonam has clearly stated that she left her home on her own and of her own free will. This cuts through the case of kidnapping and insofar as the offence punishable under section 376 IPC is concerned, the present case falls under the exception to section 375 inasmuch as Poonam is Jitender's wife and she is above 15 years of age. The allegation of criminal intimidation is also not sustainable at the outset. Hence, FIR No. 110/2010 u/s 363/376 IPC and FIR No. 177/2010 u/s 363/506 IPC (both of PS Gandhi Nagar, New Delhi) and all proceedings pursuant thereto are liable to be quashed. Since Jitender is less than 18 years of age, even the offence under Section 9 of the Prohibition of Child Marriage Act, which provides for the punishment of a male adult above 18 years of age, is not made out.

25. Before we conclude, we would like to point out that the expression 'child marriage' is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages but also those marriages which are contracted by the minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? In the former kind,

the parents consent but not the minor who is forced into matrimony whereas in the latter kind of marriage the minor of his or her own accord enters into matrimony, either by running away from home or by keeping the alliance secret. The former kind is clearly a scourge as it shuts out the development of children and is an affront to their individualities, personalities, dignity and, most of all, life and liberty. As per the 205th Report of the Law Commission of India, February 2008, child marriages continue to be a fairly widespread social evil in India and in a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33.8% were currently married or in a union. In 2000 the UN Population Division recorded that 9.5% of boys and 35.7 % of girls aged between 15-19 were married [at p.15 of the Report]. Such practices must be rooted out from our social fabric. In the law commission reports on the subject as well as in the statements of objects and reasons behind the Child Marriage Restraint Act, 1929 and now the Prohibition of Child Marriage Act, 2006, the apparent target seems to be these unhealthy practices. However, we have, in our experience in the present bench, noticed a burgeoning of cases of missing daughters and married daughters detained by their parents. It is a serious societal problem having civil and criminal consequences. In countries like USA and Canada also there is the problem of teenage marriages. There many states have recognized teenage marriages provided the boy and girl are both above 16 years of age and the minor has his or her parents' consent. In some cases, consent and approval of the court is also required with or without the consent of the parents. Where the minor girl is pregnant, the marriage is usually permitted. There is a distinction between the problem of child marriages as traditionally understood and child marriages in the mould of teenage marriages of the West. India is both a modern and a tradition bound nation at the same time. The old and evil practices of parents forcing their minor children into matrimony subsists alongwith the modern day problem of children falling in love and getting married on their own. The latter may have been occasioned by aping the West or the effect of movies or because of the independence that the children enjoy in the modern era. Whatever be the reason, the reality must be accepted and the State must take measures to educate the youth that getting married early places a huge burden on their development. At the same time, when such marriages to occur, they may require a different treatment. The sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with habeas corpus petitions and judges would be left to deal with broken hearts, weeping daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their 'sin' is that they fell in love.

10. Therefore, in ***Jitender Kumar's*** *case supra, the FIR registered under Section 363, 366 and 376 was ordered to be quashed and the couple i.e. accused-petitioner Jitender Kumar and prosecutrix, irrespective of minors were allowed to live as husband and wife in the company of each other. In similar set of facts and circumstances, the apex Court in* ***S. Varadarajan versus State of Madras, AIR 1965 Supreme Court, 942,*** *has concluded that no case under Section 363 and 366 is made out against the accused.*

11. Even a co-ordinate Bench of this Court in a recent judgment in ***Cr.MMO No.113 of 2016*** *titled* ***Rajinder Singh*** *versus* ***State of H.P. & Others*** *decided on 29.3.2017 in an identical case where the prosecutrix, belonging to a higher*

caste abandoned the company of her parents to join the company of her husband, the accused petitioner and solemnize marriage voluntarily with him, the Court after taking into consideration the law laid down by the apex Court has held as under:-

> *"12. Thus, taking into consideration the averments and law, as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties are living a peaceful life and the fact that proforma respondent No. 4, Sita Devi has married to the petitioner with her own consent, Marriage Registration Certificate (Annexure P-2), to this effect is duly placed on record. The allegation, as made in the FIR, does not disclose the commission of any offence against the petitioner. Since the complainant has now died and his legal heirs are not coming to the Court, despite service, it seems that they do not want to continue the criminal proceedings against the petitioner.*
>
> *13. Accordingly, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly F.I.R No. 277 of 2009, dated 09.10.2009, under Sections 363, 366 and 506 of the Indian Penal code, registered at Police Station, Manali, District Kullu, H.P., is ordered to be quashed. Since F.I.R No. 277 of 2009, dated 09.10.2009, under Sections 363, 366 and 506 of the Indian Penal code, registered at Police Station, Manali, District Kullu, H.P., has been quashed, consequent proceedings/Challan pending before the learned Judicial Magistrate 1st Class, Manali, District Kullu, H.P. against the petitioner, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion."*

5. In view of what has been said hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, FIR No. 202 of 2017 registered against petitioner No. 1-accused at the instance of petitioner No. 2-complainant in Police Station, Indora is quashed and set aside. The pending criminal proceedings, if any, shall also stand quashed.

6. The petition is accordingly disposed of, so also the pending application(s), if any.

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

Anil Kumar ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

Cr.MP(M) No. 1460 of 2017
Decided on: December 8, 2017

Code of Criminal Procedure, 1973- Section 439- Indian Penal Code, 1860- Sections 376 and 506- Accused sexually exploited complainant on the false promise of marriage- Record suggests that the complainant and bail petitioner were well known to each other – They had been meeting frequently during the last 6 months- Complainant is 30 years old lady- She was knowing the consequences of physical relationship before marriage- The allegation of sexual exploitation under the promise of marriage does not stand in the way in allowing the bail application as while considering bail application Court needs to see the circumstances in which alleged offences are committed, besides seeing whether the bail applicant would be available for trial and possibility of bail applicant tempering the evidence, threatening the witnesses and repeating of the offence- Bail applicant being local resident would be available for investigation and trial- **Held**- that

gravity alone cannot be decisive ground to deny bail, rather entirety of facts needs to be seen by the Court- Bail granted- Petition allowed. (Para-7 and 12)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Varun Thakur, Advocate.
For the respondent	:	Mr. P.M. Negi, Additional Advocate General with Mr. R.K. Sharma, Deputy Advocate General. ASI Nokh Ram, I/O Police Station, Sadar, Solan, HP.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition filed under Section 438 CrPC, prayer has been made for grant of bail in FIR No. 304/2017 dated 15.11.2017, under Sections 376 and 504 IPC, registered at Police Station, Sadar, District Solan, Himachal Pradesh.

2. Sequel to order dated 4.12.2017, ASI Nokh Ram has come present with the record. Mr. P.M. Negi, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency till date. Record perused and returned.

3. Perusal of record suggests that FIR herein above came to be registered against the bail petitioner at the behest of the complainant-prosecutrix, who alleged that the bail petitioner had met her six months back in relation to sale-purchase of some vehicle. Complainant further alleged that the bail petitioner started talking to her on her mobile phone, whereafter, they developed good relations. As per complainant, she developed physical relations with the bail petitioner, who promised to marry her in the near future. During this period, complainant-prosecutrix became pregnant and thereafter she again requested bail-petitioner to marry her, who advised the complainant to wait for some time. Since the bail petitioner was not coming forth to solemnize marriage and complainant-prosecutrix was carrying pregnancy, she threatened the bail petitioner to lodge report with the police. Thereafter, bail petitioner allegedly gave some medicine to the complainant-prosecutrix, in a cup of coffee, whereafter, complainant-prosecutrix had to get the pregnancy terminated.

4. Mr. Varun Thakur, learned counsel representing the bail petitioner, while inviting attention of this Court to the record/status report vehemently argued that no case is made out against the bail-petitioner under Sections 376 and 504 IPC, rather, it is a clear cut case of consent, as such, bail petitioner deserves to be enlarged on bail. Mr. Thakur, further contended that there is nothing on record to substantiate the allegation that bail petitioner gave some medicine in a cup of coffee to the complainant-prosecutrix, as a consequence of which, she had to abort the pregnancy. Mr. Thakur, further contended that the bail petitioner is a local resident of area and there is nothing on record, from where it can be inferred that in the event of petitioner being enlarged on bail, he shall not make himself available for trial/ investigation.

5. Mr. P.M. Negi, learned Additional Advocate General, while opposing aforesaid prayer having been made by the learned counsel for the bail petitioner for grant of bail, argued that keeping in view the conduct of the petitioner as well as gravity of offence committed by bail petitioner, he does not deserve any leniency and present petition deserves to be dismissed. Mr.

Negi, further contended that it has come in the investigation that bail petitioner has been consistently meeting the complainant-prosecutrix and during this period, he sexually assaulted the complainant-prosecutrix on false assurance of marriage as such, he does not deserve to be enlarged on bail. Mr. Negi, further contended that even after passing of order dated 4.12.2017, wherein interim bail was granted to the bail petitioner, he failed to join the investigation and as such, there is every likelihood of his fleeing from justice, in the event of being enlarged on bail.

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

7. After having carefully perused the record, this Court finds that bail petitioner was well known to the complainant-prosecutrix and he had been meeting her frequently for the last six months and during this period both of them developed intimate relations. Perusal of investigation as well as status report itself suggests that complainant-prosecutrix on the pretext of marriage herself developed physical relations with the bail petitioner. Complainant-prosecutrix is a thirty year old lady and as such, argument advanced by Mr. Negi, that bail petitioner sexually assaulted the complainant-prosecutrix on false promise of marriage, deserves to be rejected ourightly. Though, aforesaid aspect of the matter with regard to consent, if any, is to be considered and decided by the learned trial Court, on the basis of material adduced on record by the prosecution, this Court, after having carefully perused record/ status report, sees no reason for custodial interrogation of the bail-petitioner, who otherwise being a local resident, shall always be available for investigation and thereafter for trial. There is nothing on record suggestive of the fact that in the event of petitioner being enlarged on bail, he may flee from justice, as such, he deserves to be enlarged on bail.

8. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been 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. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694,

while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.
>
> 112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> (iii) The possibility of the applicant to flee from justice;
>
> (iv) The possibility of the accused's likelihood to repeat similar or the other offences.
>
> (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
>
> (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
>
> (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;
>
> (viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
>
> (ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
>
> (x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

10. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

> "8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before

a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable

> offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

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

12. The Apex Court in **Prasanta Kumar Sarkar** versus **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.

13. In view of above, interim order dated 4.12.2017, is made absolute, subject to the petitioner furnishing fresh bail bonds in the sum of Rs.20,000/- with a surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

> (a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;
>
> (b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
>
> (c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and
>
> (d) He shall not leave the territory of India without the prior permission of the Court.
>
> (e) Petitioner shall join investigation at 10.00 AM on 9.12.2017 in the Police Station concerned.

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.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own motion .....Petitioner.

Vs.

State of H.P. and others .....Respondents.

CWPIL No.: 146 of 2017
Date of Decision: 11.12.2017

Constitution of India, 1950- Article 226- Public Interest Litigation- A letter petition by the students of Government College, Rampur mentioning therein that the premises of the College being used for holding the activities and functions other than those related with the academics and same is causing inconvenience to the students- **Held**- that authorities need to be very strict in maintaining high academic standards – Further held, that it is the responsibility of the students union organizing functions in the college premises that persons who are not members of student body or of the faculty do not attend such functions- Further directed that function be held with the prior permission of the Principal - Further directed that for the purpose of holding international affairs, a part of premises of the institution is being used, then the Deputy Commissioner concerned shall ensure that studies in the campus do not suffer, no loss be caused to the property of the institution and maintenance of law and order in the premises - petition disposed of. (Para-2 and 7)

For the petitioner: Mr. Dilip Sharma, Senior Advocate, as Amicus Curiae.

For the respondents: Mr. Shrawan Dogra, Advocate General, with M/s. Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General for the State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

A letter petition was received by this Court, addressed by the students of Government College, Rampur, wherein it was *inter alia* mentioned that the premises of the College were being used for holding of activities and functions, which had got nothing to do with academics and were causing inconvenience to the students at large.

2. Pursuant thereto, on 22.09.2017, this Court passed the following order:

"All the Deputy Commissioners of the State of Himachal Pradesh are impleaded as party respondents to this petition. Registry is directed to carry out necessary correction in the Memo of Parties.

2. Notice. Mr. J.K. Verma, learned Deputy Advocate General, appears and waives service of notice on behalf of the respondents.

3. On the basis of a letter addressed to the Chief Justice of this Court, comments of the District & Sessions Judge, Civil and Sessions Division, Kinnaur at Rampur Bushahr, were called for.

4. The state of helplessness expressed by the Principal is in the following terms:-

"1. That it has been requested ample numbers of times from the students to maintain the decorum of the institution by limiting the intensity of the functions. But is has been found that despite of repetitive request and guidance the real objective goes unachieved.

2. That the students of the college are found divided on dialectical groups for organizing their functions which is fore seen as the threat to the social makeup of the area.

3. The College administration is finding it difficult to control the mob that specifically is considered outsidous influence during the function.

4. That inspite of a good sound system installed and maintained to certain decibels, the students are hiring external auditory system that works beyond the prefixed sound limits. This causes a huge hindrance in studies and on going classes.

5. That the college tried to restrict the timings of the functions from 2 PM to 5 PM and strictly on holidays but due to external influences this aim again goes unmet.

6. That the faculty members are strictly deputed on duty to maintain the discipline during the function in the auditorium but, the faculty feels threatened by the unidentifiable mob gathered in the function.

7. That even the police department refuses to comply to maintain the law and order in the campus during ongoing functions due to the larger no. of functions being organized. (Copy attached). Therefore it is pleaded that it may prove us a great help if suitable directions are given to us so as to improve the academic environment of the institution as well as that of students."

5. It is this, which led the Court suo moto take cognizance of an issue which is of vital public interest and importance.

6. In Church of God (Full Gospel) vs. K.K.R Majestic Colony Welfare Association, (2000) 7 SCC 282, the Hon'ble Apex Court held that students are entitled to concentrate on their studies without any unnecessary disturbance. Hence the question as to whether students' organizations have a duty to ensure an atmosphere conducive for undertaking good education has to be answered in the affirmative.

7. The Hon'ble Apex Court in Director (Studies) v. Vaibhav Singh Chauhan, (2009) 1 SCC 59 laid down that the authorities have to be very strict in maintaining high academic standards and maintaining academic discipline and academic rigour if the country was to progress. Hence court reiterated to all concerned for ensuring their conduct to be of such a nature which furthers the academic discipline of the institute and is not detrimental to it. 8. In the matter of maintaining discipline, the educational Institution must be given the right of exercising such power and right of the Principal to maintain peaceful atmosphere should be preserved and upheld.

9. No leniency ought to be shown in academic matters and the educational institutions ought to be very strict in maintaining high academic standards and academic discipline.

10. Therefore, it is directed that the concerned student unions conduct their activities in accordance with directions issued by the college administration in this regard. Moreover, it is also directed that it would be the responsibility of the student union organizing the function that persons who are not members of the student body or of the faculty do not attend such function.

11. We direct that no function, save and except the one meant for the students and so permitted by the Principal, G.B. Memorial Government College, Rampur Bushehar, District Shimla, H.P., shall be held in the campus of the college.

12. We are shocked to note that the police refuses to cooperate with the college authorities in the maintenance of law and order. We highlight that presence of anti-social elements within the confines of the college will inevitably create a fear in mind of the students who may be left unable to adequately focus on the academics.

13. Therefore, we direct the Deputy Superintendent of Police, Rampur, Shimla to ensure that the college campus is adequately policed during the functions and no anti-social element enters the college during the conduct of such functions.

14. We further direct that no activity other than the one connected with the affairs of the institution shall be carried out in any of the campuses, meant for imparting teaching to students, be it a primary, secondary, higher or college levels. The Principal(s) of such institutions are directed to ensure that activities conducted by the concerned student unions are not carried out in a manner so as to be detrimental to education or interest of the students.

15. We further direct the Principal(s) of the college(s) to take all steps as may be necessary to ensure a peaceful and serene atmosphere in the college(s). They may take suitable steps for instilling discipline and penalize any person, in accordance with law, whom they find to be in violation of orders for maintaining congenial atmosphere in the college(s).

16. It is the duty of the authorities concerned, more so that of the Principal(s), Sub Divisional Magistrate(s) and the Deputy Commissioner(s)/Superintendent(s) of Police to ensure maintenance of law and order.

17. We direct the Chief Secretary to the Government of Himachal Pradesh to forthwith issue directions to all the Deputy Commissioners, who shall personally ensure that the order are complied with in letter and spirit.

18. Let affidavit be filed on or before the next date of hearing.

List on 16th October, 2017."

3. Mr. Dilip Sharma, learned Senior Counsel was appointed as Amicus Curiae and was requested to assist the Court.

4. On 24.10.2017, this Court passed the following order:

"Affidavits on behalf of some of the respondents stand filed, though not on record. Learned Counsel to follow up with the registry.

CMP No. 10425 of 2017

This application is taken on record. Be registered. Considering the averments made in the application and the historical importance and significance of the International Lavi Fair, for which purpose, traditionally the playground and the premises of the college have been put to use continuously, in the previous years, we permit the Deputy Commissioner concerned to use the premises of Government College, Rampur, for the purpose of International Fair "Lavi" at Rampur. Undertaking of the Deputy Commissioner concerned that with the organization of such fair (a) studies of the students shall not suffer; (b) no loss would be caused to the property of the college; and (c) that at all times law and order shall be maintained during the fair/festival, is accepted and taken on record. We clarify that this permission is only for the ensuing international fair 'Lavi' to be held in the month of November-December, 2017, at Rampur, District Shimla, H.P. We further clarify that for future, the State shall take such steps as may be found necessary so as to ensure that in future premises of Educational

Institution(s)/College(s) are not used for such purpose(s). The application stands disposed of in above terms."

5. We have heard learned Amicus Curiae as well as learned Advocate General and have also gone through the affidavits filed on behalf of the respondents.

6. Learned Advocate General has assured the Court that order, dated 22.09.2017, passed by this Court shall be adheared to and implemented by one and all concerned throughout the State in letter and spirit and that the campuses of education institutions, be it School or Colleges, shall not be permitted to be used for activities which are alien to education. Learned Advocate General has also assured the Court that as far as use of part of premises of certain education institutions in the State which were being used for holding international festivals is concerned, the State shall ensure that for this purpose, only that portion of the premises of the campus is used which is utmost necessary for holding international festival and that too, by ensuring that in future premises of education institutions/Colleges are not used for such purposes.

7. We take the assurance given by the learned Advocate General on record and dispose of this petition by making order, dated 22.09.2017, absolute by directing all the concerned authorities to implement the same in letter and spirit and ensure that campuses/premises of the educational institutions, including Colleges are not used for activities, other than educational and co-curricular activities necessary in the interest of the students. We further direct that if for the purpose of holding international affairs, part of premises of educational institutions are used, then the Deputy Commissioner concerned shall ensure; (a) that studies of the students do not suffer; (b) no loss should be caused to the property of the College; and (c) that at all times, law and order shall be maintained during the fair/festival.

8. Before parting, we wish to place on record appreciation qua the efforts put in by Mr. Dilip Sharma, learned Amicus Curiae, who, on the instructions of this Court, contacted letter petitioners and obtained necessary feedback.

9. Registry is directed to send a copy of this judgment to all the Deputy Commissioners in the State of Himachal Pradesh for necessary action as well as to the letter petitioners to enable them to take follow up action with the concerned authorities.

Petition stands disposed of in above terms.

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

ICICI Lombard General Insurance Company Limited ..Appellant

Versus

Anjana Devi and others ..Respondents

FAO(ECA) No. 475 of 2016 a/w
Cross Objections No. 61 of 2017
Reserved on: November 21, 2017
Decided on: December 11, 2017

Employees Compensation Act, 1923- Section 4- The appellant/Insurance Company was burdened with liability of paying compensation to the tune of Rs. 10,07,233/- on behalf of the owner to the claimants on account of death of Parveen Kumar, driver of the ill-fated truck- the deceased driver had no effective and valid driving licence - Owner of the vehicle had not pleaded that he had taken due care in verifying the validity of the licence of the deceased at the time of engaging him as driver on the vehicle in question - vehicle was being driven in violation of the terms and conditions of the insurance policy- Insurance Company cannot be saddled with burden

of paying compensation– **Held** - that deceased indisputably died during the course of the employment, therefore, owner of the vehicle is liable to pay compensation- Further held that daily diet money paid to the driver besides salary also forms the part of the salary for the purpose of computing compensation- Further held that in the accidents having taken place prior to the amendment dated 30.5.2010, in the Act maximum salary/ wages of an employee can be taken as Rs.4,000/- per month only- further held that when owner of the vehicle was having knowledge of the accident and did not deposit the amount of compensation as per requirements of Section 4-A of the Act within 30 days, he is liable to pay penalty along with interest- Accordingly, appeal allowed. (Para-16, 36, 49, 50 and 51)

Cases referred:
National Insurance Co. Ltd. v. Mastan. (2006) 2 SCC 641
Gottumukkala Appala Narasimha Raju v. National Insurance Co. Ltd. (2007) 13 SCC 446
New India Assurance Co. Ltd. v. Harshadbhai Amrutbhai Modhiya, (2006) 5 SCC 192
Kamla Chaturvedi v. National Insurance Co., (2009) 1 SCC 487
Beli Ram v. Rajinder Kumar and another, 2010 ACJ 1653
Kerala State Electricity Board vs. Valsala K., 2000 ACJ 5 (SC)
Project Officer, Basudeopur Colliery vs. Dhaneswari Devi, 2014 ACJ 1325
Basantabai and another vs. Shamim Bee and another, 2012 ACJ 1858
Jayamma versus Executive Engineer, P.W.D., Madhugiri 1982 ACJ 361
Ishwar Gulab Pawar v. Ayoub Jamal, 2015 ACJ 1316
Moti Lal v. Thakur Das, 1985 ACJ 634
Singareni Collieries Co. Ltd versus Commissioner for Workmen's Compensation, 1988 ACJ 940

For the Appellant	Mr. Jagdish Thakur, Advocate.
For the Respondents	Mr. Praneet Gupta, Advocate, for respondents No.1 and 2.
	Mr. Ashwani Kaundal, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

FAO No. 475 of 2016

Instant appeal is directed against order /award dated 27.5.2016 passed by the learned Civil Judge (Senior Division), Shimla exercising powers of Commissioner under the Employee's Compensation Act, 1923 in W/C Case No. 15/2 of 2009/2013, whereby compensation to the tune of Rs.10,07,233/- including interest at the rate of 12% per annum from 15.7.2009, till its realization came to be awarded in favour of the respondents No.1 and 2-claimants (hereinafter, 'claimants').

2. Before proceeding to ascertain the correctness and legality of aforesaid impugned award, it may be noticed that respondents No.1 and 2-claimants and respondent No.3-owner/insured have not chosen to lay challenge, if any, to the impugned award on any count, thus, same has attained finality qua them. However, insurer being aggrieved with the liability imposed upon it, has approached this Court on the ground that the learned Commissioner below has wrongly saddled the insurer with the liability.

3. Facts in brief, as are necessary for the adjudication of the case at hand are that legal representatives of deceased driver-employee, filed a petition before the learned Commissioner below under Section 22 of the Workmen's Compensation Act, 1923 for grant of compensation on account of death of Praveen Kumar alias Pappu. Claimants averred that the deceased Praveen Kumar was employed as a driver on the Truck bearing registration No. HP-63-5015 by respondent No. 3/Mr. Brij Lal i.e. owner of the aforesaid truck, which was insured with

the appellant-insurance company for the period from 24.6.2008 to 23.6.2009, vide certificate/policy No. 3003/52065750/01/000 issued on 28.6.2008. Claimants also averred that on 14.6.2009, at about 5.00 pm, deceased Praveen Kumar alias Pappu left Darlaghat Cement Factory with loaded truck of cement for Kinnaur and during the intervening night of 14/15.6.2009 at 12.30-1.00 am, on Luhri road near Dhami, District Shimla, truck in question met with an accident and Praveen Kumar alias Pappu died during the course of employment. Post-mortem was conducted on 15.6.2009 at Community Health Centre, Suni and as per post-mortem report, cause of death of the deceased was sudden neurogenic shock followed by head injury and blunt trauma over chest due to accident. As per claimants, deceased was receiving Rs.4500/- as salary per month besides Rs.25/- per day. Age of deceased at the time of accident was 22 years and he was holding a valid and effective driving licence issued by Registering and Licensing Authority on 9.3.2008 for HTV/HGV and other types of vehicles valid upto 5.4.2010. No notice was sent to the owner, as he was in the knowledge of the accident. Owner submitted claim for vehicle with the appellant-Insurance Company and as such appellant-Insurance Company was also having knowledge of the accident. Claimants further averred that Praveen Kumar was maintaining them and both of them were dependent upon his earnings. Since no compensation amount, which became due on 15.6.2009, came to be deposited within one month by the respondents, claimants preferred aforesaid claim petition before the learned Commissioner below.

4. Respondent No.3 (owner) while admitting the claimants to be widow and mother of the deceased Praveen Kumar, specifically denied that he used to pay salary of Rs.4500/- per month and Rs.25/- per day to the deceased Praveen Kumar. He claimed before the learned Commissioner below that he used to pay wages of Rs.2,000/- per month to the deceased and Rs.100/- as daily allowance. He further stated that at the time of accident, age of deceased was 22 years and he was holding a valid and effective driving licence issued by Registering and Licensing Authority.

5. Appellant-insurance company while opposing claim put forth by the claimants, averred before learned Commissioner below that vehicle in question was being driven in contravention of the terms and conditions of the policy and provisions of Motor Vehicles Act as such, no compensation is payable on account of death of deceased, Praveen Kumar. However, the fact remains that the appellant-insurance company admitted the factum with regard to Truck bearing registration No. HP-63-5015 being insured by it for the period from 24.6.2008 to 23.6.2009, vide policy issued by it on 28.6.2008, in favour of the insured/owner of truck. Appellant-insurance company also denied for want of knowledge the factum with regard to accident as well as wages @ Rs.4500/- per month being paid by the owner of the truck. In nutshell, case of the appellant before the learned Commissioner below was that since vehicle was being driven by the deceased in violation of insurance policy, it is/was the employer who is/was liable to pay compensation to his employee and as per policy, it is/was to indemnify the insured subject to terms and conditions of the insurance policy. But since in the instant case, vehicle in question was being driven in contravention of the terms and conditions of the policy, appellant-Insurance Company is not liable to indemnify the claimants.

6. Learned Commissioner below allowed the claim petition and awarded a sum of Rs.10,07,233/- alongwith interest at the rate of 12% per annum, payable by the appellant-insurance company.

7. In the aforesaid background, appellant-insurance company has approached this Court by way of instant appeal, laying therein challenge to the aforesaid Award passed by the learned Commissioner below under Employee's Compensation Act, with a prayer to quash and set aside the same.

8. Instant appeal came to be admitted by this Court on 25.7.2017, on the following questions of law:

> "1. Whether the learned Civil Judge (Senior Division) Shimla exercising powers of Commissioner under Employee's compensation Act below is right in taking monthly

wages of the deceased as Rs.5000/ instead of Rs.2000/ per month when the accident has taken place prior to the amendment dated 31.5.2010 vide notification dated S.O.1258(E)?

2. Whether the appellant is liable to pay the compensation when the driving licence of the deceased driver was found fake that too when the same has been proved by the appellant by leading cogent evidence?

3. Whether the learned Civil Judge (Senior Division) below is right in taking the income or salary of the deceased as Rs 5000/ per month in the absence of any documentary evidence that too when the respondent has admitted his wages as Rs 2000/ per month?"

9. Mr. Jagdish Thakur, learned counsel representing the appellant, while inviting attention of this Court to the findings returned by the learned Commissioner below strenuously argued that once the learned Commissioner below had come to the conclusion on the basis of cogent and convincing evidence adduced on record by the appellant that deceased had no valid and effective driving licence, there was no occasion for the learned Commissioner below to saddle the appellant with the liability to pay the compensation to the claimants being insurer. Mr. Thakur, further contended that it is well settled by now that if the vehicle involved is/was being plied in breach of terms and conditions of the policy, insurance company can not be held liable, rather, it is the owner, who is to be saddled with the liability. Mr. Thakur, further submitted that the learned Commissioner below has fallen in grave error while concluding that since respondent No.3 being owner of the vehicle had taken due and proper care to verify the licence of the deceased before employing him as a driver, no liability can be saddled upon him. He further submitted that mere verification of licence, if any, by owner will not absolve him of his liability to pay compensation, especially if vehicle owned by him is plied in violation of the terms and conditions of the policy. Mr. Thakur, contended that once it is/was specifically provided in the policy that it shall not be liable to pay compensation, if vehicle is driven by the driver not having a valid and effective driving licence, there was no occasion for the learned Commissioner below to saddle the appellant with the liability, which otherwise should have been imposed upon the owner of the truck being employer. Lastly, Mr. Thakur argued that otherwise also, bare perusal of Section 3 of the Employee's Compensation Act, 1923 nowhere provides that insurance company shall be liable to pay compensation for injury, permanent incapacitation or death of an employee caused during the course of employment, rather, it is the employer, who shall be liable to pay compensation according to the provisions of the Act. Mr. Thakur, contended that the appellant being insurer is/was only bound to indemnify the insured under the 1923 Act, subject to terms and conditions of the policy. In support of aforesaid contentions, he placed reliance upon the judgment passed by Hon'ble Apex Court in case **National Insurance Co. Ltd.** v. **Mastan.** reported in (2006) 2 SCC 641

10. Mr. Praneet Gupta, learned counsel representing the claimants and Mr. Ashwani Kaundal, learned counsel representing the owner of the truck, supported the impugned Award passed by learned Commissioner below and contended that once it stands duly proved that vehicle in question was insured with the appellant-Insurance Company, it was under obligation to indemnify the employer. Learned counsel for the respondents, further contended that it has specifically come in the evidence that the owner of the truck had made an attempt to verify the correctness of driving licence possessed by the deceased as such, plea that the deceased employee was not having driving licence was not available to the appellant-Insurance Company. Aforesaid counsel further contended that the claim under Workmen's Compensation Act can not be opposed by the insurance company by placing reliance upon various provisions contained under the Motor Vehicles Act i.e. Sections 147, 148 and 149 contained under Chapter XI of the Act *ibid* and the claim petitions under both the Acts need to be determined and decided as procedure contained in the respective Acts.

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

12. Though from a bare perusal of the questions enumerated above, it is quite apparent that all the questions are factual and same can not be said to be questions of law, much less substantial questions of law, however, this Court in the process of exploring answers to the aforesaid questions, deems it proper to deal with question No.2, at the first instance.

13. Section 143 contained in Chapter X of Motor Vehicles Act provides that only provisions of Chapter X of the Motor Vehicles Act shall be applicable to the claims preferred under Workmen's Compensation Act. Section 143 of the Motor Vehicles Act nowhere provides that the provisions contained in Chapter XI of the Motor Vehicles Act are also applicable to the Workmen's Compensation Act, thereby excluding applicability of Chapter XI to the proceedings under the Workmen's Compensation Act.

14. Hon'ble Apex Court in **National Insurance Co. Ltd.** v. **Mastan (supra)**, has held that applicability of provisions of 1988 Act, in proceedings under 1923 Act is confined to the matters coming under the purview of Chapter X only and it can not be stretched any further. As far as Section 143 of 1988 Act is concerned, it only applies to the Workmen's Compensation Act, 1923 in cases where liability arises despite the fact that accident may have taken place without any fault on the part of the driver of the vehicle or other persons in control thereof. Under 1923 Act, workman is entitled to compensation even if no negligence is proved against the owner or any person in charge of the vehicle, as such, there is no scope of applicability of Section 143 of the 1988 Act including Chapter XI thereof.

15. In the case at hand, there is no dispute with regard to the plea having been raised by the appellant that the employee or driver of the vehicle in question was not having valid and effective driving licence, rather, it is the categorical finding of the learned Commissioner below that the deceased employee was not having valid licence. Moreover aforesaid finding returned by learned Commissioner below has attained finality because neither the claimants nor the owner of the vehicle have laid challenge to the aforesaid finding of the learned Commissioner below.

16. The question, which arises for consideration of this Court at this stage is whether aforesaid defence as raised by the appellant-Insurance Company is available to it or not. In the case at hand, there is no dispute with regard to the insurance given by the appellant qua vehicle owned and possessed by the owner, which was being plied/driven by the deceased employee at the time of alleged accident, rather, in nutshell, case of the appellant is that since vehicle in question was being driven in breach of the terms and conditions of the insurance policy, it is not liable to indemnify the owner, who otherwise, in terms of Section 3 of the Workmen's Compensation Act is liable to pay compensation to the deceased employee, who dies during the course of employment, which stands duly proved on record.

17. Section 3 of the Workmen's Compensation Act is reproduced below:

> ""3. Employer's liability for compensation. -
>
> (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:
>
> Provided that the employer shall not be so liable -
>
> (a) In respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding 1[three] days;
>
> (b) In respect of any injury, not resulting in death or permanent total disablement cause by an accident which is directly attributable to -
>
> (i) The workman having been at the time thereof under the influence of drink or drugs, or
>
> (ii) The wilful disobedience of the workman to an order expressly given, or to a rule expressly trained, for the purpose of securing the safety of workmen, or

(iii) The wilful removal or disregard by the workman of any safety guard or other device which he knew to hive been provided for the purpose of securing the safety of workman, 4[* * *]

4[* * *]

5[(2) If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as all occupational disease peculiar to that employment, or if a workman , whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III, contracts any disease specified therein as all occupational disease peculiar to that employment, or if a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify ill respect of each such employment, contracts any disease specified therein as all occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the contrary is provided, the accident shall be deemed to have arisen out of, and in the course of, the employment

6[Provided that if it is proved, -

(a) That a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule II has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment; and

(b) That the disease has arisen out of and in the course of the employment, the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section:

Provided further that if it is proved that a workman who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in Part C of that Schedule, for a continuous period specified under this sub section for that employment and he has after the cessation of such service contracted any disease specified in the said Part B or the said Part C, as the case may be, as an occupational disease peculiar to the employment and that such disease arose out of the employment, the contracting of the disease shall be deemed to be all injury by accident within the meaning of this section.]

7[(2A) If a workman employed in any employment specified in Part C of Schedule III contracts any occupational disease peculiar to that employment, the contracting whereof is deemed to be all injury by accident within the meaning of this section, and such employment was user more than one employer, all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may, in the circumstances, deem just.]

(3) 8[The Central Government or the State Government], after giving, by notification in the official Gazette, not less than three months, notice of its intention so to do, may, by a like notification, add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and thereupon the provisions of sub-section (2) shall apply 6[in the case of a notification by the Central Government, within the territories to which this Act extends, or, in case of a notification by the State Government, within the State] 7[* * *] as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.]

(4) Save as provided by 9[sub-sections (2), (2A)] and (3), no compensation shall be payable to a workman in respect of any disease unless the disease is 10[***] directly attributable to a specific injury by accident arising out of and in the course of his employment.

(5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any Court of law in respect of any injury-

(a) If he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) If an agreement has been come to between the workman and his employer, providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

18. Complete reading of Section 3 as reproduced herein above, nowhere makes the appellant-Insurance Company directly liable to pay compensation on account of injury, incapacitation or death of an employee during the employment, rather, it is the employer, who is liable to pay compensation to the employee or his family members in the event of his death. Similarly, insurance company being an insurer is bound to indemnify the insured under 1988 Act, but that is subject to terms and conditions of the contract of policy. In the case at hand, there is no dispute, if any, with regard to contract of insurance between appellant and insured/owner of truck qua the vehicle involved in the accident but now the question arises, whether appellant being insurer is liable to indemnify the owner of the truck qua insurance policy given by it against the vehicle which at the relevant time was being driven by the deceased driver in breach of the terms and conditions of the insurance policy.

19. In this background, it is pertinent to take note of the fact that insurance policy issued by appellant was qua the vehicle and that was issued under Motor Vehicles Act, under Section 146 thereof, which makes it necessary to get an insurance policy. Section 146 of the Motor Vehicles Act is quoted below:

"146. Necessity for insurance against third party risk-

(1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that person, as the case may be, a policy of insurance complying with the requirement of this Chapter.

1 [Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991 (6 of 1991)].

Explanation--A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub-section not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no believe that there is no such policy in force.

(2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise.

(3) The appropriate Government may, by order, exempt from the operation of sub-section (1) any vehicle owned by any of the following authorities, namely--

(a) the Central Government or a State Government, if the vehicle issued for Government purposes connected with any commercial enterprise;

(b) any local authority;

(c) any State transport undertaking.

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under this Act for meeting any liability person in its employment may incur to third parties.

Explanation--For the purposes of this sub-section," appropriate Government" means the Central Government or a State Government, as the case may be, and--

(i) in relation to any corporation or company owned by the Central Government or any State Government, means the Central Government or that State Government;

(ii) in relation to any corporation or company owned by the central Government and one or more State Government, means the Central Government;

(iii) in relation to any other State transport undertaking or any local authority, means that Government which has control over that undertaking or authority.

20. It would be apt to take note of Section 3 of the Motor Vehicles Act, which is reproduced herein below:

"3. Necessity for driving license -

(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving license issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle (other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75) unless his driving license specifically entitles him so to do.

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may by prescribed by the Central Government."

21. It would be appropriate to take note of the judgment passed by Hon'ble Apex Court in the case of **National Insurance Co. Ltd**. v. **Mastan** (supra), wherein Hon'ble Apex Court has held that under Workmen's Compensation Act, 1923, a workman is entitled to compensation, even if no negligence is proved against the owner or any person in charge of the vehicle but it is not possible to extend the applicability of Section 143 of 1988 Act included in Chapter XI thereof, to claims under 1923 Act. Hon'ble Apex Court, in the aforesaid judgment has categorically held that insurer would be bound to indemnify the insured under 1923 Act, subject to terms and conditions of the contract insurance. Hon'ble Apex Court has held as under:

"17. It is beyond any doubt or dispute that in a proceeding where the right of the insurer to raise a defence is limited in terms of sub-section (2) of Section 149, an appeal preferred by it against an award of the Motor Accidents Claims Tribunal must only be confined or limited to some extent. But once a leave has been granted to the insurer to contest the claim on any ground as envisaged in Section 170 of the 1988 Act, an appeal shall also be maintainable as a matter of right, wherein the High Court can go into all contentions. The Full Bench of the Karnataka High Court, in our opinion, committed a serious error in relying upon the judgments of this Court, in terms whereof the right of appeal of the insurance company has been held to be limited, inasmuch in those decisions this Court was considering a situation where sub-section (2) of Section 149 was attracted.

18. Section 143 of the 1988 Act limits its applicability to the 1923 Act in a case where the liability arises despite the fact that the accident might have taken place without any fault on the part of the driver of the vehicle or others in control thereof. Under the 1923 Act also, as noticed hereinbefore, a workman is entitled to compensation even if no negligence is proved against the owner or any other

person in charge of the vehicle. It is, thus, not possible to extend the applicability of Section 143 of the 1988 Act to include Chapter XI thereof to a claim under the 1923 Act.

19. Right of appeal is a creature of statute. The scope and ambit of an appeal in terms of Section 30 of the 1923 Act and Section 173 of the 1988 Act are distinct and different. They arise under different situations. In a case falling under the 1923 Act, negligence on the part of the owner may not be required to be proved. Therein what is required to be proved is that the workman suffered injuries or died in course of employment. The amount of compensation would be determined having regard to the nature of injuries suffered by the worker and other factors as specified in the Act. The findings of fact arrived at by the Commissioner for Workmen's Compensation are final and binding. Subject to the limitations contained in Section 30 of the 1923 Act, an appeal would be maintainable before the High Court; but to put the insurer to further disadvantages would lead to an incongruous situation.

20. An insurer, subject to the terms and conditions of contract of insurance, is bound to indemnify the insured under the 1923 Act as also the 1988 Act. But as noticed hereinbefore, keeping in view the nature and purport of the two statutes, the defences which can be raised by the insurer being different, the scope and ambit of appeal are also different.

21. Under the 1988 Act, the driver of the vehicle is liable but he would not be liable in a case arising under the 1923 Act. If the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured. In a given situation, the Accident Claims Tribunal, having regard to its rights and liabilities vis-à-vis the third person may direct the insurance company to meet the liabilities of the insurer, permitting it to recover the same from the insured. The 1923 Act does not envisage such a situation. Role of Reference by incorporation has limited application. A limited right to defend a claim petition arising under one statute cannot be held to be applicable in a claim petition arising under a different statute unless there exists express provision therefor. Section 143 of the 1988 Act makes the provisions of the 1923 Act applicable only in a case arising out of no fault liability, as contained in Chapter X of the 1988 Act. The provisions of Section 143, therefore, cannot be said to have any application in relation to a claim petition filed under Chapter XI thereof. A fortiori in a claim arising under Chapter XI, the provisions of the 1923 Act will have no application. A party to a lis, having regard to the different provisions of the two Acts cannot enforce liabilities of the insurer under both the Acts. He has to elect for one.

22. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non-obstante clause providing for such an option notwithstanding anything contained in the 1923 Act."

22. It is quite apparent from the aforesaid proposition of law laid down by Hon'ble Apex Court that under the 1988 Act, driver of the vehicle is liable but he would not be liable in cases arising under 1923 Act but, if driver of the vehicle has no licence, insurer would not be liable to indemnify the insured. Motor Vehicles Act, 1988 provides for mandatory insurance under Section 147 of the Act, and as such, award can be passed against an insurer and, insurer having regard to Section 149 of the 1988 Act, has a limited defence as provided therein. However, defence of the insurer in the proceedings under 1923 Act would be unlimited and all the defences are available to the insurer. Insurance Company can agitate violation of any condition of policy to

make it substantial question of law. As has been taken note above, Hon'ble Apex Court in Mastan's case (supra) has categorically held that insurer subject to terms and conditions of contract of insurance is bound to indemnify the insured under 1923 Act as also 1988 Act but keeping in view the nature and purport of the statutes, defences which can be raised by the insurer being different, scope and ambit of appeal are also different. Under 1988 Act, Accident Claims Tribunal having regard to its right and liabilities vis-à-vis third party person may direct the insurance company to meet the liabilities of the insurer, permitting it to recover the same from the insured but 1923 Act does not envisage such a situation, as such, limited right of defence in claim petition under 1988 statute can not be held applicable to claim petition arising under different statute unless there exists special provision thereof. Section 143 of the 1988 Act makes provisions of 1923 Act applicable in cases arising out of no fault liability as contained in Chapter X of 1988 Act, but certainly it can not be said to have applicability in relation to claim petitions filed under Chapter XI thereof.

23. Otherwise also, in the case at hand, there is no dispute that policy in question has been issued under Motor Vehicles Act and not under Workmen's Compensation Act, as such, plea of limited right to defend the claim petition arising under Motor Vehicles Act, can not be held to be applicable in claim petitions arising under a different statute i.e. 1923 Act.

24. Leaving everything aside, there is no provision, if any, contained in Workmen's Compensation Act, 1923, which provides that plea with regard to driver having no valid licence can not be raised by insurance company, especially when it is to indemnify owner qua policy taken by him/her against a third party or a vehicle. In the case at hand, insurance company has successfully proved on record that deceased workman was driving vehicle owned by the owner in breach of the terms and conditions of the insurance policy /contract inter se appellant and owner. Insurance policy given by appellant strictly provides that it shall not be liable to indemnify the insurer in case vehicle is driven in breach of the terms and conditions of the insurance policy.

25. Interestingly, in the case at hand, respondent No. 3 (owner) in his reply has nowhere taken the defence that at the time of engaging employee as a driver in the vehicle, he had verified authenticity and correctness of the driving licence held by driver/ deceased employee. He for the first time in his statement recorded before the learned Commissioner below stated that he had employed deceased on his vehicle after having verified licence held by him. It is well settled by now that no evidence can be led beyond the pleadings, but in the instant case, learned Commissioner below solely with a view to defeat the plea/argument raised by the insurance company that deceased employee was not having valid licence at the time of accident, placed undue reliance upon aforesaid statement made by respondent No.3-owner during his examination-in-chief, which otherwise could not be taken into consideration by the learned Commissioner below being beyond the pleadings.

26. Similarly, Hon'ble Apex Court in **Gottumukkala Appala Narasimha Raju** v. **National Insurance Co. Ltd.** (2007) 13 SCC 446, has held that defence available to insurer in proceedings under Motor Vehicles Act, 1988 and Workmen's Compensation Act are distinct. Having regard to Section 149(2) of Motor Vehicles Act, insurer ordinarily has limited defence as provided for therein. However, its defence in proceedings under Workmen's Compensation Act would be unlimited and all defences available to employer would be available to it. Further the Hon'ble Apex Court held that in case of a contract of insurance, the insurer is liable to indemnify the insured, subject to terms and conditions of the insurance policy. Hon'ble Apex Court further held as under:

> "15. The 1988 Act provides for mandatory insurance for the matters laid down under Section 147 of the Act and, thus, an Award can be passed against an insurer. An insurer, having regard to Sub-Section (2) of Section 149 of the Act, would, ordinarily, have limited defence as provided for therein. The defence of an insurer in a proceeding under the 1923 Act would be unlimited and all the defences which are available to the employer would be available to it.

20. The correctness of the said decision is not in question before us. We may, however, notice that the said decision was distinguished in New India Assurance Co. Ltd. v. Harsahadbhai Amrutbhai Modhiya and Anr. [(2006) 5 SCC 192], wherein it was held that whereas under the 1988 Act contracting out is not permissible, it would be so permissible under the 1923 Act, stating:

> "As indicated hereinbefore, a contract of insurance is governed by the provisions of the Insurance Act. Unless the said contract is governed by the provisions of a statute, the parties are free to enter into a contract as for their own volition. The Act does not contain a provision like Section 147 of the Motor Vehicles Act. Where a statute does not provide for a compulsory insurance or the extent thereof, it will bear repetition to state that the parties are free to choose their own terms of contract. In that view of the matter, contracting out, so far as reimbursement of amount of interest is concerned, in our opinion, is not prohibited by a statute."

Balasubramanyan, J. in his concurring judgment, opined :

> "23. The law relating to contracts of insurance is part of the general law of contract. So said Roskill, L.J. in Cehave v. Bremer. This view was approved by Lord Wilberforce in Reardon Smith v. Hansen-Tangen (1976)3 All ER 570 (HL) (All ER p. 576h) wherein he said: "It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law."

A contract of insurance is to be construed in the first place from the terms used in it, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. (See Colinvauxs Law of Insurance, 7th Edn., para 2-01.) A policy of insurance has therefore to be construed like any other contract. On a construction of the contract in question it is clear that the insurer had not undertaken the liability for interest and penalty, but had undertaken to indemnify the employer only to reimburse the compensation the employer was liable to pay among other things under the Workmen's Compensation Act. Unless one is in a position to void the exclusion clause concerning liability for interest and penalty imposed on the insured on account of his failure to comply with the requirements of the Workmen's Compensation Act of 1923, the insurer cannot be made liable to the insured for those amounts."

27. Similarly, Hon'ble Apex Court in **New India Assurance Co. Ltd.** v. **Harshadbhai Amrutbhai Modhiya**, (2006) 5 SCC 192, has held as under:

> “14.By reason of the provisions of the Act, an employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the employer and the insurer, the insurer shall be liable to indemnify the employer. The insurer, however, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability. Section 17 of the Act does not provide for any restriction in the matter of contracting out by the employer vis-a-vis the insurer.
>
> 15. The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.
>
> 20. The views taken by us find support from a recent judgment of this Court in P.J. Narayan v. Union of India and Ors. [2004 ACJ 452] wherein it was held:

"1. This writ petition is for the purpose of directing Insurance Company to delete the clause in the Insurance Policy which provides that in case of compensation under the Workmen's Compensation Act, 1923, the Insurance Company will not be liable to pay interest. We see no substance in the writ petition. There is no statutory liability on the Insurance Company. The statutory liability under the Workmen's Compensation Act is on the employer. An insurance is a matter of contract between the Insurance Company and the insured. It is always open to the Insurance Company to refuse to insure. Similarly they are entitled to provide by contract that they will not take on liability for inter est. In the absence of any statute to that effect, insurance Company cannot be forced by Courts to take on liabilities which they do not want to take on. The Writ Petition is dismissed. No order as to costs.""

28. Further the Hon'ble Apex Court in **Kamla Chaturvedi** v. **National Insurance Co.**, (2009) 1 SCC 487, has held as under:

7. In Ved Prakash Garg v. Premi Devi and others [1997(8) SCC 1] this court observed that the Insurance Company is liable to pay not only the principal amount of compensation payable by the insurer employer but also interest thereon if ordered by the Commissioner to be paid by the insured, employee. Insurance company is liable to meet claim for compensation along with interest as imposed on insurer employer by the Act on conjoint operation of Section 3 and 4(A)(3)(a) of the Act. It was, however, held that it was the liability of the insured employer alone in respect of additional amount of compensation by way of penalty under Section 4(A)(3)(b) of the Act.

8. In New India Assurance Co.'s case (supra) and Ved Prakash Garg's case (supra) was distinguished on facts. It was observed that in the said case the court was not concerned with a case where an accident had occurred by use of motor vehicle in respect whereof the Contract of Insurance will be governed by the provisions of the Motor Vehicles Act, 1988 (in short the `M.V. Act').

> "19.... a contract of Insurance is governed by the provisions of the Insurance Act, 1938 (in short the `Insurance Act'), unless the said contract is governed by the provisions of a statute. The parties are free to enter into a contract as per their own volition. The Act does not contain a provision like Section 148 of the MV Act where a statute does not provide for a compulsory insurance or accident thereof. The parties are free to choose their terms of contract. In that view of the matter contracting out so far as the reimbursement of amount of interest is concerned is not prohibited by a statute.

This position have been reiterated in P.J. Narayan v. Union of India and others [2006 (5) SCC 200]. In the instant case the position is different. The accident in question arose on account of vehicular accident and provisions of MV Act are clearly applicable. We have gone through the policy of insurance and we find that no such exception as was the case in New India Assurance Co.'s case was stipulated in the policy of insurance. Therefore, the Insurance Company is liable to pay the interest."

29. A Coordinate Bench of this Court in a judgment in case **Beli Ram** v. **Rajinder Kumar and another**, decided on 3.3.2009, 2010 ACJ 1653, has categorically held that in the absence of any valid and effective driving licence the liability to pay compensation can not be fastened upon the insurer notwithstanding the fact that the vehicle in question was insured by the insurer. It was held as under:

> "19.The vehicle in question was insured in terms of insurance policy, Exh. RA. The driver proved his valid and effective driving licence, Exh. PW1/C. As per the statement of Bal Krishan the driving licence in question was endorsed by the

> Superintendent R&LA, Udaipur. He, however, categorically deposed that licence in question, even though bearing the endorsement of the Superintendent of the R&LA was not endorsed for renewal after 6.9.1996. Importantly, there is a letter written by Manoj Kumar, Surveyor and Assessor, on which there is an endorsement that 'no such licence has been endorsed by this office during 1996 (as per office record)'. The vehicle in question met with an accident on 20.5.1999, thus, in the absence of any renewal, in my considered view, the findings returned by the Commissioner that the applicant being an illiterate person cannot be expected to know whether the endorsement was signed by Office Superintendent are wrong, perverse and contrary to record and as such are set aside. Findings with regard to issue No. 3 returned by the Commissioner are set aside and it is categorically held that the driver in question was not possessed with a valid and effective driving licence at the time of occurrence of the accident.
>
> 20. In the absence of any valid and effective driving licence, the liability to pay the compensation cannot be fastened upon the insurer notwithstanding the fact that the vehicle in question was insured by the insurer. That the vehicle was insured in terms of insurance policy, Exh. RA, is not in dispute. Clause (17) of the same, as 'is sought to be pressed by learned counsel for the insured is of no consequence. In the absence of any valid and effective driving licence the terms and conditions of the policy stood materially breached. Therefore, the findings of the Commissioner that the liability to pay the compensation is that of insurer are illegal and need to be reversed. The substantial question of law as framed at the instance of the insurer is thus answered."

30. After having carefully perused aforesaid law laid down by the Hon'ble Apex Court as well as Coordinate Bench of this Court, this Court has no hesitation to conclude that defence of the insurer in proceedings under 1923 Act would be unlimited and all the defences which are available to the employers are available to it. Hence, insurer is not liable to indemnify the insured in case vehicle is driven in breach of the terms and conditions of the insurance policy. Question of law No.2 is answered accordingly.

31. Mr. Jagdish Thakur, learned counsel representing the appellant further contended that the learned Commissioner below has erred in taking into consideration income of the deceased as Rs.5,000/- per month, because as per Section 4(3) of the Employee's Compensation Act, maximum salary/wages of an employee can be taken as Rs.4,000/- per month prior to 30.5.2010. He further argued that the amendment was made applicable prospectively but despite that learned Commissioner below has taken monthly salary of deceased as Rs.5,000/-, as such, impugned award is liable to be quashed and set aside.

32. Admittedly, in the case at hand, death of workman took place on 6.8.2009, whereas, amendment with respect to salary of workman came to be carried out vide S.O. 1258(E) on 31.5.2010, as such, maximum income of the workman could not be taken more than Rs.4,000/- for the purpose of calculation of compensation amount.

33. The explanation (II) under section 4 (1) of Employee's Compensation Act, 1923 has been omitted with effect from 18.1.2010. Thus, the income of the deceased was to be calculated as per the existing explanation (II), which was in vogue at the time of accident. Thus, the income of the deceased was to be computed at Rs. 4,000/-instead of Rs. 5,000/-per month. Learned Commissioner has overlooked this important aspect of the matter while computing the income of the deceased.

34. Their Lordships of the Hon'ble Supreme Court in **Kerala State Electricity Board** vs. **Valsala K.,** 2000 ACJ 5 (SC) have held that Sections 4 and 4-A of the Workmen's Compensation Act, 1923 as amended in 1995 would not apply retrospectively. Their Lordships have held as under:

"[4] A two Judge Bench of this Court in The New India Assurance Company Limited v. V. K. Neelakandan, Civil Appeal Nos. 16904- 16906 of 1996, decided on 6-11-1996, however, took the view that Workmen's Compensation Act, being a special legislation for the benefit of the workmen, the benefit as available on the date of adjudication should be extended to the workmen and not the compensation which was payable on the date of the accident. The two Judge Bench in Neelakandan's case (supra) , however, did not take notice of the judgment of the larger Bench in Pratap Narain Singh Deo's case (AIR 1976 SC 222 : 1976 Lab IC 222) as it presumably was not brought to the notice of their Lordships. Be that as it may, in view of the categorical law laid down by the larger Bench in Pratap Narain Singh Deo's case, the view expressed by the two Judge Bench in Neelakandan's case is not correct.

[7] Insofar as these special leave petitions are concerned, we find that the accident took place long time back. Compensation became payable to the workmen, as it is not disputed that the accidents occurred during the course of employment, as per the law prior to the amendment made in 1995. Keeping in view the peculiar facts and circumstances of these cases, pettiness of the amounts involved in each of the cases and the time that has since elapsed, we are not inclined to interfere with the impugned orders, decided on the basis of the 1995 amendment, in exercise of our jurisdiction under Art. 136 of the Constitution of India and, therefore, dismiss the special leave petitions, but, after clarifying the law, as noticed above."

35. Learned Single Judge of Jharkhand at Ranchi High Court in **Project Officer, Basudeopur Colliery** vs. **Dhaneswari Devi**, 2014 ACJ 1325 has held that the calculation of compensation amount should be made under the provision existing on the date of incident relying upon Kerala State Electricity Board vs. Valsala K., 2000 ACJ 5 (SC). Learned Single Judge has held as under:

"[3] It is further pointed out that the original claim of the claimant was also under the same calculation, but the learned Presiding Officer, Labour Court, Dhanbad has wrongly calculated the amount under the amended provision and therefore, the aforesaid finding of the learned Presiding Officer, Labour Court is liable to be set aside and the amount payable to the claimant shall be calculated in view of the existing provision as contained under section 4 at the relevant point of time. In this context learned Counsel appearing for the appellant has relied upon the judgment in Kerala State Electricity Board and another v. Walsala Kr. and another, 1999 AIR(SC) 3502 In paragraph-5 their lordships have held as follows:--

5. Our attention has also been drawn to a judgment of the Full bench of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi,1998 80 FLR 72 wherein the Full Bench precisely considered the same question and examined both the above noted judgments. It took the view that the injured workmen becomes entitled to get compensation the moment he suffers personal injuries of the types contemplated by the provisions of the Workmen's Compensation Act and it is the amount of compensation payable on the date of the accident and not the amount of compensation payable on account of the amendment made in 1995, which is relevant. The decision of the Full Bench of the Kerala High Court, to the extent it is in accord with the judgment of the larger Bench of this Court in Pratap Singh Narain Singh Deo v. Srinivas Sabata and another lays down the correct law and we approve it."

36. As far as another argument advanced by the learned counsel representing the appellant is concerned that it has specifically come in the reply filed by the respondent No.3 that he used to pay Rs.2,000/- per month to the deceased and as such, there was no occasion for the learned Commissioner below to take income of the deceased as Rs.5,000/-, without there being any evidence on record. This Court finds from the record that claimants pleaded before the learned Commissioner below that respondent No. 3 was paying monthly salary of Rs.4500/- and

Rs.25/- per day as diet money to the deceased Praveen Kumar, whereas, respondent No.3 stated that he was paying Rs.2500/- per month and Rs.100/- per day and as such respondent No.1 was paying Rs. 5500/- in total, hence learned Commissioner below could take into consideration income of deceased as Rs.4,000/- as has been held.

37. Mr. Jagdish Thakur, learned counsel representing the appellant further contended that the daily allowance received by the deceased could not be included as part of salary as such same could not be taken into consideration by the learned Commissioner below while calculating salary of deceased.

38. The question whether the daily allowance was to be calculated for the purpose of wages of the deceased is no more *res integra* in view of the law laid down by learned Single Judge of Madhya Pradesh High Court (Indore Bench) in **Basantabai and another** vs. **Shamim Bee and another**, 2012 ACJ 1858. Learned Single Judge has held that bhatta received by deceased should form part of his income while computing compensation. Learned Single Judge has held as under:

> [4]..... To determine the question whether the bhatta (daily allowance) is a part of wages for computing the compensation under Motor Vehicles Act and ultimately to determine the question of wages of a driver, we have to consider the evidence and if it has come in the evidence that he was also getting Rs. 50 per day as daily allowance, whether the same can form part of wages. The term 'wages' has been defined in many Central Acts, such as, under the Payment of Wages Act, 1936; the Minimum Wages Act, 1948, the Industrial Disputes Act, 1947; and under the Workmen's Compensation Act, 1923, which are as under: Payment of Wages Act, 1936: Section 2(vi)--'wages' means all remuneration (whether by way of salary allowance, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and include-- (a) xxx (b) xxx (c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name): (d) xxx (e) xxx Minimum Wages Act, 1948: Section 2(h)--'wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance, but does not include—
>
> (i) the value of (a) xxx (b) any other amenity of any service excluded by general or special order of the appropriate Government;
>
> (ii) xxx
>
> (iii) any travelling allowance or the value of any travelling concession;
>
> (iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
>
> (v) xxx
>
> Industrial Disputes Act, 1947:
>
> (rr) 'wages' means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment and includes such allowances (including dearness allowance) as the workman is for the time being entitled to;
>
> (ii) xxx
>
> (iii) xxx Workmen's Compensation Act, 1923:
>
> (m) 'wages' includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling

concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment;

From a bare reading of the definitions of 'wages' under the Minimum Wages Act, 1948, Industrial Disputes Act, 1947 and the Workmen's Compensation Act, 1923, it is amply clear that the 'wages' means all remuneration whether by way of salary, allowance or otherwise expressed in terms of money or capable of being so expressed, payable to a person employed in respect of his employment or of work done in such employment and includes any additional remuneration, any travelling allowance or the value of any travelling concession or any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment, shall form part of the wages. These definitions are quite exhaustive and it prima facie appears that any amount paid to the driver either as additional remuneration payable in terms of employment or any travelling allowance or any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment, would be included in the definition of 'wages'. Therefore, any bhatta or daily allowance that is paid to the driver under any special contract as additional remuneration or as daily allowance may be considered as part of the wages but if any sum is paid for defraying any expenses towards food as and when the driver will go outside the city then it may not form part of the wages. For that the claimant has to prove that the amount of daily bhatta is paid as additional remuneration or as travelling allowance and it may depend from case to case and on the nature of the vehicle as well as the nature of duties and if it is found proved that the bhatta is paid as additional remuneration under the terms of contract for the purposes mentioned in the definition of 'wages' :::then as per the evidence on record the court may include the aforesaid bhatta as part of wages.

[6] For the above-mentioned reasons, the substantial question of law No. 2 framed by this court is answered in favour of the appellants by holding that bhatta is part of the wages for the purpose of computation of compensation."

39. Questions No. 1 and 3 are accordingly answered.

40. In view of the detailed discussion above, present appeal is allowed. Award passed by the learned Commissioner below is set aside to the extent that instead of appellant-Insurance Company, respondent No.3 i.e. owner of the truck/employer is held liable to pay the amount of compensation to the respondents No.1 and 2. The amount of compensation shall be calculated after taking salary of the deceased as Rs.4,000/- per month. Thus, after applying multiplier of 221.37 the amount of compensation would be 221.37 x 2000 = 4,42,740/-, plus interest of 12% per annum from 15.7.2009 till the date of realization. Both the claimants shall be entitled to equal shares of compensation.

41. The amount deposited by the appellant-Insurance Company with the Registry of this Court alongwith upto-date interest, is ordered to be released to it forthwith.

42. Pending applications, if any, are disposed of.

CROSS-OBJECTIONS NO. 61 OF 2017

43. At this stage, it may also be noticed that respondents/claimants No.1 and 2 have also filed cross-objections bearing No. 61 of 2017, praying therein to dismiss the appeal preferred by the appellant/Insurance Company and award them penalty to the extent of 50% alongwith interest in terms of Section 4-A(3)(b) of the Employees Compensation Act, 1923.

44. Mr. Praneet Gupta, learned counsel representing the respondents/claimants forcibly contended that unfortunate accident took place in the intervening night of 14/15.6.2009 but no effort was made to pay compensation as contemplated under Section 4 of the Employees

Compensation Act, 1923. He further contended that factum with regard to death of deceased employee was well within the knowledge of the employer i.e. respondent No.3, who is truck owner and as such, they have also apprised aforesaid facts to the employer by way of notice but despite that no amount was paid in terms of aforesaid provisions of law within the period prescribed therein. Mr. Gupta, while inviting attention of this Court to the claim petition filed by the respondents, further contended that it was specifically pleaded in the petition under Section 22 of the Workmen's Compensation Act that respondent No.1 to the best of knowledge of the applicants/claimants, lodged claim qua vehicle with the appellant/Insurance Company and as such, appellant/insurance company is/was also aware of the death of the driver and as such, is/was under obligation to pay amount as envisaged under Section 4 of the Employees Compensation Act. While inviting attention of this Court to the impugned Award passed by learned court below, Mr. Gupta, further contended that despite there being specific plea to grant penalty on account of failure on the part of the respondent employer as well as insurer, learned court below failed to award any amount in terms of Section 4 of the Employees Compensation Act and as such impugned award deserve to be modified accordingly.

45. Mr. Jagdish Thakur, while opposing the aforesaid cross-objection having been filed by the respondents/claimants No.1 and 2, strenuously argued that since deceased had no valid and effective driving licence, insurer was not under any obligation to indemnify the employer i.e. owner of the truck, since vehicle in question was being plied in breach of insurance policy. Mr. Thakur, further contended that penalty, if any, in terms of aforesaid provisions of law is/was required to be paid by the employer, who had acquired the knowledge of accident immediately after the accident, as has been admitted by him before the Court below.

46. Mr. Ashwani Kaundal, learned counsel representing respondent No.3 i.e. owner of the truck, denied the factum with regard to receipt of any notice allegedly issued by respondents/claimants No.1 and 2. Mr. Kaundal, further contended that since claim with regard to vehicle involved in the accident was immediately lodged by the respondent No.3 i.e. Owner of the truck to the insurance company, insurance company was under obligation to pay amount as envisaged under Section 4 of the Employees Compensation Act.

47. However, the fact remains that neither the counsel representing insurance company nor learned counsel representing owner of truck raised question, if any, with regard to maintainability of cross-objections filed by respondents No.1 and 2 during pendency of present appeal having been preferred by the appellant/insurance company.

48. This Court after having noticed the aforesaid plea with regard to penalty raised on behalf of the respondents/claimants No.1 and 2, deems it proper to frame following questions of law:-

> "Whether learned Commissioner below has erred in law in not awarding penalty in terms of Section 4-A(3)(b) of the Workmen's Compensation Act when employee i.e. owner of the truck or insurer thereto failed to deposit the amount when it fell due as per provisions of Employees Compensation Act, 1923."

49. Now this Court shall proceed to decide additional substantial question of law formulated at the time of hearing of instant appeal. As per section 3 of the Act, employer is liable to pay compensation if personal injury caused to employee in the accident is during the course of his employment. Under Section 3 of the Act certain exceptions have been carved out where employer has not been made liable to pay compensation as envisaged under Section 3 of the Act but Section 3(b) of the Act specifically provides that employer shall not be liable in respect of any injury not resulting into death or permanent total disablement caused by an accident, which is directly attributable to the employee who at the time of accident was under the influence of drugs or liquor or there was willful disobedience on his part to obey an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employee. But careful perusal of Section 3(b) clearly suggests that in case of death or permanent disablement of an employee, employer shall be liable to pay compensation in terms of Section 3 of the Chapter II of the Act.

Section 4(a) specifically provides that compensation under Section 4 shall be paid as soon as it falls due and in case the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of employee to make any further claim. Section 4(3)(b) empowers Commissioners to direct employer to pay sum not exceeding 50% of such amount by way of penalty, in addition to the amount of arrears and interest thereon.

50. At this stage, it would be profitable to reproduce Section 4-A of the Act, as under:-

> "4-A compensation to be paid when due and penalty for default.(1) Compensation under Section 4 shall be as soon as it falls due.
>
> (2). In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the {employee}, as the case may be, without prejudice to the right of the (employee) to make any further claim.
>
> (3) Where any employer is an default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall:-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty:
>
> Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed"

51. In the case at hand, there is no dispute with regard to fact that respondent No.3 i.e. owner of the truck had acquired knowledge of the accident immediately because in his cross-examination he has categorically admitted that he after having acquired knowledge of accident through conductor of the truck visited the spot of the accident on the next day. Though, there is no denial in the reply filed by the respondent No.3 to the reply filed by respondents/claimants No. 1 and 2 that due notice was given to employer with regard to accident but otherwise also it is an admitted fact that employer was in the knowledge of the accident and despite that he failed to pay amount in terms of Section 4-A of the Act and as such, learned court below ought to have considered and decided the specific plea with regard to penalty under Section 4-A of the Act. But interestingly, learned court below while holding insurance company liable to pay compensation failed to take note of specific prayer having been made by respondents/claimants No.1 and 2 for levying penalty against the employer or insurer in terms of Section 4-A on account of delay in paying amount of compensation in terms of Section 4 of the Act.

52. As per section 4-A, compensation in terms of Section 4 is required to be paid as soon as it falls due. Section 4-A(2) specifically provides that even if employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts and such payment shall be deposited with the Commissioner or made to the employee as the case may be, without prejudice to the right of the employee to make any further claim.

53. Section 4-A(3) further provides that where employer is in default in paying the compensation due under this Act within one month from the date, it fell due, the Commissioner shall be empowered to award penalty as has been discussed hereinabove.

54. Section 4(1) of the Act provides for compensation payable to workmen, who have suffered different injuries. Similarly, Section 4-A(1) provides that the compensation prescribed under Section 4 of the Act shall be paid as soon as it falls due. The last words " as soon as it falls due" under Section 4-A(1) evidently indicate that in the case of death of a workman it falls due upon his death and not on the date on which the Commissioner determines it in case of any dispute. Aforesaid provision of law further casts a duty upon the employer to make the provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim. In this regard reliance is placed upon judgment passed by Karnataka High Court in **Jayamma versus Executive Engineer, P.W.D., Madhugiri** 1982 ACJ 361; wherein it has been held as under:-

> "7. We may now take up the primary question for consideration. The answer to this question depends upon the date on which the compensation falls due under the Act. Section 4-A operates when there is default in paying the amount of compensation within one month from the date it fell due. It was urged by counsel for the appellant that the compensation falls due immediately upon the death of a workman and it shall be deposited within one month from that date. But, on the other hand, it was urged by the Government Advocate that the amount of compensation falls due only when it is determined by the Commissioner and not until then.
>
> 8. It seems to us that the contention urged for the respondent appears to be untenable. Section 4(a) of the Act provides for compensation payable to workman who have suffered different injuries. Section 4-A(1) provides that the compensation prescribed under Section 4 of the Act shall be paid as soon as it falls due. The last words " as soon as it falls due" under section 4-A(1) evidently indicate that in the case of death of a workman it falls due upon his death and not on the date on which the Commissioner determines it in case of any dispute. This becomes further clear if we move on to Section 4-A(2) of the Act, which provides:
>
> > " In case where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim."
>
> It is clear from the above sub-Section that even when there is a dispute as to the amount payable, the employer shall make a provisional deposit calculated on the extent of liability which he accepts and he cannot keep quiet till the Commissioner determines the correct amount payable to the workman.
>
> 9. In the case of death resulting from the injury, this question has been made further clear from section 8 of the Act r/w rules 6&7 of the Rules framed under the Act. Section 8 prohibits payment of compensation in respect of a workman, who death resulted from the injury in any manner otherwise than by deposit with the Commissioner. Rule 6 provides procedure for depositing such compensation. Rule 8 provides a remedy to the dependents where the employer has failed to deposit the compensation. It states that the dependent of the deceased workman may apply to the Commissioner for the issue of an order directing the employer to deposit the amount.

When the Act prohibits payment of compensation directly to the dependents and recognizes the only method of payment i.e., by depositing with the Commissioner, it is incumbent upon the employer to determine the compensation payable under the Act and deposit the same immediately after the death of a workman. In our opinion, in a case like this, the death of the workman alone is the cause of action for payment of the amount of compensation under the Act.

55. Reliance is also placed on a judgment passed by High Court of Judicature at Bombay Aurangabad Bench, in **Ishwar Gulab Pawar** v. **Ayoub Jamal**, 2015 ACJ 1316, wherein it has been held as under:

"18. On the second point, the learned counsel for the claimant placed reliance on the case reported as 2009 (5) Bom.C.R. 523 (AURANGABAD BENCH0 [Udhav Rangnathrao Pawar Vs. Sheshrao Ramji Jogdanad and Anr.]. The learned Single Judge of this Court has considered and discussed three cases of the Apex Court on the point of penalty, which can be given to claimant and the cases are reported as AIR 1976 SC 222 [Pratap Narain Singh Deo Vs. Shrinivas Sabata], AIR 1997 SC 3854 [Ved Prakash Garg Vs. Premi Devi] and AIR 2007 SC 1208 [National Insurance Co. Ltd. Vs. Mubasir Ahmed]. The learned Single Judge of this Court has held that the case of Pratap Narain Singh Deo was decided by larger bench and the other case of Ved Prakash Garg cited supra need to be used as the law laid on the point. It is observed that in the subsequent case viz. Mubasir Ahmed's case, the Apex Court has not considered the ratio laid down in the two cases already decided and so, the ratio laid down in the case of Pratap Nairan's case cited supra need to be used. The relevant paras from the judgment of the learned Single Judge of this Court are 12, 21, 31 and 32 and they are as under :-

"12. Section 3 of the said Act deals with the employers liability for compensation. Sub-section (1) of section 3 of the said Act states that if personal injury is caused to a workman by an accident arising out of and in the course of his employment, his employer shall be liable to pay the compensation in accordance with this chapter. What is the amount of compensation, which is required to be paid by the employer to the workman under sub-section (1) of section 3, is specified under section 4. Section 4-A of the said Act deals with the compensation to be paid when due and the penalty for default. Sub-section (1) of section 4-A states that the compensation shall be paid as soon as it "falls due". Sub-section (3) of section 4-A states that where any employer is in default in paying the compensation under this Act, within one month from the date it "fell due", the Commissioner can direct in terms of clause (a) that the employer shall, in addition to the amount of arrears, pay simple interest thereon, at the rate of 12 per cent per annum. Clause (b) further empowers the Commissioner to direct the employer to pay, in addition, a further sum not exceeding 50 per cent of such an amount by way of penalty, if, in his opinion, there is no justification for delay in payment of arrears and interest. However, the only rider on imposition of penalty under clause (b) is that the employer has to be given a reasonable opportunity to show cause why the order imposing the penalty should not be passed.

21. Thus, the decision of the larger bench in Pratap Narain's case would bind this Court and hence, it is held that the compensation payable in such cases would be on the date of accident, irrespective of any dispute regarding total denial of liability or denial of liability to the extent claimed as against the accepted sum. The expression "falls due" employed under subsection (1) of section 4-A of the said Act shall have to be, therefore, construed with reference to the date of accident only. Any other construction would defeat the object of sub-section (1) of section 3 of the said Act, which is to make the compensation immediately

available for the benefit of the claimants, whose bread winner might have been seriously injured or might have lost his life.

31. Now, turning to the question of imposition of penalty under sub-clause (b) of sub-section (3) of section 4-A of the said Act, the Apex Court has held in Ved Prakash's case (supra) that the penalty is required to be levied under the said provision after issuing show cause notice to the employer concerned who will have a reasonable opportunity to show cause why, on account of some justification on his part for the delay in payment of the compensation amount, he is not liable for this penalty. It has further been held that if ultimately, the Commissioner after giving reasonable opportunity to the employer to show cause, takes a view that there is no justification for such a delay on the part of the insured employer and because of his unjustified delay and due to his personal fault he is held responsible for the delay, then the penalty would be imposed on him. It has further been observed that so far penalty is concerned, the same is not automatic flowing from the main liability incurred by the insured employer under the said Act.

32. This judgment in Ved Prakash's case has been followed in un-reported judgment of this Court in F.A.No. 1562/2009, Nandi Sahakari Sakhar Karkhana's case (supra). It has been held that a show cause notice was required to be issued to the employer calling upon him to furnish the explanation for the delay caused in making the payment of arrears. Upon receipt of the explanation from the employer, if the Commissioner is not satisfied then the penalty to the extent of maximum 50 per cent of the amount of compensation determined is required to be paid by the employer. The order impugned in the present case is a composite order determining the compensation payable by the employer imposing the interest on the arrears of the amount of compensation and imposing penalty for failure to furnish the satisfactory explanation. The show cause notice contemplated by clause (b) of section 3 of section 4-A of the said Act is with reference to the arrears of the amount of compensation determined to be payable by the employer along with the interest payable thereon. This finding would arise only upon determination of the compensation by the Commissioner under section 19 of the said Act. Hence, the show cause notice contemplated is after passing of the order by the Commissioner determining the compensation. In view of this order imposing penalty of Rs.45,000/- to the extent of 50% of the amount of compensation of Rs.90,000/- determined by the Commissioner, needs to be quashed and set aside with a direction to the Commissioner to issue a show cause notice providing the appellant / employer a reasonable opportunity of being heard in the matter and to furnish the explanation for the delay caused in making the payment of arrears of compensation and interest, and thereafter to pass an appropriate order."

19. In view of the aforesaid position of law and the facts of the present case, it can be said that there was sufficient material to make out the case for imposing penalty on owner. The Commissioner ought to have considered the case from the angle discussed above. This Court holds that for following the procedure like issuing show cause notice to the employer, for giving the opportunity in respect of imposition of penalty, the matter needs to be remanded back. So substantial questions of law (i) and (iii) are answered accordingly, in favour of claimant. The remaining substantial question of law is answered against the appellants/claimant. In the result, the following order."

56. This Court in FAO No. 621 of 2003, titled **Executive Engineer, B & R HPPWD Solan** versus **Kewal Ram**, decided on 16.7.2004, has held as under:

"8. After having examined the over all facts and circumstances of this case, I am satisfied that there is no justification either in law or on the admitted facts for non deposit/payment of compensation by the appellants. Thus, Section 4-A(3)(b) of the Workman's Compensation Act is clearly attracted so far levy of penalty is concerned. Further, on the basis of the discussion in the preceding paras, of this judgment, it is felt that in addition to sum of Rs.14,620/- + 6% interest, respondent is also liable to pay 50% penalty on the awarded compensation i.e. Rs.14,620/-.

9. In case compensation was paid to the respondent or deposited with the Commissioner below, liability to pay interest as well as penalty could have been legitimately avoided. As already noted, after contesting the case for almost a decade, amount was deposited on 3.9.2003 for maintaining the present appeal.

10. This is not the first case of its type that has come to the notice of this Court where State and its functionaries have been found remiss to protect its interest. On the facts of a particular case and law governing the same, a lis may be contested. But the contest should not have to be there for the sake of contest, only because a case has been instituted. Functionaries of State are expected to properly examine the matter and then take action in its best interest. This observation is being made for being kept in view by the State so that its interest is well protected.

11. No other point is urged.

12. In view of the aforesaid discussion, while partly allowing the appeal, impugned order of Commissioner, under Workmen's Compensation Act, 1923, HP PWD, South Zone, Winter Field, Shimla-171003 in case No. LA-SLN-129/93, dated 6.5.2002 titled as Shri Kewal Ram versus The Executive Engineer, HP PWD, (B&R), Solan Division and another, is modified in the following terms:

(a) that the respondent is held entitled to compensation of Rs.14,620/- only,

(b) on this amount, respondent is held entitled to interest @ 6% per annum on and with effect from 21.6.1993 to the date of deposit/payment, whichever is earlier.

(c) he is also held entitled to 50% penalty on the sum of Rs.14,620/-

(d) copy of this judgment will be circulated by the Registry to all the Commissioner under, Workmen's Compensation Act, 1923 in the State of H.P. for their guidance; and

(e) a copy of this judgment be also sent to the Chief Secretary to the Government.

No costs.

57. After having carefully perused the aforesaid law laid down by various High Courts as well as Coordinate Bench of this Court, this Court has no hesitation to conclude that learned Commissioner below ought to have granted penalty in terms of Section 4-A of the Act, against the employer, who despite having acquired knowledge, immediately after the accident, failed to deposit the amount of compensation in terms of Section 4-A of the Act within stipulated period. In the case at hand, respondent No.3 i.e. truck owner has nowhere rendered explanation, if any, for delay in paying the amount of compensation in terms of Section 4-A of the Act, rather, he has stated that appellant being insurer was liable to pay compensation in terms of Section 4-A of the Act, which submission is not tenable in view of categorical findings recorded by this Court while answering substantial question No.2 that appellant-insurance company, is/was not liable to indemnify the respondent No.3 i.e. employer/truck owner as truck was being plied in contravention of terms and conditions of insurance policy.

58. Though the question with regard to maintainability of cross-objections filed during the pendency of the appeal has not been raised by any of the parties to the lis but this Court draws strength from judgment passed by High Court of Judicature at Allahabad in **Moti Lal** v. **Thakur Das**, 1985 ACJ 634, wherein it has been held as under:

> "12. For the respondent, it is contended that the Compensation Commissioner was wrong in deducting the sum i.e. Rs.1,800/- said to have been spent over medical treatment and Rs.1,600/- paid in cash from the compensation. A cross-objection to this effect has also been filed. The appellant took a preliminary objection that no cross-objection was legally maintainable. He has in his support cited a decision of the Andhra Pradesh High Court reported as Parimi Venkanna v. Managing Partner, Modern Spun Pipe Co., 1974 Labour and Industrial Cases, 1480, where it was held that the Workmen's Compensation Act was a self contained Code and since there was no provision for filing a cross-objection none was maintainable. It was also observed that the right of the respondent ot prefer cross-objection under Order 41, rule 22, Code of Civil Procedure, arises in an appeal against a decree. Since the appeal under section 30 of the Act is directed against an order only and not against any decree the provisions of Order 41, rule 22 could not be applied. However, the legal position in this High Court is different. Under the Motor Vehicles Act also against an award in a motor accident claim case an appeal is provided under section 110-D. There is no provision for filing cross-objection in the same way as in the Workmen's Compensation Act. A Full Bench of this Court in U.P. State Road Transport Corporation v. Janki Devi, 1982, ACJ 429 (Allahabad), however, took the view that in an appeal filed under section 110-D of the Motor Vehicles Act, 1939, a cross-objection as contemplated under Order 41, rule 22, Code of Civil Procedure was maintainable.
>
> 13. After considering a large number of authorities regarding the nature of appeal emanating from different special Acts, it was held that if an appeal was provided to the High Court without anything more the same procedure should govern it as applies to an appeal of a similar nature under the ordinary law. Thus in a matter of civil nature the procedure applicable to a civil appeal should apply. It was further observed that although the Claims Tribunal was not a civil court yet the nature of jurisdiction exercised by it was the same as that of the civil court and its award is a judicial decision. While hearing an appeal under section 110-D, the High Court has to consider the claim in the same manner as any claim in an appeal from a civil court from an area where there is no Claims Tribunal. The award was held to be akin to a decree of the civil court. Extending this principle and by reading 'Court' for 'Tribunal' and 'decree' for an 'award, it was held that Order 41, rule 22, Code of Civil Procedure applied. The position under Workmen's Compensation Act is also similar. I am respectfully bound by the decision of the Full Bench and, therefore, on a parity of reasoning, I hold that in an appeal filed under section 30 of the Act also the respondent would be entitled to prefer a cross-objection under Order 41, rule 22, Code of Civil Procedure. The preliminary objection is, therefore, rejected."

59. Reliance is also placed upon the judgment passed by High Court of Andhra Pradesh at Hyderabad in case titled as **Singareni Collieries Co. Ltd** versus **Commissioner for Workmen's Compensation**, 1988 ACJ 940, wherein it has been held as under:-

"15. Following the aforesaid principles, I am of the view that even though there is no specific provision in the Workmen's Compensation Act, enabling the respondent to prefer cross-objection still, the cross-objections are maintainable.

Reliance is also placed upon the judgment passed by Hon'ble High Court of Andhra Pradesh in case titled Government of Andhra Pradesh Transport Department, Hyderabad versus Mrs. K.Padma Rani and others 1975 ACJ, 462

"23. In the Union co-operation Insurance Society Limited, Madras v. Lazarammal Ravel and others(1974 II MLJ 160) a Division Bench of the Madras High Court has taken similar view and held:-

"4. Regarding the cross-objection two preliminary objections were raised. The first is that the appeal being one arising under a special stature and the Civil Procedure Code, not being applicable to the Tribunal constituted under the said statute, viz, the Motor Vehcile Act no cross-objection can be filed. It is pointed out that under Section 110-D though there is provision for any of the aggrieved parties to file an appeal, there is nothing in the section permitting a respondent to an appeal to file cross-objection.

5. In support of this contention, three decisions were relied on, the first is Vedanta-Charsami v.Muthiah Chetti... "Under section 110-D of the Motor Vehicles Act, an appeal lies to this court. It must be remembered that when once an appeal is entertained by this court, all the provisions relating to the appellate jurisdiction of this court are attracted. It is true that all the provisions of the Code of Civil Procedure are not applicable to the Tribunal, because it is a creature of the statute, but the appeal against the order of the Tribunal is to the High Court not to any other Tribunal constituted under the Statute. In Secretary of State v. Ramarao, the question was whether the ordinary rules of the Code of Civil Procedure would apply to an appeal to the District Court against the decision of the Forest Settlement Officer, under section 10(2) of the Madras Forest Act. The privy council pointed out that the appeal being to the District Court which is one of the ordinary court of the country the ordinary rules of the Code of Civil Procedure, apply"...

"As we pointed out earlier, section 110-D of the Motor Vehicles Act contemplates an appeal to the High Court. Once an appeal is entertained by this Court, all the rules in the Code of Civil Procedure would be applicable to such an appeal in asmuch as no other procedure is prescribed under the said Act that means, order 41 rule 22, Code of Civil Procedure would be applicable and the respondent in an appeal would be entitled to present a memorandum of cross-objections as provided under the said rules. Venkataraman, J. in disposing of Venkatesan v. Ranganayaki has taken a similar view and we agree with the same."

60. Having regard to the aforesaid law laid down by various High Courts including this Court, this Court has no hesitation to conclude that cross-objections filed by respondents No.1 and 2 under Order 41 rule 22 CPC are maintainable and cross-objectors are entitled to penalty in terms of Section 4-A of the Act *ibid*, because admittedly the employer has failed to pay the compensation within a period of one month from the date of knowledge with regard to alleged accident.

61. Accordingly, this Court taking note of the material adduced on record by the respective parties, holds cross-objectors/ respondents No.1 and 2 entitled to penalty equivalent to 25% of the amount of compensation calculated above i.e. 25% x 4,42,740/-= Rs.1,10,685/-, in equal shares, to be paid by respondent No.3/employer, in addition to the amount of compensation calculated in para-40 above. The Cross-objections are disposed of accordingly.

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

Smt. Sushila Devi ....Appellant
Versus
Ankur Dutt and another ....Respondents

RSA No. 83 of 2008
Decided on: December 11, 2017

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for permanent prohibitory injunction and mandatory injunction- Challenge to the concurrent findings of the trial Court and 1st Appellate Court allowing the relief of permanent prohibitory injunction and mandatory injunction- Plaintiffs claimed that defendant encroached upon the suit land and encroachment identified by way of demarcation- Demarcation had taken place in the presence of defendant and his family members- Record suggests that the evidence brought by the plaintiffs to the establish his cause is genuine and inspiring confidence- **Held**- that concurrent findings of the fact cannot be upset by the High Court in Regular Second Appeal, unless the findings so recorded are shown to be perverse- also held that power of attorney cannot depose in respect of the matter in which the principal may have exclusive knowledge and in respect of which the principal is liable to be cross-examined – Testimony of power of attorney cannot be thrown away, if he has personal knowledge of the facts deposed- no perversity in the judgment and decrees under challenge and same is based upon the correct appreciation of the evidence - no merit in the appeal- Appeal dismissed. (Para-11, 23 and 26)

Cases referred:
Jagtamba & Ors vrs. Smt. Kanta Devi, Latest HLJ 2005(HP) 1291
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant Mr. Virender Singh Rathore, Advocate.
For the respondents: Mr. Vijay Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal filed under Section 100 CPC is directed against judgment and decree dated 27.12.2007 passed by the learned District Judge, Kangra at Dharamshala, Himachal Pradesh in Civil Appeal No. 159-G/XIII of 2005, affirming judgment and decree dated 26.10.2005 passed by the learned Civil Judge (Senior Division), Dehra, District Kangra, Himachal Pradesh, in Civil Suit No. 264/1999, whereby suit for perpetual prohibitory injunction and for possession having been filed by the respondents-plaintiffs (hereinafter, 'plaintiffs') came to be decreed.

2. Briefly stated facts as emerge from the record are that the plaintiffs filed a suit for perpetual prohibitory, mandatory injunction and also for possession of land comprised in Khata No. 42 Khatauni No. 80, Khasra No. 1036, measuring 62-65 square metre (hereinafter, 'suit land') situate in Mohal Jawalamukhi, Tehsil Dehra, District Kangra, Himachal Pradesh, averring therein that the suit land is owned and possessed by him and the land of the defendants comprised in Khasra No. 1023 is adjoining to the land of the suit land. Plaintiffs further averred in the plaint that he is having his house on suit land and also on the land comprising of Khasra No. 1017. Some portion of the suit land was vacant, which was adjoining to the defendant's land in Khasra No. 1023. As per plaintiff, in the second week of October, 1999, defendant without

getting the map sanctioned from local authority, threatened to raise construction on the suit land as shown in the site plan by letters 'ABCD'. An application was moved by the plaintiff before the Nagar Panchayat, Jawalamukhi on 11.10.1999 intimating therein factum with regard to threats extended by the defendant to encroach the suit land. Plaintiff had also applied for the demarcation of his land before Revenue Officer and accordingly, suit land was demarcated by Tehsildar on 15.10.1999 in the presence of the defendant and her father. During demarcation it was found by the Kanungo that there was vacant land in the suit land and Pakka points were fixed, however, defendant objected to the demarcation. The report was accepted by Tehsildar Dehra on 26.10.1999. After demarcation on 16.10.1999, the defendant forcibly raised septic tank on the portion 'ADCF' shown in the site plan and also kept one outlet for over flow from the septic tank in the vacant land of the plaintiff. Since defendant failed to stop the construction over the suit land despite plaintiff's requests, he was compelled to file the instant suit, praying therein for a decree of perpetual prohibitory injunction restraining the defendants from raising any construction over the land as reflected by letters, 'ABCD' in the site plan. Plaintiff also sought a decree for mandatory injunction for demolition and removal of the structure in the form of septic tank and foundation dug by the defendant during the pendency of the trial. Apart from above, plaintiff also prayed for a decree for possession of encroached portion of suit land, comprising of Khasra No. 1036, by way of demolition of structure.

3. Defendant by way of written statement refuted the aforesaid claim put forth by the plaintiff. Defendant denied that there is any vacant land of plaintiff adjoining to her land. She also denied the allegations of threats, if any, extended by her in October, 1999. Defendant also denied the allegations of encroachment made by her on any portion of suit land, while raising construction of septic tank and foundation. Defendant, while denying allegations of raising construction after demarcation report dated 16.10.1999, specifically averred that she took demarcation on 3.7.1999 of her land in Khasra Nos. 1023 and 1022, in the presence of plaintiff's son namely Jitender Pal, which was accepted by Tehsildar on 15.7.1999. As per defendant, lintel of septic tank was laid on 20.7.1999 and construction was completed in September, 1999. Defendant also denied that during the pendency of the suit and despite visit of local commissioner and stay order, construction was raised by her over the suit land. Defendant, while refuting contention of the plaintiff that no permission was sought from the authorities concerned before raising construction, submitted that map of the construction in question was submitted by her before Nagar Panchayat, Jawalamukhi, much prior to present suit and charges for sanctioning map were also deposited.

4. Plaintiff by way of replication, reasserted and reaffirmed his claim and denied all the allegations and averments made by the defendant in the written statement.

5. On the basis of pleadings of the parties, following issues came to be framed by the learned trial Court, on 8.8.2001:

> "1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP
>
> 2. Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for? OPP
>
> 3. Whether the plaintiff is entitled for the possession of the suit land? OPP
>
> 4. Whether the plaintiff is estopped by his act, conduct and acquiescence from filing the suit? OPD
>
> 5. Whether the suit of the plaintiff is not maintainable in the present form? OPD
>
> 6. Whether the suit of the plaintiff is not properly valued for the purposes of Court fee and jurisdiction? OPD.
>
> 7. Relief."

6. Subsequently, learned trial Court vide judgment and decree dated 26.10.2005, on the basis of evidence adduced on record by the respective parties, decreed the suit of the

plaintiff for mandatory injunction and possession, whereas, prayer for permanent injunction was declined. Learned trial Court held the plaintiff entitled for possession of the suit land as shown in demarcation report Ext. CW-1/A, Mussabi Ext. CW-1/B and Field Book, Ext. CW-1/C. Learned trial Court, further directed for demolition of the structure raised by the defendant over Khasra No. 1036/1 on her cost and risks.

7. Being aggrieved and dissatisfied with the judgment and decree passed by learned trial Court, appellant-defendant (hereinafter, 'defendant') filed appeal under Section 96 CPC in the Court of learned District Judge, Kangra at Dharamshala. However, the fact remains that the same was dismissed, as a consequence of which, judgment and decree passed by learned trial Court came to be upheld. In the aforesaid background, defendant has approached this Court in the instant proceedings, seeking therein dismissal of suit having been filed by the plaintiff after setting aside judgments and decrees passed both the learned Courts below.

8. The present Regular Second Appeal came to be admitted by this Court on 29.6.2009, on the following substantial question of law:

"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?"

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

10. During the proceedings of the case, this court had an occasion to peruse the pleadings and evidence adduced on record before the learned Courts below, perusal whereof certainly does not compel this Court to agree with the contentions of Mr. V.S. Rathore, learned counsel representing the defendant that there is misreading, misappreciation and misinterpretation of the pleadings and evidence adduced on record by the respective parties before the learned Courts below, while passing judgments and decrees by the learned Courts below, rather this Court, after having carefully examined the material available on record has no hesitation to conclude that both the learned Courts below have dealt with each and every aspect of the matter meticulously and there is no scope of interference, especially in view of the concurrent findings of fact and law recorded by the courts below. In the case at hand, plaintiff, while claiming decree for permanent prohibitory injunction restraining the defendant from raising construction over the suit land and also decree for possession by way of demolition of the structure raised on the portion of the suit land has categorically claimed that suit land is adjoining to the land bearing Khasra No. 1023 owned and possessed by the defendant. Aforesaid factum has not been denied at all by the defendant rather, in her written statement, she has claimed that neither she intends to raise any construction over the land nor she has raised construction over any portion of suit land. It is also not in dispute, as clearly emerges from the record that during the pendency of the suit, Tehsildar, Dehra, came to be appointed as a local commissioner, who was specifically examined as CW-1. Shri V.S. Rathore, learned counsel representing the defendant, while referring to the judgment passed by first appellate Court strenuously argued that that it has failed to appreciate the evidence available on record in its right perspective, as a consequence of which erroneous findings have come on record to the detriment of the defendant. While inviting attention of this Court to the statement of PW-4, Jitender Pal i.e. Power of Attorney of plaintiff, Mr. Rathore, forcibly contended that not much reliance could be placed upon the version put forth by this witness, especially when plaintiff himself has not chosen to appear and examine himself as a witness in support of his claim. Aforesaid argument having been made by Mr. Rathore, learned counsel representing the defendant does not appear to be based upon material available on record, because it stands duly proved on record that the plaintiff is an old and paralytic person and he is confined to bed and his mental faculties are not functioning well. It has also come on record that the plaintiff is being looked after and maintained by PW-4 Jitender Paul. It has also come in evidence that property owned and possessed by the plaintiff is also maintained by PW-4, as such, he was competent to depose in place of the original owner, who was unable to appear before the Court being paralytic.

There is no material placed on record by the defendant, from where it can be inferred that Power of Attorney, if any, executed in favour of PW-4 Jitender Paul, is/was procured by coercion or fraud, rather, it has come in the statement of defendant herself that PW-4 Jitender Paul, being son of the plaintiff used to maintain the property including suit property of the plaintiff.

11. In **Smt. Jagtamba & Ors** vrs. **Smt. Kanta Devi**, Latest HLJ 2005(HP) 1291, which has been taken note by the first appellate Court, this Court, has categorically held that Power of Attorney can act on behalf of principal and his testimony should only confine to the acts done by the Power of Attorney holder in exercise of powers granted by the instrument. In the aforesaid judgment, it has been categorically held that Power of Attorney can not depose in respect of the matter in which the principal may have exclusive knowledge and in respect of which the principal is liable to be cross-examined. But, in the case at hand, suit has been filed by the plaintiff against defendant with the specific allegation that defendant despite there being demarcation report submitted by Tehsildar Dehra on 26.10.1999 forcibly constructed septic tank over part of suit land, meaning thereby unauthorized construction, if any, was raised by the defendant during the illness of original plaintiff, who was admittedly being taken care of and maintained by PW-4 Jitender Paul, being his son. It has specifically come in the statement of defendant that she also got suit land demarcated through revenue authorities in the presence of PW-4 Jitender Paul, as such, aforesaid plea having been raised by Mr. Rathore, learned counsel representing the defendant is not tenable, as such, same is rejected accordingly.

12. PW-1 Des Raj, who was Secretary of Nagar Panchayat, Jawalamukhi at the relevant point of time, proved certain documents, which are Ext. P3, Map Ext. P6, Notice Ex. P8 and resolution Ext. P7. Perusal of aforesaid documents clearly suggests that application dated 12.10.1999 Ext. P3 was moved by plaintiff to the Secretary, Nagar Panchayat, complaining therein that defendant had started raising construction of building in land comprised in Khasra Nos. 1022 and 1023 and also laid foundation in the land bearing Khasra No. 1038 unauthorisedly. It has also come in the evidence of aforesaid witness that on the basis of aforesaid allegation, Secretary, Nagar Panchayat directed Junior Engineer to inspect the spot and submit his report.

13. PW-3 Pratap Singh, Nambardar also stated that on 15.10.1999, Field Kanungo demarcated the suit land, wherein digging of foundation on the portion of suit land, owned and possessed by plaintiff was reported. This witness also stated that at the time of demarcation, no septic tank was constructed.

14. PW-2 V.P. Singh, Advocate, in his evidence also stated that he was appointed as a local commissioner by the Court and on the direction of the Court, he inspected the spot on 17.12.1999 and submitted his report dated 17.12.1999 (Ext. P9). As per report, Ext. P9, defendant encroached over some portion of suit land but this witness in his cross-examination, admitted that when he visited the spot alongwith Patwari, Patwari was not in possession of copy of Mussabi, but despite that land was demarcated. Aforesaid demarcation carried out by PW-2, V.P. Singh, was not taken into consideration by the court below, since it was not carried out in accordance with law. Otherwise, it has come in the statement of PW-2 that when he visited the spot in connection with demarcation of land, he found that construction was being carried out on the spot and as per his report, encroachment was made by defendant over the suit land.

15. It is also not in dispute that Court appointed Tehsildar Dehra as a local commissioner, who in his statement recorded before the court below stated that as per direction issued by the court on 27.10.1999, he visited the spot and submitted report, Ext. CW-1/A. It has also come in his statement that defendant encroached upon the suit land as reflected by him on Mussabi, Ext. CW-1/D. He categorically stated that before and after carrying out demarcation, he recorded statements of the parties regarding three Pakka points fixed by him before carrying out demarcation, Ext. CW-1/D. Careful perusal of the cross-examination conducted on this witness nowhere suggests that defendant was able to extract anything contrary to what was stated in examination-in-chief.

16. PW-4 Jitender Paul deposed that his father is a heart patient and had been medically advised to take rest. He also stated that he is looking after property of his father for the last twenty years and is acquainted with the facts of the case. It has come in his statement that suit land is adjoining to Khasra No. 1022, whereupon defendant started raising construction and encroached upon the suit land. Even cross-examination conducted on this witness, nowhere suggests that defendant was able to extract anything contrary to what was stated by this witness in examination-in-chief.

17. Even, defendant, as has been observed above, has categorically stated before the learned Court below that demarcation of land comprised in Khasra Nos. 1022 and 1023 was obtained by her in the presence of Jitender Paul, which corroborates version put forth by PW-4 that he in the absence of his father, maintained property owned and possessed by him.

18. DW-1 Sushila Devi and DW-2 Des Raj, by way of affidavits deposed that during demarcation, no encroachment was found on the land of the plaintiff. DW-2 feigned ignorance about demarcation being carried out by Field Kanungo or local commission appointed by the Court.

19. Careful perusal of evidence, be it ocular or documentary, adduced on record clearly suggests that plaintiff successfully proved on record that defendant encroached upon the suit land and thereafter raised construction over the same, during the pendency of the trial. Demarcation report submitted by local commissioner appointed by the Court below Ext. CW-1/A clearly proves on record encroachment made by defendant because there is nothing on record suggestive of the fact that aforesaid report was ever disputed by the defendant. If statement of Tehsildar Dehra, M.S. Thakur, is read in its entirety, there is no force in the argument of Mr. Rathore, learned counsel representing the defendant that demarcation was not carried out in accordance with law, rather, careful perusal of demarcation report, Ext. CW-1/A clearly suggests that local commission before carrying out demarcation on the spot, associated both the parties and recorded their statements. He has categorically stated that suit land of defendant was demarcated in the presence of both the parties and encroached portion as shown in Mussabi Ext. CW-1/B was found during demarcation. He further stated that Field Book, Ext. CW-1/C was prepared and statements of parties with regard to Pakka points were recorded. It has also come on record that statements of parties after demarcation, Ext. CW-1/E and Ext. CW-1/F were also recorded, perusal whereof nowhere suggests that objection, if any, was ever raised by the defendant with regard to correctness of demarcation carried out by the aforesaid local commissioner. Cross-examination conducted on this witness, nowhere suggests that defendant was able to extract anything contrary to what was stated by this witness in examination-in-chief, rather, this witness in his cross-examination reiterated that on three sides of suit land and land of defendant, there is a constructed area but some portion is vacant. It has also come on record that pursuant to aforesaid demarcation given by Tehsildar Dehra, objections were invited from both the parties and defendant filed objection. Court below afforded opportunity to defendant (DW-1) to substantiate her objection and accordingly, Tehsildar Dehra, was summoned to appear as a witness in the Court. As has been taken note above, defendant was not able to extract from CW2 anything contrary to what he stated in his examination-in-chief.

20. From the statement of PW-1 Des Raj, it clearly stands proved on record that no prior permission was obtained by defendant from Nagar Panchayat before carrying out construction activity on the suit land, hence, this Court, after having carefully perused the evidence adduced on record, by respective parties, especially plaintiff, sees no reason to differ with the findings returned by the both the learned Courts below that defendant has encroached upon the suit land and thereafter, raised construction unauthorisedly.

21. Hence, there is no force in the arguments of Mr. Rathore, learned counsel representing the defendant that there is misreading, misappreciation and misinterpretation of evidence by the learned Courts below, while decreeing the suit of the plaintiff. Substantial question of law is answered accordingly.

22. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the respondents with regard to maintainability and jurisdiction of this Court, while examining the concurrent findings returned by both the Courts below. Mr. Vijay Verma, invited the attention of this Court to the judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, wherein the Hon'ble Supreme Court has held:

> **"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)**

23. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

24. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in **Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161** wherein the Court held:

> **"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)**
>
> > **"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:**
> >
> > **(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.**
> >
> > **(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial**

question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same."

(pp.174-175)

25. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

"14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal.

15) It is more so when these findings were neither found to be perverse to the extent that no judicial person could ever record such findings nor these findings were found to be against the evidence, nor against the pleadings and lastly, nor against any provision of law."

26. It is quite apparent from aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by learned Courts below, rather same are based upon correct appreciation of evidence as such, same deserve to be upheld.

27. This court after having carefully gone through the evidence available on record, has no hesitation to conclude that both the learned Courts below have appreciated the evidence in its right perspective and there is no misappreciation of the evidence.

28. Consequently, in view of discussion above, there is no merit in the appeal and same is dismissed. Judgments and decrees passed by both the learned Courts below are upheld. Pending applications are disposed of. Interim directions, if any, are vacated.

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BEFORE HON'BLE MR.JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Jagdish Chand Memorial Trust ....Petitioner
Versus
State of H.P. ....Respondent

CWP No.475 of 2017
Judgment Reserved on: 29.11.2017
Date of decision: 13.12.2017

Constitution of India, 1950- Article 226- Principal Secretary (Ayurveda) Government of Himachal Pradesh issued No Objection Certificate/ Letter of Intent in favour of the petitioner Trust for establishment of Himachal Ayurvedic Medical College and Hospital, Nalagarh to start 60 seats of BAMS Course, in private sectors on 20th February, 2017- The NOC/LOI was withdrawn vide communication dated 14th March, 2017 under the pretext that Hon'ble Chief Minister has desired that the matter be placed before the Cabinet- Held- that record suggests that NOC/LOI was issued by the Department of Ayurveda in haste in violation of rules after withdrawing the file from the office of Chief Minister, when Hon'ble Chief Minister was seized with the matter and had directed to list the matter before Cabinet for discussion as per Rules 14 and 16 governing the business- Further held that no NOC/LOI could have been granted by the department without the approval from the office of Hon'ble Chief Minister/Cabinet and as such the order passed by the department was ex-facie illegal- It could be withdrawn without issuing notice to the petitioner - Hon'ble Chief Minister was well within his competence to list the matter before the Cabinet for discussion before according the permission to establish the College- No merits in the petition- petition dismissed accordingly. (Para-51, 65 and 66)

Cases referred:

Hindustan Petroleum Corpn.Ltd. vs. Darius Shapur Chenai and Others, (2005)7 SCC 627
MRF Ltd.Kottayam vs. Asstt.Commissioner (Assessment) Sales Tax and Others, (2006)8 SCC 702
M/s.Motilal Padampat Sugar Mills Co.Ltd. vs. The State of Uttar Pradesh and others, AIR 1979 SC 621.
State of Kerala and Others vs. K.G. Madhavan Pillai and Others, (1988)4 SCC 669
Shri Ram Dayal Yadav vs. State of Himachal Pradesh and Others, 1975(2) S.L.R. 360
M/s.Rajureshwar Associates vs. State of Maharashtra and Others, AIR 2004 SC 3770
Indian Charge Chrome Ltd. and Another vs. Union of India and Others, (2006)12 SCC 331
M/s.Jit Ram Shiv Kumar and Others vs. The State of Haryana and another, AIR 1980 SC 1285
State of Bihar and others vs. Project Uchcha Vidya, Sikshk Sasngh & others, (2006)2 SCC 545
Chairman, Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee, AIR 1977 SC 965
Union of India v. P.K. Roy and Ors., AIR 1968 SC 850
Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors., (2001) 1 SCC 182
S.L. Kapoor v. Jagmohan and Others, AIR 1981 SC 136
State of U.P. v. O.P Gupta, AIR 1970 SC 679
Rae Bareli Kshetriya Gramin Bank v. Bhola Nath Singh and Others., AIR 1997 SC 1908
K.L. Tripathi v. State Bank of India, AIR 1984 SC 273
R.S. Dass vs. Union of India, AIR 1987 SC 593
A.K. Kraipak vs. Union of India, AIR 1970 SC 150
Suresh Koshi vs. University of Kerala, AIR 1969 SC 198
Union of India v. Tulsiram Patel, AIR 1985 SC 1416
J. Mohapatra & Co. and Another v. State of Orissa and Another, (1985) 1 SCR 322
Gadde Venkateswara Rao vs. Government of Andhra Pradesh, AIR 1966 SC 828

Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati and Others, (2015)8 SCC 519
State of Haryana and Others vs. Northern Indian Glass Industries Limited, (2015)15 SCC 588
Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27
Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657
Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796
State of Kerala and Another vs. B.Six Holiday Resorts Private Limited and Others, (2010)5 SCC 186
Arun Kumar Agrawal vs. Union of India and Others, (2013)7 SCC 1
Kuldeep Singh vs. Govt.of NCT of Delhi, (2006)5 SCC 702
Centre For Public Interest Litigation vs. Union of India and Others, (2016)6 SCC 408
State of Himachal Pradesh and Others vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh, (2011)6 SCC 597

For the Petitioner:	Mr.M.L. Sharma, Advocate.
For the Respondent-State:	Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

In the petition at hand, we are obliged to adjudicate, *"Whether 'No Objection Certificate' issued by Department of Ayurveda, Government of Himachal Pradesh, after having obtained necessary permission from Minister-in-charge of Ayurveda Department could be withdrawn subsequently by the Department on the pretext that Hon'ble Chief Minister, Himachal Pradesh has desired to place the matter before Cabinet?"*

2. Before exploring answer to aforesaid moot question involved in the present case, certain undisputed facts, which may be necessary for having bird's eye view, are that the petitioner-Trust *(hereinafter referred to as 'Trust'),* which came to in existence on 13th December, 2012 (Annexure P-2) with the objective to start and establish Medical Research, Hospital, Nursing Institutes, Diagnostic Centres, Educational Institutions and Rural Development Activities, started its Ayurvedic Hospital in the name and style of 'Himachal Ayurvedic Hospital' at Nalagarh with a capacity of 50 beds in the year 2014. Since Trust decided to start Ayurvedic Medical College and Hospital at Nalagarh with a capacity of 60 seats of Bachelor of Ayurvedic Medicine and Surgery *(hereinafter referred to as 'BAMS')* Course, it, after having obtained necessary 'No Objection Certificate' *(for short 'NOC')* and permission from the authorities concerned, preferred an application to the State Government for grant of NOC. Though, there is no application placed on record, whereby formal proposal was made by the Trust to the Government of Himachal Pradesh, but perusal of communication dated 6th February, 2015 (Annexure P-8), issued from the office of Commissioner Industries, Himachal Pradesh to the Additional Chief Secretary (Health) and Principal Secretary (Ayurveda) to the Government of Himachal Pradesh, suggests that Dr.Bhupesh Gupta, Trustee of the petitioner-Trust met Hon'ble the Chief Minister, Himachal Pradesh in the first phase of Investment meet held in Mumbai on 5th November, 2014 and proposed to set up an Ayurvedic College & Hospital in Baddi-Barotiwala-Nalagarh area *(for short 'BBN area').* Since the subject matter was related to Department of Ayurveda, Commissioner Industries, vide communication, referred hereinabove, requested the Department to process the case/proposal initiated by the above named Trustee as per the provisions and Rules of the Department. It also emerge from aforesaid communication that Project Proposal received in this regard from the Trust was forwarded to the Department of Health to the Government of Himachal

Pradesh. Further perusal of communication dated 20th March, 2015, issued by Joint Director Ayurveda, Himachal Pradesh, (Annexure P-9) suggests that Department of Ayurveda, taking note of proposal made by the Trust, advised it to apply on the prescribed format i.e. Form No.1, disclosing therein all details for want of 'NOC' from the State Government as prescribed by the Central Council of Indian Medicine, Government of India *(for short 'CCIM').* Department of Ayurveda also directed the Trust to furnish detailed project report so that the project site is inspected by the Departmental Committee. Perusal of communications dated 28th April, 2015 and 7th May, 2015(Annexures P-10 & P-11) made available on record suggests that site was inspected by the Committee constituted by the Department of Ayurveda on 16th May, 2015, whereafter, vide communication dated 20th February, 2017, issued by the Principal Secretary (Ayurveda) to the Government of Himachal Pradesh to the Chairman of the Trust, 'No Objection Certificate/Letter of Intent' *(for short 'NOC/LOI')* was granted in favour of Trust for establishment of Himachal Ayurvedic Medical College & Hospital Nalagarh, Himachal Pradesh to start 60 seats of BAMS course, in Private Sector subject to certain terms and conditions as contained in Annexure P-12. As per condition No.7 contained in letter dated 20th February, 2017, respondent-State reserved liberty to itself to withdraw NOC, if the Society fails to fulfill the norms of CCIM as well as terms and conditions contained in the LOI.

3. Subsequent to grant of aforesaid NOC/LOI by State Government of Himachal Pradesh, Trust also obtained consent of affiliation from Himachal Pradesh University, who, vide communication dated 2nd March, 2017 (Annexure P-13), agreed in principle to affiliate the proposed Himachal Ayurvedic Medical College and Hospital with admission capacity of 60 seats to be established at Nalagarh, Himachal Pradesh for starting BAMS course subject to grant of permission by Government of India, Ministry of Health and Family Welfare, New Delhi. Vide Communication dated 5th March, 2017 (Annexure P-14) Trust sent a communication to Ministry of Ayurvedic, Yoga and Naturopathy, Unani, Siddha and Homeopathy *(for short 'AYUSH')*, Government of India, New Delhi, seeking therein permission to start first batch classes at the premises of the hospital being run by the Society until the new building remains under construction. Similarly, Trust also deposited an amount of Rs.3.50 lacs by way of Demand Draft with the CCIM, New Delhi on account of registration charges. On 3rd March, 2017 (Annexure P-16), The Baghat Urban Co-op. Bank Ltd. also sanctioned loan to the tune of Rs.Five Crores in favour of the Trust for starting/promoting Ayurvedic Medical Education and Treatment Methodology through Himachal Ayurvedic Medical College and Hospital Nalagarh District Solan, H.P.

4. Thereafter, Department of Ayurveda, Government of Himachal Pradesh, vide communication dated 14th March, 2017, addressed to the Chairman of the Trust, (Annexure P-17), informed that NOC/LOI and extension for validity period of NOC/LOI respectively granted in favour of the Trust for establishment of Himachal Ayurvedic Medical College & Hospital, Nalagarh, to start 60 seats of BAMS course, in Private Sector vide this Department's letters of even number dated 20th February, 2017 and 3rd March, 2017 are hereby withdrawn.

5. In the aforesaid background, Trust being aggrieved and dis-satisfied with the aforesaid action has approached this Court by way of instant petition filed under Article 226 of the Constitution of India praying therein following main relief amongst other:-

> ***"1. To issue of a writ of certiorari quashing impugned order dated 14.03.2017 annexure P-17 being arbitrary, void and illegal or for any other appropriate writ, order or direction in the facts and circumstances of the case."***

6. Shri M.L. Sharma, learned counsel appearing for the Trust, vehemently contended that decision, as contained in communication dated 14th March, 2017 (Annexure P-17), whereby NOC/LOI issued in favour of the Trust came to be withdrawn, is not sustainable in the eye of law and as such same deserves to be quashed and set aside. While inviting the attention of this Court to various communications, which otherwise have been taken note by this Court while discussing the facts enumerated hereinabove, Mr.Sharma strenuously argued that

indefeasible right had accrued in favour of Trust with the issuance of communication dated 20th February, 2017, whereby necessary NOC and LOI was issued in favour of Trust, to set up the Ayurvedic Medical College & Hospital at Nalagarh, and as such there was no authority vested in the Department to withdraw the same that too without assigning any reason. Mr. Sharma further contended that bare perusal of communication dated 14th March, 2017, whereby NOC/LOI came to be withdrawn, nowhere disclosed reasons, if any, for withdrawal of NOC, which was granted in favour of Trust after completion of all necessary codal formalities. Mr.Sharma also contended that after initial acceptance of proposal submitted by the Trust, the Trust procured loan to the tune of Rs.five crores and also obtained necessary permissions from the concerned Department to enable the Department of Ayurveda to accord necessary sanction in favour of Trust for setting up Ayurvedic Medial College. Learned counsel, while terming impugned order Annexure P-17 to be totally non-speaking, un-reasoned, forcefully contended that the action of the respondents in withdrawing NOC unilaterally smacks of extraneous consideration and, as such, same needs to be rectified in accordance with law. While refuting the contention of the respondent-Department as put forth in its reply, Mr.Sharma further contended that Minister-in-charge of Ayurvedic Department was fully competent to accord sanction/NOC in favour of petitioner-Trust and as such right accrued in favour of Trust can't/could not be defeated on the pretext of Rules of Business of the Government of Himachal Pradesh *(for short 'Rules of Business')* framed by the General Administration Department for guidance of various departments working under the respondent-State. Mr.Sharma contended that since no reasoning is/was given in the impugned order dated 14th March, 2017 (Annexure P-17), explanation rendered on the part of Department that Hon'ble the Chief Minister desired that such matter be placed before Council of Ministers cannot be accepted because it is well settled law that an order has to be judged by the reasoning and same cannot be allowed to be supplemented by way of explanation/reasoning, if any, rendered in the shape of affidavit.

7. While placing reliance upon the judgment of Hon'ble Apex Court in ***Hindustan Petroleum Corpn.Ltd. vs. Darius Shapur Chenai and Others, (2005)7 SCC 627,*** Mr.Sharma contended that orders are not like wine becoming better as they grow old and as such bad orders cannot become valid by reasons assigned subsequent to issuance of such orders. Learned counsel further contended that there is nothing on record from where it can be inferred that the Chief Minister or Governor ever desired under Rule 14 of the Rules of Business to place the matter before the Council of Ministers. Mr.Sharma, while inviting the attention of this Court to para-9(v) of reply filed on behalf of the respondent-Department, contended that Minister-in-charge is/was competent authority to grant such approval and as such procedural irregularity, if any, committed by Department before issuing LOI/NOC cannot have any bearing on the right conferred/accrued in favour of the petitioner-Trust with the issuance of LOI/NOC.

8. Lastly, Mr.Sharma, contended that otherwise also there is nothing to substantiate desire, if any, of Chief Minister and as such, half hearted attempt to justify the palpably illegal order on the part of respondent-department is not tenable and the same deserves to be rejected out rightly. Mr.Sharma further contended that otherwise also action of respondent inasmuch as withdrawal of NOC/LOI is hit by doctrine of promissory estoppel and legitimate expectation. While praying for setting aside aforesaid impugned order dated 14th March, 2017 (Annexure P-17), Mr.Sharma also placed reliance upon the following judgments of Hon'ble Apex Court in support of his aforesaid contentions:-

> ***"1. MRF Ltd.Kottayam vs. Asstt.Commissioner (Assessment) Sales Tax and Others, (2006)8 SCC 702.***
>
> ***2. M/s.Motilal Padampat Sugar Mills Co.Ltd. vs. The State of Uttar Pradesh and others, AIR 1979 SC 621.***
>
> ***3. Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chenai and Others, (2005)7 SCC 627.***
>
> ***4. State of Kerala and Others vs. K.G. Madhavan Pillai and Others, (1988)4 SCC 669."***

9. Mr.Shrawan Dogra, learned Advocate General, while refuting the aforesaid submissions having been made by learned counsel representing the petitioner-Trust as well as averments contained in the writ petition, vehemently contended that respondent-State is/was well within its right to rectify its mistake, whereby NOC/LOI came to be issued in favour of respondent erroneously by department after having obtained permission from Minister-in-charge, whereas permission in the case at hand could only be accorded by Council of Ministers headed by Hon'ble the Chief Minister, who was seized of the matter.

10. Learned Advocate General further contended that though matter was already pending before Cabinet with regard to proposal given by Trust for setting up Ayurvedic Medical College and in this regard certain queries were raised by Hon'ble the Chief Minister, but even otherwise, as per Rule 14 of Rules of Business, any matter can be ordered to be brought before the Council by a special direction of the Chief Minister or the Governor under Article 167(c). He further contended that in the case at hand Hon'ble the Chief Minister, taking note of the matter/proposal, desired that such matter should be placed before the Cabinet and accordingly NOC issued in favour of the Trust came to be withdrawn and as such, there is no illegality, if any, in the action of respondent-Department, who inadvertently had issued NOC in favour of the Trust without having obtained necessary permission from the Council of Minister. While referring to Rule 14 of Rules of Business, learned Advocate General contended that all cases referred to in "Schedule" attached to such Rules can be ordered to be brought before the Council of Ministers in accordance with the provisions of the Rules ibid subject to the orders of Chief Minister under Rule 16, whereby Chief Minister may direct any case referred to in the "Schedule" to be either circulated to the Ministers for opinion or to be discussed at the Meeting of Council. While refuting the arguments advanced on behalf of petitioner-Trust that vested right accrued with the Trust with the issuance of NOC, learned Advocate General contended that since Ayurvedic College was proposed to be opened on the request of Trust, it being a policy decision, having State-wide application, required to be decided by Chief Minister or Council of Ministers.

11. Lastly, Mr.Dogra, learned Advocate General, contended that respondent-department, after having noticed irregularity committed by it, rather pointed out by the office of Chief Minister, rightly withdrew NOC granted in favour of the Trust. While praying for dismissal of the petition at hand preferred on behalf of the Trust, learned Advocate General also contended that scope of judicial review, as far as this Court is concerned, is very limited qua policy decision, if any, taken by the respondent-State having State-wide effect. In support of aforesaid contention, he placed reliance upon the following judgments of Hon'ble Apex Court:-

"1. Shri Ram Dayal Yadav vs. State of Himachal Pradesh and Others, 1975(2) S.L.R. 360.

2. M/s.Rajureshwar Associates vs. State of Maharashtra and Others, AIR 2004 SC 3770.

3. Indian Charge Chrome Ltd. and Another vs. Union of India and Others, (2006)12 SCC 331.

4. M/s.Jit Ram Shiv Kumar and Others vs. The State of Haryana and another, AIR 1980 SC 1285.

5. State of B ihar and others vs. Project Uchcha Vidya, Sikshk Sasngh and others, (2006)2 SCC 545.

12. We have heard learned counsel for the parties and gone through the record of the case carefully.

13. Before adverting to the factual matrix of the case vis-à-vis rival submissions/pleadings adduced on record by the respective parties, it may be noticed that this Court, taking note of serious doubt raised/expressed by learned counsel with regard to stand put forth by respondent in its affidavit with regard to desire of Hon'ble the Chief Minister to place the matter before him, this Court requested learned Advocate General to make available record pertaining to the proposal made by Trust for setting up Medical College and thereafter decision, if

any, taken by Hon'ble the Chief Minister/Cabinet. During arguments, learned Advocate General made available aforesaid record, perusal whereof clearly suggests that matter relating to issuance of NOC/LOI in favour of Trust for setting up Ayurvedic Medical College and Hospital at Nalagarh came to be placed before the Council of Ministers in its meeting held on 21st July, 2016, but the same was withdrawn after discussion.

14. Subsequently, the matter was again proposed to be placed before the Council of Ministers in its meeting, wherein brief note relating to scope of Ayurveda Education in the State/Country/Foreign Country received from Prof.Y.K. Sharma, Principal, Rajiv Gandhi Government Post Graduate Ayurvedic College, Paprola was also enclosed. On 29th September, 2016 Hon'ble Ayurveda Minister, State of Himachal Pradesh, while drawing attention to the notings vide N/59 to N/63 requested the Hon'ble Chief Minister for placing the matter before the Cabinet. Record reveals that on 22nd November, 2016, Hon'ble the Chief Minister, acceding to the request of Ayurveda Minister, directed the matter to be placed before the Cabinet. On 25th November, 2016 vide note (N/67) again Ayurveda Minister requested the Hon'ble Chief Minister to place the matter before the Cabinet in the public interest. In the aforesaid noting Hon'ble Ayurveda Minister specifically requested the Hon'ble Chief Minister to consider the proposal in the Cabinet meeting on 28th November, 2016. However, noting (N/68) on the file reveals that Hon'ble the Chief Minister called for following informations:-

"- Total number of colleges in Govt. and Private sector in the State,

- ***Total graduates passing out from these colleges,***
- ***How many of these Doctors who passed have been absorbed in the Govt. sector so far?***
- ***What is the position of batch-wise postings?***
- ***Do we have figures of employment given to Doctors in Govt. as well as in private sector?***
- ***What would be impact of allowing NOC to private sector?"***

15. Pursuant to aforesaid queries raised by Hon'ble the Chief Minister, Department of Ayurveda furnished information/detailed comments as finds mentioned in notings (N/71 & N/72). However, perusal of notings (N/73 & N/74) suggests that Hon'ble Ayurveda Minister directed the Department to place the matter before Hon'ble the Chief Minister for prior approval before placing the same in Council of Ministers.

16. On 19th December, 2016, Hon'ble the Chief Minister gave approval for placing the same before Council of Ministers. Subsequently, Hon'ble Ayurveda Minister again on 21st December, 2016 requested the Hon'ble Chief Minister to take decision in the matter, but interestingly noting (N/75) suggests that the file with regard to aforesaid proposal initiated by Trust for setting up Ayurveda Medical College was withdrawn by respondent on Ist February, 2017, as has been noted by Private Secretary to the Hon'ble Chief Minister. On Ist February, 2017, Hon'ble Ayurveda Minister, Himachal Pradesh, directed Principal Secretary (Ayurveda) to re-examine the matter and put up the same for approval of Council of Ministers in its meeting, if required. Perusal of notings (N/78 & N/79) suggest that the matter was re-examined and it was noted that as per Rules of Business of the Government proposals involving any important change or policy or practice having State-wide application are required to be placed before the Council of Ministers and the same practice is being followed by the Health Department for issuance of NOC in respect of all private health institutions. Perusal of note (N/80) further suggests that it was brought to the notice of Hon'ble Ayurveda Minister that as per CCIM, NOC from the concerned State is essential for the opening of new Ayurvedic Medical College and as such, matter requires approval of Council of Ministers. However, fact remains that Hon'ble Minister desired that Rules of Business may be placed before him. Subsequently, vide order dated 18th February, 2017, Hon'ble Ayurveda Minister recorded on the file as under:-

"N-88:- I have gone through the file. As per Rules of Business placed below matter regarding issuance of NOC is not to be placed before the Council of Ministers as it is within the competence of the Administrative Department.

Being private institute no financial application is involved and on the other hand the students of Himachal Pradesh who have to go to other States to get education will get facilities in the State itself besides providing employment and infrastructure.

Issuance of NOC of the State is just for submitting the matter to CCIM and it is incumbent on the institute to complete the formalities and obtain approval of CCIM.

In view of above, NOC be granted as recommended by the Director of Ayurveda."

17. Subsequent to aforesaid permission granted by Hon'ble Ayurveda Minister, NOC/LOI came to be issued in favour of petitioner-Trust vide communication dated 20th February, 2017.

18. Note as available at N/105 suggests that subsequently Hon'ble the Chief Minister discussed the matter with the Hon'ble Ayurveda Minister, who thereafter desired/directed that matter relating to issuance of NOC/LOI requires discussion of Cabinet. Pursuant to aforesaid discussion, letter dated 14th March, 2017 withdrawing NOC came to be issued by the Department of Ayurveda after having obtained approval from Ayurveda Minister, as is evident from the record. Hon'ble the Chief Minister in his note on 16th March, 2017 has observed as under:-

"Once the Cabinet is seized of the case, it is against the Rule of Business to deal the case by Ayurveda Department. It needs to be kept in view in future."

19. Having perused the record made available to this Court, one thing is clear that proposal at the first instance for issuance of NOC in favour of the "Trust" for setting up Ayurveda Medical College was intended to be placed before the Cabinet and in this regard necessary approval of Chief Minister was sought. It also emerge from the record that Hon'ble the Chief Minister, taking note of proposal routed through Hon'ble Ayurveda Minister sought certain information, as has been taken note above, matter was again placed before Hon'ble the Chief Minister, who gave his approval that the matter be placed before the Cabinet. Rather record reveals that on 21st December, 2016 Hon'ble Ayurveda Minister again requested Hon'ble the Chief Minister to take decision in the matter, but interestingly on 1st February, 2017 Ayurvedas Department withdrew the file from the office of Chief Minister, whereafter Hon'ble Ayurveda Minister directed Principal Secretary(Ayurveda) to re-examine the matter and put up the same for approval of Council of Ministers in its meeting, if required. Though it was brought to the notice of Hon'ble Minister that as per Rules of Business approval of Cabinet is required for issuance of NOC/LOI in favour of the petitioner-Trust, but despite that Hon'ble Ayurveda Minister gave his approval vide order dated 28th February, 2017 for issuance of NOC/LOI in favour of Trust, on the basis of which formal letter dated 20th February, 2017 came to be issued in favour of the Trust.

20. Whether Chief Minister is/was well within its rights to desire/direct authorities to place matter before Cabinet in terms of Rule 14 of Rules of Business, is a question which shall be dealt with by the Court lateron, but it is not understood that once matter was pending before Cabinet, as is evident from the record, where was the occasion for Ayurveda Department to withdraw the file from the office of the Chief Minister and thereafter accord permission to grant NOC/LOI in favour of Trust. Apart from above, Hon'ble the Chief Minister, after having gone through the answer given to his queries, had agreed to place the matter before Cabinet, as is evident from the record, but there is nothing on record from where it can be inferred that the Chief Minister, who was seized of the matter, rather who had approved the matter to be placed before the Cabinet, ever authorized the Ayurveda Minister to deal with the matter and thereafter issue NOC as prayed for by the Trust. It clearly emerge from the perusal of the record that

Hon'ble Ayurveda Minister was quite keen to have NOC issued in favour of Trust and in this regard he repeatedly requested the Chief Minister to place the matter before the Cabinet, but definitely there is nothing on record which prompted Ayurveda Department to withdraw file from the office of Chief Minister, rather noting given by Hon'ble the Chief Minister on 16th March, 2017 clearly suggests that once Cabinet was seized of the matter, Ayurveda Department had no authority to deal with the same. Hence, this Court, after having taken note of unnecessary hurry shown by Ayurveda Department, has no hesitation to conclude that decision with regard to grant of NOC/LOI taken by Ayurveda Department in favour of Trust was taken in hush-hush manner without taking necessary approval of the Council of Ministers or Chief Minister and as such same being *ex-facie* illegal rightly came to be withdrawn subsequently after the intervention of Hon'ble the Chief Minister.

21. Rules 14 and 16 of the Rules of Business of the Government of Himachal Pradesh state as under:-

> ***"14. Subject to the orders of the Chief Minister under Rule 16, all cases referred to in the Schedule shall be brought before the Council in accordance with the provisions of these Rules. Cases shall also be brought before the Council by a special direction of the Chief Minister, or the Governor under Article 167(c).***
>
> ***Provided that no case in regard to which the Finance Department is required to be consulted under these Rules, shall, save in an emergency or exceptional circumstances and under the specific directions of the Chief Minister, be discussed by the Council unless the Finance Department has had an opportunity for considering it.***
>
> ***16(1) The Chief Minister may direct that any case referred to in the Schedule may, instead of being brought up for discussion at a Meeting of the Council, be circulated to the Minister for opinion and if all the Ministers are unanimous and the Chief Minister thinks that a discussion at a Meeting of the Council is unnecessary, the case shall be decided without such discussion. If the Ministers are not unanimous or if the Chief Minister thinks that a discussion at a meeting is necessary, the case shall be discussed at a Meeting of the Council.***
>
> ***(2) If it is decided to circulate any case, the department to which the case belongs shall prepare a Memorandum setting out in brief the facts of the case, the points for decision and the recommendations of the Minister-in-charge and forward copies thereof to the Secretary to the Council who shall arrange to circulate the same among the Ministers and simultaneously send a copy to the Governor."***

22. Perusal of Rules 14 and 16 of the Rules of Business, which are reproduced hereinabove, clearly suggest that all cases referred to in the "Schedule" are required to be brought before the Council of Ministers in accordance with the provisions of these Rules. Subject to the order of the Chief Minister under Rule 16, who is empowered to direct that any case referred to in the "Schedule" may instead of being brought up for further discussion in the Meeting of Council can be circulated to the Ministers for opinion and if all the Ministers are unanimous and the Chief Minister thinks that a discussion at a Meeting of the Council is unnecessary, the case can be decided without such discussion, but, if the Ministers are not unanimous or if the Chief Minister thinks that the discussion in the meeting is necessary, the case needs to be discussed at the Meeting of Council of Ministers.

23. Rule-14 clearly suggests that subject to the orders of the Chief Minister all cases referred to in the Schedule needs to be placed before Council in accordance with the provisions of these Rules, rather cases can also be brought before the Council by a special direction of the Chief Minister, or the Governor under Article 167(c) of the Constitution. At this stage it may also

be profitable to take note of the following "Rules 14, 15, and 16", as referred to in "Schedule", attached to Rules of Business of the Government of Himachal Pradesh:-

"Schedule

(Rules 14, 15 and 16)

1. ***Proposals to summon the House of Legislature of the State***
2. ***Proposal for the making or proposal involving amendment, other than routine amendment of rules regulating the recruitment and the conditions of service of-***

   (a) persons appointed to the Secretariat staff of the assembly under Article 187(3);

   (b) officers and servants of the High Court under Article 229, provisions to clauses (1) and (2);

   (c) Persons appointed to the Public Service and posts (excepting Class-II, III & IV post(s) in connection with the Affairs of State

   Provided that minor amendments int eh service rules of Class-I posts like-change of Pay Scales, nomenclature of posts, number of post and age limit for direct recruitment pursuant to the notifications/instructions of the Department of Personnel shall be made by the concerned Administrative Department with the approval of the Minister-in-charge;

   Provided further that the cases of class-II posts involving difference of opinion with the Himachal Pradesh Public Service Commission and where there is departure from common rules shall be brought to the Council of Ministers.
3. ***The annual financial statements to be laid before Legislature and demands for supplementary , additional or excess grants.***
4. ***Proposals for the making or amending of Rules under Article 234.***
5. ***Proposals for the issue of a notification under Article 237.***
6. ***Any proposal involving action for the dismissal, removal or suspension of the Member of the Public Service Commission.***
7. ***Proposals for making or amending regulations under Article 313 or under the proviso to clause (3) of Article 320.***
8. ***Report of the Public Service Commission on the working under Article 323(2) and any action proposed to be taken with reference thereto.***
9. ***Proposals for legislation including the issue of Ordinance under Article 213 of the Constitution.***
10. ***Proposals for the imposition of a new tax, or any change in the method of assessment or the pitch of any existing tax, or land revenue, or irrigation rates, or for the raising of loans on the security of revenue of the State or for giving of a guarantee to the Government of the State.***
11. ***Any proposal which affects the finance of the State which has not the consent of Finance Department.***
12. ***Any proposal for re-appropriation to which the consent of the Finance Department is required and has been withheld.***
13. ***Proposal involving the alienation either temporary or permanent or of sale, grant or lease of Government property exceeding Rs.50,000/- in value or the abandonment of reduction of revenue exceeding that amount except when such alienation, sale, grant or lease of Government property or***

abandonment or reduction of revenue is in accordance with the Rules or with a general scheme already approved by the Council.

14. The annual audit review of the finances of the State and the report of the Public Accounts Committee.

15. Proposals for the creation, upgradation and abolition of all posts;

Provided that the Administrative Department shall be competent to abolish the posts in consultation with the Finance Department. The Finance Department shall facilitate maintenance of records of abolition of posts in various Departments and working out likely financial impact for budgetary purposes.

16. Reports of the Committees of inquiry appointed in pursuance of a resolution passed by the State Legislature.

17. Proposal involving any important change or policy or practice having State-wide application.

18. Cases required by the Governor or the Chief Minister to be brought before the Council.

19. Proposals for action inconsistent with the recommendation of the Public Service Commission.

20. Proposals to vary or reverse a decision previously taken by the Cabinet.

21. Proposals which adversely affect the operation of the policy laid down by the Government of India."

24. Item No.17 of "Schedule" clearly suggests that proposals involving any important change or policy or practice having State-wide application can be ordered to be placed before Council by the Chief Minister or Governor in terms of Rules 14 and 16 of the Rules of Business. Bare perusal of aforesaid Rules read with Items/cases referred in the Schedule, clearly suggest that Chief Minister is well empowered to direct/desire certain matters as referred in the Schedule to be placed either before him or Council of Ministers. Admittedly, whether question of opening new College in a State can be termed to be a proposal involving any important change or policy or practice having State-wide application is another question which requires consideration at this stage.

25. After having perused record of proposal submitted by the petitioner-Trust, which subsequently came to be considered by Hon'ble Ayurveda Minister and Hon'ble Chief Minister, we are persuaded to agree with the contention of learned Advocate General that opening of a new college that too professional college is definitely a policy decision is to be taken by the respondent-State. Record, which has been discussed/examined in detail hereinabove, clearly reveals that Hon'ble the Chief Minister, after having perused recommendation made by Hon'ble Ayurveda Minister, specifically sought certain information, which, in our mind, is/was quite relevant for determining need, if any, for opening new Ayurvedic College in the State of Himachal Pradesh, wherein admittedly two Ayurvedic Colleges run by the State are/were in existence. As per information submitted by Ayurvedic Department, no sufficient posts are available for Ayurvedic Graduates in the Government Sector and they have either been employed with the CHS/PHC level and providing their services on contract in the State as Medical Officers AYUSH. Though, we are not to judge whether, on the basis of information supplied by the Ayurvedic Department in response to queries raised by Hon'ble the Chief Minister, Government should have given permission for opening of Ayurvedic College or not, but definitely after having perused queries, which have taken note above, raised by Hon'ble the Chief Minister, this Court is convinced and satisfied that the matter, being policy matter, required to be placed either before the Chief Minister or in the Cabinet, who would have either got it approved unanimously by circulation or through placing the proposal before Cabinet as prescribed under Rules 14, 15 and 16 of Rules of Business. Otherwise also, initial proposal mooted by Department itself suggests that the matter being policy matter was intended to be placed before Cabinet with the approval of

Hon'ble the Chief Minister, who, after having perused information supplied to him pursuant to his queries, approved for placing the matter before Cabinet and as such this Court is unable to agree with the contention of Shri M.L. Sharma, learned counsel representing the petitioner-Trust, that matter being of great public importance was not required to be placed before Cabinet and mere approval of Ayurvedic Minister was sufficient for grant of NOC/LOI. As has been taken note hereinabove that Hon'ble Ayurvedic Minister, after having interacted with Hon'ble the Chief Minister, approved letter of withdrawal of NOC and this Court sees no illegality and infirmity in the decision of the Department to rectify its own mistake.

26. In this regard reliance is placed upon judgment of this Court in ***Shri Ram Dayal Yadav vs. State of Himachal Pradesh and Others, 1975(2) S.L.R. 360,*** wherein this Hon'ble Court has held***:-***

> ***"12 Rule 58 of the Rules of Business mentions the class of cases which shall be submitted to the Chief Minister before the issue of orders. Clause (v) of this rule mention one of such classes of cases; as the proposals for the prosecution, dismissal, removal or compulsory retirement of any Gazetted Officer. Therefore, from this it would follow that the cases of compulsory retirement of Gazetted Officers have got to be submitted to the Chief Minister before orders in such cases are passed. In the instant case it is stated by the Advocate General that the case was not submitted to the Chief Minster and, therefore, there was admittedly a breach of rule 58 (v) of the Rules of Business.***
>
> ***13. Next the opinion has to be formed, as is the intention of F.R. 56 (j), by the appropriate authority. In the case in hand under the Rules of Business the appropriate authority is the Chief Minister. Now we have to see whether any opinion was formed and by whom and what was the material.***
>
> ***14. The department has placed on record the personal file No. 1- 209/69-PWD of Shri Yadav.***
>
> ***This file starts with a note of the dealing Assistant, dated 13.4.71 and no record preceding this has been made available to the Court. It shows that the matter initiated at the instance of the Chief Engineer and the note was put up by the dealing Assistant. Thereafter there are office notings which ultimately culminated in the constitution of a Departmental Promotion Committee, consisting of Shri U.N. Sharma, Secretary (PWD) as Chairman, Shri H.C. Malhotra Chief Engineer (II) and Shri R.C. Singh, Chief Engineer (I) as members and it appears from para 3 of the proceedings of the meeting of the D.P.C. held on 14.6.1971 that the committee considered the cases of three persons including the petitioner for assessing their suitability for retention in service beyond the age of 55 years . The relevant portion of para 3 of the minutes read as under:-***
>
> ***"Shri Jagdish Chander Sharma and Shri Kartar Singh should be retained in service beyond the age of 55 years as provided in FR 56 (a). Shri R.C. Yadav whose record has been consistently unsatisfactory should be given three months' notice in August, 1971, in order to retire him from service at the age of 55 years."***
>
> ***The minutes reveal that the committee examined the confidential records of these three Assistant Engineers pertaining to the period of three years immediately preceding the attainment of age of 55 years and thereafter the committee made the aforementioned recommendations, resulting in the issue of the impugned order, Annexure PK. The submission made by the petitioner, therefore, is not acceptable that there was no material on the basis of which the opinion was formed. The question is whether the opinion was formed by the Departmental Promotion Committee or by the***

appropriate authority. Note No. 12, dated 14.6.71 shows that the minutes of the D.P.C were put up before the Finance Minister, who, it appears was also incharge of the P.W.D. for his approval, and his note No. 13 is to the following effect:-

" Secy P.W.D. may kindly discuss.

Sd/-Karam Singh

3-7-71"

And then note No. 14 runs like-

"Discussed with the F.M. Notice may be issued now.

Sd/-

Secretary

15-9-71"

It is thereafter on the 15th September 1971 that the notification, Annexure PK, was issued.

15. Consequently, it follows that the case was not put up before the Chief Minister, who for purposes of a case of compulsory retirement was the appropriate authority under the Rules of Business and the matter was disposed of at the end of the Finance Minister, who also did not form any opinion. What to talk of the material, the case was not at all sent to the Chief Minister. Therefore, for breach of rule 58 (V) of the Rules of Business this order is without jurisdiction and is liable to be struck down on this very ground.

16. The opinion in the present case was formed by the Departmental Promotion Committee, which cannot be said to be a delegate of the appropriate authority. The Chief Minister as the appropriate authority had to apply his mind and then to pass necessary orders, as contemplated under rule 58 (v) of the Rules of Business.

17. In the light of above, I, therefore, hold that the order has been passed in violation of rule 58 (v) of the rules of Business, which enjoined that the case should have gone to the Chief Minister as it related to the case of compulsory retirement of a Gazetted Officer, that not having been done, the order is bad. In view of this I think it is not necessary for me to go into the other matters whether the order cast a stigma or the order is mala fie or that it is discriminatory."

27. In this regard reliance is placed upon ***M/s.Rajureshwar Associates vs. State of Maharashtra and Others, AIR 2004 SC 3770,*** wherein the Hon'ble Apex Court held as under:-

"36. The orders of resumption of the land were passed by the Collector, Aurangabad on 18.12.1997 and on 4.2.1999. The legality of the order dated 18.12.1997 is the subject matter of challenge in RCS No. 17 of 1998 and, therefore, the same issue could not be adjudicated in a petition filed under Article 226 of the Constitution of India as has rightly been held by the High Court. On 14.2.1999, a proclamation was issued by the Collector, Aurangabad that the entire land in question i.e. 43 acres 12 gunthas belonged to the Government and that nobody should enter into any transaction with respect thereto. The terms of grant were specific and having regard to the provisions of the Maharashtra Land Revenue Code, 1966 it cannot be held that the subject land was the exclusive property of the mill and the society owning the mill had the right to dispose it of without the permission of the State Government. Condition No. (v) specifically provided that the mill should not transfer the right in the land

to anybody by sale, lease, mortgage, etc. without prior permission of the Government, The Collector had resumed the land in exercise of his statutory powers on 18.12.1997. Since the land stood resumed, the mill had no power to dispose of the land without getting the order of attachment revoked. This observation is in addition to the view that the subject land was a Government property at all times.

41. ***Rule 9 provides that all cases referred to in the Second Schedule shall be brought before the Council of Ministers. Entry 15 in the Second Schedule provides that any proposal which affects the finance of the State which does not have the consent of the Finance Minister has to be placed before the Cabinet. Similarly, entry 17 provides that proposal involving alienation either temporary or permanent by way of sale, grant or lease of Government property exceeding Rs. 50.000 in value of the abandonment or reduction of a recurring revenue exceeding. That amount or the abandonment or revenue exceeding Rs.5 lacs except when such alienation. sale, grant or lease of Government property is in accordance with the rules or with a general scheme already approved by the Council. It is evident that requirement of these rules was not complied with at the time when decision dated 23.10.2000 was taken by the Textile Minister to sell the entire land in favour of the appellant. The matter was required to be placed before the Council of Minister as the alienation of the property exceeded Rs. 5 lacs as per Rule 11 of the Rules of Business secondly since the Finance Department had not concurred with the Textile Department the matter was required to be placed before the Cabinet in terms of Sub-rule (2) of Rule 11 of the Rules of Business. The conclusion which flows from the record is to the effect that the Government had not given sanction approval for the sale of subject land when the Cooperative of Textile Department approached it for the same. The Government as per Rules of Business had not given any sanction/approval for the sale of land. The communication dated 23.10.2000 is not a Government decision as is obvious from the record and the subsequent communications dated 24.1.2001 and 12.7.2001 which were issued without verifying the record and ran contrary to the record did not convey a proper sanction.***

48. ***In the circumstances, when the Chief Minister had an occasion to consider the matter when an offer was received from Mr. Save, he was right and justified in directing re-tender, Such direction was in keeping with the views expressed by the Departments of Revenue and Finance. The matter was considered further after the noting of the Chief Minister at various levels including, the legal department and the final decision was taken on 27.11.2001. This decision, it appears from the file is on account of the Government's belief that the price of Rs. 7,81,33,000 was an under valuation of the subject property which is a prime land located within the Corporation area. The Divisional Commissioner, Aurangabad vide his communication dated 8.8.2001 as well as 23.10.2001 brought to the attention of the State Government that the market value of the property was in the range of Rs. 24 - 25 crores. When the offer of the appellant was received, no valuation of the land had been got done. The Liquidator could not have invited tenders for the entire land as out of 43 acres 12 gunthas, 38 acres 12 gunthas had been attached by the Collector on 18.12.1997 and taken possession of by the government leaving only 5 acres of land on which buildings had been erected. Initial decision was to sell 5 acres of land along with the building and machinery standing thereon. The Revenue department was as the finance department had not agreed for the***

sale of the entire land. The decision was taken by the textile department including its Minister to sell the entire land and the matter was required to be placed before the Cabinet and in the absence of any proper sanction the government had the power to cancel the same especially when it was of the opinion that the price of Rs. 7,81,33,000 offered by the appellant was under valuation of the property. The High Court was right in coming to the conclusion that the State Government did not, at any time, give approval for the sale or disposal of the subject land as was claimed by communication dated 23.10.2000.

49. It is true that the proposal sent by the Divisional Commissioner to set up sports complex in the subject land was not accepted by the government as a sports complex already existed in the city of Aurangabad and the learned counsel for the appellant has rightly contended that this could not be a valid reason for cancellation of the agreement to sale made in favour of the appellant. Even if the reason that the land was required by the government for setting up a sports complex is ruled out of consideration. the final decision taken by the Government to cancel the agreement of sale dated 27.11.2001 cannot be invalidated in the fact of our Finding that there was no proper approval/sanction of the Government for the sale of the subject land."

28. In ***Indian Charge Chrome Ltd. and Another vs. Union of India and Others, (2006)12 SCC 331,*** the Hon'ble Apex Court has held as under:-

"31. When the State Government made the recommendation for grant of a lease to Nava Bharat, the infirmities in that recommendation were pointed out by the Central Government, in its letter dated 27.6.2001. The violation of Rule 59 was also pointed out. Instead of placing the letter before the Chief Minister or the Cabinet and obtaining directions thereon, the Steel and Mines Department on its own chose to send a letter dated 30.6.2001 purporting to conform to the requirements. When the matter reached the Chief Minister and the Cabinet, the decision taken was to withdraw the earlier request for grant of approval of lease to Nava Bharat. On the materials, it is clear that the letter dated 30.6.2001 sent by the Secretary of the Steel and Mines Department was not one consistent with the Rules of Business framed under Article 166 of the Constitution of India. The letter also lost its efficacy in view of the decision taken by the Cabinet to withdraw the recommendation itself. The position that emerges is that there was no valid recommendation by the State Government for the grant of a lease to Nava Bharat and there was hence no valid approval of the Central Government. Non-compliance with Rule 59 of the Rules also vitiated the proposal to lease to Nava Bharat.

32. In view of our conclusion that the State Government was entitled to seek the approval of the Central Government in respect of the balance extent of 436.295 hectares, in which was included the proposed Nava Bharat grant, for exploitation by OMC and since, we are satisfied that the grant to Nava Bharat cannot be sustained, the proposed grant or grant to it has to be set aside. We do so. If it is a question of reconsideration of the applications of various entities for grant of leases in respect of 436.295 hectares, it would be a case where the claim of Nava Bharat would also have to be considered along with the claim of others in the light of the directions earlier issued by this Court. This contingency may arise only if the Central Government does not grant approval to the request of the State Government under Section 17A(2) of the Act. To that extent, we allow the appeals of I.C.C.L."

29. In ***MRF Limited vs. Manohar Parrikar and Others, (2010)11 SCC 374,*** the Hon'ble Apex Court held***:-***

> ***"89. At this stage, we find it necessary to refer to some of the Constitutional provisions to deal with the issue raised by the appellants. Under Article 154 of the Constitution of India, the Governor is vested with the Executive Power of the State and he shall exercise them either directly or through Officers subordinate to him in accordance with the provisions of the Constitution. The Governor is advised by the Council of Ministers with the Chief Minister at its head in exercise of his functions except those specifically stated in discharge of his functions as the head of the State. The Council of Minister is collectively responsible to the Legislative Assembly of the State. The Rules of business framed under Article 166(3) of the Constitution are for convenient transaction of the business of the Government and for allocation of the business among the Ministers. Article 166(2) of the Constitution requires the decision of the State Government to be authenticated as per the Rules framed thereunder. Any decision taken by the State Government therefore, reflects the collective responsibility of the Council of Ministers and their participation in such decision making process. The Chief Minister as the Head of the Council of Ministers is answerable not only to the Legislature but also to the Governor of the State. The Governor of the State as the Head of the State acts with the aid and advice of the Council of Ministers headed by the Chief Minister. The Rules framed under Article 166 (3) of the Constitution are in aid to fulfill the Constitutional Mandate embodied in Chapter II of Part VI of the Constitution. Therefore, the decision of the State Government must meet the requirement of these Rules also."***

30. Another argument raised on behalf of the petitioner-Trust that after issuance of NOC/LOI, indefeasible right accrued in favour of Trust, is also devoid of any merit because, as has been held above, grant of NOC/LOI is/was in complete violation of Rules occupying the field, rather same was issued by the authority concerned dehors the Rules governing the filed. Moreover, NOC/LOI came to be issued on 20th February, 2017, whereafter, permission was granted to set up 60 bedded hospital to the Trust and as such action/expenditure, if any, taken/incurred by Trust, prior to issuance of NOC/LOI, cannot be a ground to claim right, if any, accrued in favour of the Trust. Action, if any, taken prior to issuance of letter dated 20th February, 2017 is/was unilateral, initiated at the behest of petitioner-Trust in anticipation of grant of NOC. Though, in the case at hand, proposal initiated by Trust came to be accepted, but, had the authorities rejected the aforesaid proposal, could the Trust take aforesaid plea that since it has purchased land and invested money and as such right has accrued in its favour, answer is in negative because admittedly decision, if any, qua the proposal was to be taken by the Department in the light of Rules occupying the filed. Otherwise also, there is nothing on record, save and except certain documents, suggestive of the fact that pursuant to grant of NOC/LOI, the petitioner procured/obtained loan from the Bank for setting up infrastructure, but admittedly there is nothing on record that amount, if any, out of loan amount was spent by Trust for creating infrastructure in the light of NOC/LOI issued by the Ayurvedic Department. Money, if any, spent in anticipation for purchase of land, prior to issuance of LOI/NOC, can definitely be not taken into consideration while considering plea of indefeasible right, if any, accrued in favour of the petitioner and as such same needs to be rejected.

31. So far as plea of promissory estoppel is concerned, there is no material on record that State, at any point of time, held any promise to Trust to give NOC/LOI for setting up Trust, rather proposal, if any, came to be initiated at the behest of Trust, who, after having completed codal formalities, as pointed out by the Department, submitted its approval. Since proposal submitted by Trust was not processed in accordance with law, as has been discussed in detail hereinabove, NOC/LOI issued in violation of Rules came to be withdrawn. There is no

document/material adduced on record by Trust, suggestive of the fact that it took decision to set up Ayurvedic Medical College in the State of Himachal Pradesh on the request of State of Himachal Pradesh, rather record reveals that representative of Trust at his own met Chief Minister and proposed to open the college and there is no assurance, if any, either of the Department or of the Chief Minister to give him NOC/LOI and as such case proposed/initiated by Trust came to be dealt with in accordance with the Rules governing the field.

32. In this regard reliance is placed upon ***M/s.Jit Ram Shiv Kumar and Others vs. The State of Haryana and another, AIR 1980 SC 1285,*** wherein the Hon'ble Apex Court has held as under:**.**

> ***"12. A Bench of four judges of this Court in a decision Excise Commissioner. U. P. Allahabad v. Ram Kumar, AIR 1976 SC 2237 after examining the case law on the subject observed that "it is now well-settled by a catena of decisions that there can be no question of estoppel against the Government in exercise of its legislative, sovereign or executive powers." The earlier decisions of this Court in M. Ramanathan Pillai v. State of Kerala, AIR 1973 SC 2641 and State of Kerala and Anr. v. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd., AIR 1973 SC 2734, were followed. It may, therefore, be stated that the view of this Court has been that the principle of estoppel is not available against the Government in exercise of legislative, sovereign or executive power.***
>
> ***39. The scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows :-***
>
> ***(1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.***
>
> ***(2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.***
>
> ***(3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorised acts of its officers.***
>
> ***(4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The Officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.***
>
> ***(5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State.***
>
> ***50. On a consideration of the decisions of this Court it is clear that there can be no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. The Court can enforce compliance by a public authority of***

the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest."

33. The Hon'ble Apex Court in ***State of Bihar and others vs. Project Uchcha Vidya, Sikshk Sangh and others, (2006)2 SCC 545,*** has held***:-***

"77. We do not find any merit in the contention raised by the learned counsel appearing on behalf of the Respondents that the principle of equitable estoppel would apply against the State of Bihar. It is now well known, the rule of estoppel has no application where contention as regard constitutional provision or a statute is raised. The right of the State to raise a question as regard its actions being invalid under the constitutional scheme of India is now well recognized. If by reason of a constitutional provision, its action cannot be supported or the State intends to withdraw or modify a policy decision, no exception thereto can be taken. It is, however, one thing to say that such an action is required to be judged having regard to the fundamental rights of a citizen but it is another thing to say that by applying the rule of estoppel, the State would not permitted to raise the said question at all. So far as the impugned circular dated 18.02.1989 is concerned, the State has, in our opinion, a right to support the validity thereof in terms of the constitutional framework."

34. Shri M.L. Sharma, while placing reliance upon judgment passed by Hon'ble Apex Court in ***M/s.Motilal Padampat Sugar Mills Co. Ltd., vs. The State of Uttar Pradesh and Others, AIR 1979 SC 621,*** contended that principle of promissory estoppel and legitimate expectation would apply against State and in favour of the petitioner-Trust. But this Court, after having carefully perused aforesaid judgment, is not persuaded to agree with learned counsel representing the petitioner as the same has no application in the present case.

35. Hon'ble Apex Court in the aforesaid case has categorically held that the doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law. Hon'ble Court has further held that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law and there can also be no promissory estoppel against the exercise of legislative power. The Legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel. Most importantly, in the aforesaid judgment, Hon'ble Apex Court has held that where the Government owes a duty to the public to act in a particular manner, and here obviously duty means a course of conduct enjoined by law, the doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law.

36. In the case at hand, as has been discussed above in detail, decision with regard to opening of new College being a policy decision, ought to have been taken by the Chief Minister or Cabinet in terms of Rule 17 of Rules of Business and such decision taken by the Department, while granting NOC in favour of petitioner-Trust in violation of Rules and bye-passing the Cabinet, which was only competent authority to grant NOC, cannot be held to be valid and as such doctrine of promissory estoppel is not applicable in the present case.

37. The Hon'ble Apex Court in ***M/s.Motilal Padampat Sugar Mills Co. Ltd.'s*** case *supra* has held as under:-

"24. "... ...But even where there is no such over-riding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is

possible for the promisee to restore status quo ante. If however, the promisee cannot resume his position, the promise would become final and irrevocable."

27. "... ...Where the Government owes a duty to the public to act in a particular manner, and here obviously duty means a course of conduct enjoined by law, the doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law."

28. "... ...It may also be noted that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power. The Legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel."

38. As far as judgment passed by Hon'ble Apex Court in ***MRF Ltd.Kottayam vs.Asstt.Commissioner (Assessment) Sales Tax and Others, (2006)8 SCC 702,*** is concerned, the same is also not applicable to the present case. In the above captioned case, statutory notification amended the earlier exemption notification issued by State of Kerala, as a consequent of which rights already accrued in favour of appellant i.e. MRF were adversely affected. Appellant in the aforesaid case made huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years, but, during the period of exemption State Government issued another notification excluding form of compound rubber from the definition of "Manufacture" for the purpose of original exemption notification. Hon'ble High Court of Kerala held that since notification was a statutory one no plea of estoppel would lie against it, but Hon'ble Apex Court, while setting aside the judgment passed by High Court of Kerala, held that the principle underlying legitimate expectation is based on Article 14 of the Constitution of India and as such any action taken by the State which goes against the rule of fairness is liable to be struck down. Hon'ble Apex Court further held that the State Government did not have the power to make retrospective amendment to the statutory notification issued by it affecting the rights already accrued to the appellant therein under the said notification.

39. But, in the case at hand facts are altogether different, as has been discussed in detail hereinabove. It may be noticed that in the present case, no promise, if any, was ever made by the respondent-State to the petitioner-Trust, rather proposal to open Ayurvedic Medical College came from the petitioner-Trust that too not in response of advertisement, if any, published by the respondent-State. Petitioner-Trust, who itself was interested in opening College, made a proposal to the respondent-Department, who bye-passing Chief Minister/Cabinet issued NOC/LOI and as such aforesaid law cited by the learned counsel appearing for the petitioner is not applicable to the present case.

40. As far as arguments advanced by Mr.Sharma that impugned order Annexure P-17, whereby NOC came to be withdrawn, deserves to be quashed being passed in violation of principle of natural justice, deserves outright rejection for the reasons that when decision of Ayurvedic Department to grant NOC/LOI is/was ex-facie, illegal and in violation of Rules of Business, there is/was no requirement, as such, for issuance of notice, if any, to the petitioner-Trust by the Department for withdrawing the same.

41. Hon'ble Apex Court in ***Chairman, Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee, AIR 1977 SC 965,*** has observed as under:-

"13. ... ...Natural justice is not unruly horse, no lurking land line, nor a judicial cure all. If fairness is shown by the decision/maker to the man proceeded against, the form, features and fundamentals of such essential process properly being conditioned by facts and circumstances of each situations,

no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt- that is the conscience of the matter."

42. Hon'ble Apex Court has reiterated time and again that the doctrine of natural justice cannot be imprisoned within the strait-jacket of rigid formula and its application would depend upon the scheme and policy of the statute and relevant circumstances involved in a particular case. ***(See: Union of India v. P.K. Roy and Ors., AIR 1968 SC 850;*** and ***Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors., (2001) 1 SCC 182).***

43. In ***S.L. Kapoor v. Jagmohan and Others, AIR 1981 SC 136***, the Supreme Court has observed that where on admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue the writ to compel the observance of the principles of natural justice as it would amount to issuing a futile writ.

Similarly, in ***State of U.P. v. O.P Gupta, AIR 1970 SC 679***, the Supreme Court has observed, that the Courts have to see whether non-observance of any of the principles enshrined in statutory rules or principles of natural justice have resulted in deflecting the course of justice. Thus, it can be held that even if in a given case, there has been some deviation from the principles of natural justice but which has not resulted in grave injustice or has not prejudiced the cause of the delinquent, the Court is not bound to interfere. This Court does not function as a Court of Appeal over the administrative decision taken by the Authority, rather it has limited power of judicial review. This Court can review only to correct the error of law or fundamental procedural requirements which lead to manifest injustice or Court can interfere with the impugned order if the same has been passed in flagrant violation of the principles of natural justice. ***(See: Rae Bareli Kshetriya Gramin Bank v. Bhola Nath Singh and Others., AIR 1997 SC 1908).***

44. In ***K.L. Tripathi v. State Bank of India, AIR 1984 SC 273***, Hon'ble Apex Court observed as under:-

"31. ... ...It is not possible to lay down rigid rules, as to when the principles of natural justice are to apply, nor as to their scope and extent. ... ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirement of natural justice must depend on the facts and circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is, acting, the subject matter to be dealt with, and so on so forth."

45. Hon'ble Apex Court in ***R.S. Dass vs. Union of India, AIR 1987 SC 593,*** has held as under:-

"25. ... ...Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provision, nature of the right, which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case."

46. Hon'ble Apex Court in ***A.K. Kraipak vs. Union of India, AIR 1970 SC 150,*** has held:-

"20. ... ...The rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. Whenever a complaint is made

before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision in the facts of that case."

47. Hon'ble Apex Court in ***Suresh Koshi vs. University of Kerala, AIR 1969 SC 198,*** has held as under:-

> ***"7. The rules of natural justice are not embodied rules the question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent to the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which in functions."***

48. Situation in which 'audi alteram partem' rule may be excluded has been observed in ***Union of India v. Tulsiram Patel, AIR 1985 SC 1416.*** Principles of natural justice can be modified but in exceptional cases they can even be excluded. There are well defined exceptions to the nemo judex in causa sua rule as also to the audi alteram partem rule. The nemo judex in causa sua rule is subject to the doctrine of necessity and yields to it as pointed out by the Hon'ble Apex Court in ***J. Mohapatra & Co. and Another v. State of Orissa and Another, (1985) 1 SCR 322.*** So far as the audi alteram partem rule is concerned, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded where the nature of action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion; nor can the audi alteram partem rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands, as pointed out in ***Maneka Gandhi's*** case.

49. Similarly, Hon'ble Apex Court in ***Gadde Venkateswara Rao vs. Government of Andhra Pradesh, AIR 1966 SC 828,*** has held that writ will not be issued if the effect of issuing a writ would be to sustain or restore an illegal order.

50. It is quite apparent from the aforesaid exposition of law laid down by Hon'ble Apex Court in various pronouncements that there is no strait-jacket of rigid formula for the application of principle of natural justice, rather it would depend upon the facts and circumstances of each case. It is also ample clear from aforesaid law laid down by Hon'ble Apex Court that where on admitted or undisputed fact, only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue the writ to compel the observance of the principles of natural justice as it would amount to issuing a futile writ.

51. In the case at hand, as is clearly emerge from the record, no NOC/LOI could be issued by Ayurveda Department bye-passing Hon'ble the Chief Minister/Cabinet and as such order passed by Department after having obtained permission of Ayurveda Minister is/was ex-facie illegal and there was no compulsion at all for the department to issue notice to the petitioner-Trust, seeking therein its response to action proposed to be taken by the department, Department of Ayurveda realizing its mistake withdrew the NOC/LOI admittedly issued in violation of Rules of Business and as such there was no occasion for the department to issue show cause notice.

52. In ***State of Kerala and Others vs. K.G. Madhavan Pillai and Others, (1988)4 SCC 669,*** relied upon by the learned counsel for the petitioner-Trust, State Government published a final list of areas in a Gazette where new unaided recognised high schools/upper primary schools/lower primary schools were to be opened or existing unaided lower primary schools/upper primary schools were to be upgraded in the year 1986-87, the respondent educational agencies submitted their applications for grant of sanction to open new unaided recognised schools or for upgrading the schools already run by them. By notification dated 4-2-1987, the State of Kerala issued an order granting sanction to the respondents to open new unaided schools or to upgrade their existing schools subject to the conditions set out therein. But, subsequently, the Government with another order directed the earlier order to be kept in

abeyance. The respondents challenged the order of the Government by means of petitions under Article 226 of the Constitution. During the pendency of the writ petitions, the general elections were held in Kerala State and a new ministry came to assume office. The government under the new ministry passed an order dated 19-5-87 cancelling in toto the order dated 4.2.1987 granting sanction to the respondents to open new schools or to upgrade the existing schools. This led to the respondents amending the writ petitions suitably so as to direct their challenge to the validity of the cancellation order passed on 19.5.1987. The respondents failed before the Single Judge but in the appeal the Division Bench of Kerala High Court granted them limited reliefs. Being aggrieved with the relief granted by Division Bench, State of Kerala approached Hon'ble Apex Court. Hon'ble Apex Court passed following direction:

> ***"30. In the light of our reasoning and conclusions, our answers for the three questions formulated by us are as under:***
>
> ***(1) Though the sanction granted to the respondents under Ex. P-4 would not by itself entitle them to open new schools or upgrade the existing schools, it did confer on them a right to seek the continuance of the statutory procedural stream in order to have their applications considered under Rule 9 and dealt with under Rule 11.***
>
> ***(2) It was not open to the Government, either under the Act or Rules or under Section 20 of the Kerala General Clauses Act to cancel in toto the approval granted to the respondents under Rule 2A(5), for opening new schools or upgrading existing schools in the selected areas on the basis of a revised policy.***
>
> ***(3) The impugned order under Ex.P-7, irrespective of the question whether the Government had the requisite power of cancellation or not, is vitiated by reason of non-observance of the principles of natural justice and the vice of extraneous factors."***

53. Mr.M.L. Sharma, learned counsel appearing for the petitioner, while placing reliance upon aforesaid judgments contended that with the grant/issuance of NOC/LOI in favour of the petitioner-Trust, right accrued in its favour to establish Ayurveda Medical College and as such it was not open to Government to withdraw the same on the ground that NOC was not granted by the competent authority i.e. Chief Minister/Cabinet. Mr.Sharma further contended that though Government had no power to withdraw the NOC/LOI, but otherwise also no order could be issued without observance of principle of natural justice.

54. Aforesaid argument having been made by Mr.Sharma is not sustainable in the facts and circumstances of the case, wherein admittedly no right can be said to have accrued in favour of the petitioner-Trust in the light of grant of NOC/LOI by the department of Ayurveda, who was not competent to grant NOC, as has been discussed hereinabove. In the aforesaid judgment, Hon'ble Apex Court has held that though the sanction granted to respondents in terms of notification issued by the State of Kerala in 1986-87 would not by itself entitle them to open new schools or upgrade the existing schools, it did confer on them a right to seek the continuance of the statutory procedural stream in order to have their applications considered under Rule 9 and dealt with them under Rule 11.

55. Facts of the present case are totally different from the facts of the aforesaid case decided by Hon'ble Apex Court. In the case before Hon'ble Apex Court, there was no allegation that State Government issued notification in violation of set procedure or Rules of Business and as such Hon'ble Apex Court held that it was not open for the State to cancel in toto the approval granted to the respondent for opening new school or existing school in the selected areas on the basis of revised policy. But, in the case at hand, NOC/LOI came to be issued in favour of petitioner-Trust dehors the Rules of Business and as such subsequently same was rightly withdrawn by the Department of Ayurveda.

56. Reliance is also placed upon ***Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati and Others, (2015)8 SCC 519,*** wherein the Hon'ble Apex Court has held:-

> ***"38. But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.***
>
> ***39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that the principles of natural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason – perhaps because the evidence against the individual is thought to be utterly compelling – it is felt that a fair hearing 'would make no difference' – meaning that a hearing would not change the ultimate conclusion reached by the decision-maker – then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corporation (WLR p,1595: All ER p.1294)***
>
> ***"...A breach of procedure...cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court dos not act in vain."***
>
> ***Relying on these comments, Brandon L.J. opined in Cinnamond v. British Airports Authority (1980)2 ALL ER 368 (CA) that (WLR p.593 : All ER p.377)***
>
> ***"...no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing'.***
>
> ***In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual."***

57. In ***State of Haryana and Others vs. Northern Indian Glass Industries Limited, (2015)15 SCC 588,*** the Hon'ble Apex Court has been held as under:-

"23. The prayer in the writ petition was for the issuance of a writ of Certiorari quashing the Resumption Notice dated 6.1.2005 issued by the Appellant State. In the impugned Judgment the Division Bench has opined that the principles of natural justice applied irrespective of the nature of the cause or the gravity thereof and are not mere platitudes. In our analysis of the exposition of law contained hereinabove, we think that this unjustly sets far too broad and wide a parameter to the perceptions of natural justice. Quite to the contrary, Courts should be "pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential". We cannot lose perspective of the fact that protracted litigation had already taken place between the parties as a consequence of which the legal position of all affected parties had already become well-known. It seems to us that in the writ petition, the challenge was predicated on the perceived failure to adhere to the audi alterem partem rule and not to the correctness of the decision to resume possession of the land. In any event, we harbour no manner of doubt that the circumstances of the case warrant the issuance of the Resumption Notice of the land by the Appellant State. We also note that the 'Resumption Notice' has been issued to the Respondent alone which, because of its actions, has forfeited whatsoever rights it may have enjoyed over the land in question. In fact the Respondent may be liable to make over to the Appellant State all the profit that it has illegally and unjustifiably reaped in its misutilization of the lands acquired for it for the purpose of setting up an industrial unit for manufacture of sheet glass with the accompanying projection of providing employment to almost a thousand workmen. How this Resumption Notice will be implemented against third parties is a matter on which we would think it prudent not to make any observations. The Appellant State may not treat the observations made by us above pertaining to third parties who have purchased land from the Respondent as conclusively circumscribing any relief to them and/or rendering it unnecessary to give any hearing to them. The Appellant State will avowedly have to proceed in accordance with law, especially since it has not maintained a watchful eye on the manner in which the land was dealt with by the Respondent."

58. Leaving everything aside, this Court, after having taken note of its own findings and observation made in the earlier part of judgment, is convinced and satisfied that question relating to opening or setting up a Ayurvedic Medical College, being a policy matter, needs to be dealt with either by Chief Minister or Council of Ministers, as envisaged under Rules 14, 15 and 16 of the Rules of Business, and as such, now question arise whether this Court has power of judicial review to ascertain the correctness and genuineness of decision taken at the level of Hon'ble Chief Minister. Though we have no doubt in our mind that scope of interference is very limited as far as policy decision taken by the Government/State is concerned, but, however, this Court deems it proper to take note of law laid down by Hon'ble Apex Court in ***Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27,*** wherein the Hon'ble Supreme Court held:

"16. In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires

and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution. None of these vitiating factors are shown to exist in the present case and hence there was no scope at all for the High Court to invalidate the provision contained in clause (3) of Regulation 104 as ultra vires on the grounds of its being in excess of the regulation-making power conferred on the Board. Equally untenable, in our opinion, is the next and last ground by the High Court for striking down clause (3) of Regulation 104 as unreasonable, namely, that it is in the nature of a bye-law and is ultra vires on the ground of its being an unreasonable provision. It is clear from the scheme of the Act and more particularly, Sections 18, 19 and 34 that the Legislature has laid down in broad terms its policy to provide for the establishment of a State Board and Divisional Boards to regulate matters pertaining to secondary and higher secondary education in the State and it has authorised the State Government in the first instance and subsequently the Board to enunciate the details for carrying into effect the purposes of the Act by framing regulations. It is a common legislative practice that the Legislature may choose to lay down only the general policy and leave to its delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the Statute by framing rules/regulations which are in the nature of subordinate legislation. Section 3(39) of the Bombay General Clauses Act, 1904, which defines the expression 'rule' states: Rule shall mean a rule made in exercise of the power under any enactment and shall include any regulation made under a rule or under any enactment." It is important to notice that a distinct power of making bye-laws has been conferred by the Act on the State Board under Section 38. The Legislature has thus maintained in the Statute in question a clear distinction between 'bye-laws' and 'regulations'. The bye-laws to be framed under Section 38 are to relate only to procedural matters concerning the holding of meetings of State Board, Divisional Boards and the Committee, the quorum required, etc. More important matters affecting the rights of parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations made under Section 36. The Legislature, while enacting Sections 36 and 38, must be assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and bye-laws. When the statute contains a clear indication that the distinct regulation-making power conferred under Section 36 was not intended as a power merely to frame bye-laws, it is not open to the Court to ignore the same and treat the regulations made under Section 36 as mere bye-laws in order to bring them within the scope of justiciability by applying the test of reasonableness.

21. The legal position is now well-established that even a bye-law cannot be struck down by the Court on the ground of unreasonableness merely because the Court thinks that it goes further than "is necessary" or

that it does not incorporate certain provisions which, in the opinion of the court, would have been fair and wholesome. The Court cannot say that a bye-law is unreasonable merely because the judges do not approve of it. Unless it can be said that a bye law is manifestly unjust, capricious, inequitable, or partial in its operation, it cannot be invalidated by the Court on the ground of unreasonableness. The responsible representative body entrusted with the power to make by laws must ordinarily be presumed to know what is necessary, reasonable, just and fair. In this connection we may usefully extract the following off-quoted observations of Lord Russell of Killowen in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 (quoted in Trustees of the Port of Madras v. Adminchand Pyarelal, (1976)! SCR 721, 733) (SCC p.178, para 23):

> ***(1) "When the Court is called upon to consider the byelaws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently interpreted' and credit ought to be given to those who have to administer them that they will be reasonably administered."***
>
> ***"The learned Chief Justice said further that there may be cases in which it would be the duty of the court to condemn by-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this and this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by an exception which some judges may think ought to be there'.***
>
> ***" We may also refer with advantage to the well-known decision of the Privy Council in Slattery v. Naylor, (1988) 13 AC 446, where it has been laid down that when considering whether a bye-law is reasonable or not, the Court would need a strong case to be made against it and would decline to determine whether it would have been wiser or more prudent to make the bye-law less absolute or will it hold the bye-law to be unreasonable because considerations which the court would itself have regarded in framing such a bye-law have been over looked or reflected by its framers. The principles laid down as aforesaid in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 and Stattery v. Naylor, (1988) 13 AC 446 have been cited with approval and applied by this Court in Trustees of the Port of Madras v. Aminchand Pyarelal & Ors.,(1976) 1 SCR 721, 733."***

59. In ***Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657,*** the Hon'ble Supreme Court held:

"14. No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives. Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the Executive as the policy making is the domain of the Executive and the decision in question has passed the test of the judicial review.

15. In Union of India v. Dinesh Engg. Corpn., (2001)8 SCC 491, this Court delineated the aforesaid principle of judicial review in the following manner: (SCC pp.498-99, para 12)

> *"12. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to the policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. ..... Any decision be it a simple administrative decision or policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."*

16. The power of the Court under writ jurisdiction has been discussed in Asif Hameed. v. State of J&K, 1989 Supp.(2) SCC 364: 1 SCEC 358 in paras 17 and 19, which read as under: (SCC pp. 373-74)

> *"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While*

exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

* * *

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

17. The aforesaid doctrine of separation of power and limited scope of judicial review in policy matters is reiterated in State of Orissa v. Gopinath Dash, (2005) 13 SCC 495 : (SCC p.497, paras 5-7)

"5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J&K; 1989 Supp (2) SCC 364 and Shri Sitaram Sugar Co. Ltd. v. Union of India; (1990) 3 SCC 223). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."

60. The Hon'ble Apex Court in ***Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796,*** has held:

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.

25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005)13 SCC 287, wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp.288-89, para 5)

> ***"In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India, (1989)4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki,1992 Supp(1) SCC 548. In A.K. Roy v. Union of India, (1982)1 SCC***

271it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

61. Reliance is placed upon the judgment of the Hon'ble Supreme Court in ***State of Kerala and Another vs. B.Six Holiday Resorts Private Limited and Others,*** **(2010)5 SCC 186,** wherein it has been held:

"22. Where the rules require grant of a licence subject to fulfillment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on various factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application.

27. It is true that in Kuldeep Singh case, (2006)5 SCC 702, there were no statutory rules and what was considered was with reference to a policy. But the ratio of the decision is that where licence sought related to the business of liquor, as the State has exclusive privilege and its citizens had no fundamental right to carry on business in liquor, there was no vested right in any applicant to claim a FL-3 licence and all applications should be considered with reference to the law prevailing as on the date of consideration and not with reference to the date of application. Whether the issue relates to amendment to Rules or change in policy, there will be no difference in principle. Further the legal position is no different even where the matter is governed by statutory rules, is evident from the decisions in Hind Stone, (1981)2 SCC 205 and Howrah Municipal Corporation, (2004)1 SCC 663.

28. Having regard to the fact that the State has exclusive privilege of manufacture and sale of liquor, and no citizen has a fundamental right to carry on trade or business in liquor, the applicant did not have a vested right to get a licence. Where there is no vested right, the application for licence requires verification, inspection and processing. In such circumstances it has to be held that the consideration of application of FL-3 licence should be only with reference to the rules/law prevailing or in force on the date of consideration of the application by the excise authorities, with reference to the law and not as on the date of application. Consequently the direction by the High Court that the application for licence should be considered with reference to the Rules as they existed on the date of application cannot be sustained.

Re: Question (ii)

29. The applicants for licence submitted that Rule 13(3) contemplates FL-3 licences being granted on fulfillment of the conditions stipulated therein; and the newly added proviso, by barring grant of new licence had the effect of nullifying the main provision itself. It was contended that the proviso to Rule 13(3) added by way of amendment on 20.2.2002 was null and void as it went beyond the main provision in Rule 13(3) and nullified the main provision contained in Rule 13(3).

30. Rule 13(3) provides for grant of licences to sell foreign liquor in Hotels (Restaurants). It contemplates the Excise Commissioner issuing licences under the orders of the State Government in the interest of promotion of

tourism in the State, to hotels and restaurants conforming to standards specified therein. It also provides for the renewal of such licences. The substitution of the last proviso to Rule 13(3) by the notification dated 20.2.2002 provided that no new licences under the said Rule shall be issued. The proviso does not nullify the licences already granted. Nor does it interfere with renewal of the existing licences. It only prohibits grant of further licences. The issue of such licences was to promote tourism in the State. The promotion of tourism should be balanced with the general public interest. If on account of the fact that sufficient licences had already been granted or in public interest, the State takes a policy decision not to grant further licences, it cannot be said to defeat the Rules. It merely gives effect to the policy of the State not to grant fresh licences until further orders. This is evident from the explanatory note to the amendment dated 20.2.2002. The introduction of the proviso enabled the State to assess the situation and reframe the excise policy.

31. It was submitted on behalf of the State Government that Rule 13(3) was again amended with effect from 1.4.2002 to implement a new policy. By the said amendment, the minimum eligibility for licence was increased from Two-star categorization to Three-Star categorization and the ban on issue of fresh licences was removed by deleting the proviso which was inserted by the amendment dated 20.2.2002. It was contended that the amendments merely implemented the policies of the government from time to time. There is considerable force in the contention of the State. If the State on a periodical re-assessment of policy changed the policy, it may amend the Rules by adding, modifying or omitting any rule, to give effect to the policy. If the policy is not open to challenge, the amendments to implement the policy are also not open to challenge. When the amendment was made on 20.2.2002, the object of the newly added proviso was to stop the grant of fresh licences until a policy was finalized.

32. A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid. The challenge to the validity of the proviso is therefore rejected.

33. In view of the above, the appeals filed by the State are allowed in part and the appeals filed by the applicants for licences are dismissed, subject to the following clarifications:

(i) If any licences have been granted or regularized in the case of any of the applicants during the pendency of this litigation, on the basis of any further amendments to the Rules, the same will not be affected by this decision;

(ii) If any licence has been granted in pursuance of any interim order, the licence shall continue till the expiry of the current excise year for which the licence has been granted.

(iii) This decision will not come in the way of any fresh application being made in accordance with law or consideration thereof by the State Government."

62. Reliance is also placed upon ***Arun Kumar Agrawal vs. Union of India and Others, (2013)7 SCC 1,*** wherein the Hon'ble Apex Court held:

"42. Matters relating to economic issues, have always an element of trial and error, so long as a trial and error are bona fide and with best intentions, such decisions cannot be questioned as arbitrary, capricious or illegal. This Court in State of M.P. and others v. Nandlal Jaiswal and others (1986) 4 SCC 566 referring to the Judgment of Frankfurter J. in Morey vs. Dond 354 US 457 held that (Nandlal Jaiswal case, SCC p.605, para 34)

"34. .....we must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any straight jacket formula."

43. In Metropolis Theatre Co. v. State of Chicago 57 L Ed 730 the Supreme Court of the United States held as follows:

".....The problem of government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void....."

44. In LIC v. Escorts Ltd. and others (1986) 1 SCC 264 this Court held that (SCC p.344, para 102)

"102.....The Court will not debate academic matters or concern itself with intricacies or trade and commerce."

The Court held that (SCC p.344, para 102)

"102.....When the State or its instrumentalities of the State ventures into corporate world and purchases the shares of a company, it assumes to itself the ordinary role of shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company, like any other shareholder."

63. As far as accrual of vested rights and contention with regard to legitimate expectation, put forth by the petitioners, is concerned, the reliance is placed on ***Kuldeep Singh vs. Govt.of NCT of Delhi, (2006)5 SCC 702,*** wherein the Hon'ble Apex Court held:

"14. Mr. Gopal Subramanaium, learned Additional Solicitor General appearing on behalf of the Respondent, on the other hand, submitted:

(i) The Appellants do not have any fundamental right to trade in liquor.

(ii) The State having adopted a policy decision, this Court should not exercise its power of judicial review interfering therewith. In any event, no case that the policy decision suffers from any illegality, irrationality or procedural impropriety having been made out nor any malice having been attributed in regard to the policy decision, this Court should not interfere with the judgment of the High Court.

(iii) The parties in whose favour licenses have been granted were necessary parties to the writ petitions and in their absence the writ petitions could not have been entertained.

25. It is, however, difficult for us to accept the contention of the learned Senior Counsel, Mr. Soli J. Sorabjee that the doctrine of 'legitimate expectation' is attracted in the instant case. Indisputably, the said

doctrine is a source of procedural or substantive right. (See R. v. North and East Devon Health Authority, ex parte Coughlan 2001 Q.B. 213) But, however, the relevance of application of the said doctrine is as to whether the expectation was legitimate. Such legitimate expectation was also required to be determined keeping in view the larger public interest. Claimants' perceptions would not be relevant therefor. The State actions indisputably must be fair and reasonable. Non - arbitrariness on its part is a significant facet in the field of good governance. The discretion conferred upon the State yet again cannot be exercised whimsically or capriciously. But where a change in the policy decision is valid in law, any action taken pursuant thereto or in furtherance thereof, cannot be invalidated.

33. The question again came up for consideration in Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others [(2004) 1 SCC 663] wherein this Court categorically held: (SCC p.680 para 37)

> ***"The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to "ownership or possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction. In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfillment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such "vested right" or "settled expectation" is being sought to be enforced. The "vested right" or "settled expectation" has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."***

64. Reliance is also placed upon the judgments of Hon'ble Apex Court in ***Centre For Public Interest Litigation vs. Union of India and Others, (2016)6 SCC 408, Census Commissioenr and Othrs vs. R.Krishnamurthy, (2015)2 SCC 796 and State of Himachal Pradesh and Others vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh, (2011)6 SCC 597.***

65. In view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, we are unable to accept the contentions advanced on behalf of the petitioners that the decision of the respondents-State in withdrawing the NOC/LOI is bad in law.

Exposition of law as discussed above has left no room/scope for this Court to deliberate upon the issue at hand.

66. Consequently, in view of detailed discussion made hereinabove, this Court sees no reason to interfere with the decision taken by the Government inasmuch as withdrawing the NOC/LOI issued in favour of the petitioner-Trust and as such, present petition dismissed being devoid of any merit.

67. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

****

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

Pushap Raj ....Petitioner.
Versus
Ram Dhan .... Respondent.

Cr. MP No. 1400 of 2017 in
Cr.R. No. 01 of 2016.
Decided on: 13.12.2017.

Code of Criminal Procedure, 1973- Section 482- After passing of the judgment an application for recalling the judgment filed as the matter was stated to have been amicably settled inter se the parties- While dismissing the same- **Held-** There is no provision in the Cr.P.C conferring powers on the Court to recall or review the judgment- Review or recall even cannot be exercised under Section 482 of the Cr.P.C. – Rather, Section 362 Cr.P.C. envisage that once a judgment is signed it cannot be altered and reviewed except to correct clerical or arithmetical errors. (Para-2)

For the petitioner. Mr. G.R. Palsra, Advocate.
For the respondent. Mr. H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this application filed under Section 482 of the Criminal Procedure Code (in short 'Cr.P.C.') applicant, Pushap Raj, has prayed for recalling of the judgment dated 28.12.2016, vide which this Court while affirming the judgment passed by learned Courts below had dismissed the appeal so filed by the present applicant. Reasons stated in the application wherein a prayer has been made for recall of the judgment passed by this Court dated 28.12.2016 is that the controversy stands amicably settled between the parties.

2. Having heard learned counsel for the parties, I am of the considered view that this application is not maintainable. There is no provision under the Cr.P.C., wherein powers stand conferred upon this Court to recall or review its judgment. Power of review is not a common law right, but is a statutory right. In the absence of there being any power of review or recalling its judgment conferred upon this Court under the Cr.P.C., this Court cannot either review or recall its judgment so passed in exercise of inherent powers under Section 482 of the Cr.P.C. It is necessary to point out that Section 362 of the Cr.P.C. clearly envisages that save as otherwise provided by the said Code or by any other law for the time being in force, no Court, when it has signed its judgment shall alter or review the same except to correct a clerical or arithmetical error.

In view of the above reasoning as there is no merit in the present application, the same is accordingly dismissed.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Court on its own motion ...Petitioner.

Versus

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

CWPIL Nos.11 & 45 of 2017
Date of Decision : December 14, 2017

Constitution of India, 1950- Article 226- Letter petition by the residents of village Honda Kundi, Tehsil Nalagarh, District Solan alleging that the effluents being discharged from the unit of M/s Fuzikawa Power likely to increase diseases, including cancer- During the pendency of the present public interest litigation, the grievance of the letter petitioner redressed- It was however directed that Principal Secretaries of Health and Irrigation & Public Health, to the Government of Himachal Pradesh shall ensure the concerned area be inspected at least once every quarter and any signs of increase in the disease, directly related to the discharge of effluents, be properly addressed- further Chairman and the Member Secretary of the H.P. State Pollution Board shall ensure the inspection of all industrial units in the area, especially discharging effluents be inspected every quarter for ensuring compliance of environmental laws- District Legal Services Authority also directed to get the area inspected to ensure that directions are complied with by getting the site inspected periodically from the Secretary of the District Legal Services Authority- petition disposed of. (Para-14 and 15)

For the Petitioner	:	Ms Shreya Chauhan & Mr. Surender Thakur, Amicus Curiae.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Varun Chandel, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate General, for the State. Mr. Dilip Sharma, Senior Advocate, with Ms Nishi Goel, counsel for H.P. State Pollution Control Board. Mr. Shivank Singh Panta, for M/s Fuzikawa Power.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On the basis of a letter petition, addressed by the residents of village Honda Kundi, Tehsil Nalagarh, District Solan, Himachal Pradesh, this Court, taking suo moto cognizance, issued notice.

2. Allegedly, M/s Fuzikawa Power, Tehsil Baddi, District Solan, Himahcal Pradesh, was causing industrial pollution with the discharge of effluents from the unit established within the territorial limits of the village. The discharge of effluents is likely to increase diseases, including cancer.

3. The Principal Secretary (Health) to the Government of Himachal Pradesh has filed his personal affidavit dated 21.5.2017, stating that sometime in the year 2015, similar complaints were received and the matter was got investigated. However, one fact appears to have been

admitted, and that being, that in Gram Panchayat Sanehar, several cases of different types of cancer stand identified.

4. The Superintending Engineer (IPH), Nahan Circle, has filed his affidavit dated 31.5.2017, stating that the water of village Honda Kundi was got tested and was found to be potable. Senior Environmental Engineer of the H.P. State Pollution Control Board has filed his affidavit dated 12.6.2017, only stating that periodically the unit was being inspected and there is no discharge of effluents in open.

5. The project proponent filed affidavit dated 4.7.2017, clarifying that all steps were taken for complying with the environmental laws and particular the Water (Prevention & Control of Pollution) Act, 1974; The Air (Prevention & Control of Pollution) Act, 1981; Environment (Protection) Act, 1986; Public Liability Act, 1991; and Environment Impact Assessment Notification, 2006. However, the factum of unit set up for manufacture of batteries is admitted. The affidavit also encloses reports of experts, who carried out tests on samples of ETP Sludge, stack emission, ETP Inlet Water, ETP Outlet water, STP Inlet Water, STP Outlet Water, Soil, etc., which were earlier collected from the site.

6. On 6.7.2017, this Court passed the following interim order:

> "CWPIL No.11 of 2017
>
> It is mutually agreed between learned counsel for the parties that the learned Amicus Curiae,Mr. Shivank Singh Panta and Ms. Nishi Goel, Advocates shall visit the spot alongwith the officials of the Pollution Control Board, on 9.7.2017 at 10:00 AM and submit status report within a period of one week.
>
> Mr. Anup Rattan, learned Additional Advocate General, assures that officials/officers of the Forest as well as Revenue department shall remain present at the spot.
>
> Ms. Nishi Goel, learned counsel states that the Law Officer Sh. Jitender Gupta, Pollution Control Board alongwith Scientist/Expert shall remain present at the time of inspection.
>
> However, keeping in view the seriousness of the allegations, we direct that the Secretary and concerned Scientist(s)/Experts shall also remain present at the spot. Also the Pollution Control Board shall make all arrangements for travel of the learned counsel. Also all necessary arrangements for comfortable stay shall be made by the Board.
>
> List on 20.7.2017.
>
> CWPIL No.45 of 2017
>
> Mr. Surender Thakur is appointed as Amicus Curiae in this case. Registry to reflect the name of Mr. Surender Thakur, Advocate, as Amicus Curiae in the cause list henceforth. Registry is directed to supply complete paper book to the learned Amicus Curiae. Reply be filed by the respondents."

7. Pursuant to the same, learned Amicus visited the spot alongwith the concerned Officers and submitted his report, which reads as under:

> "8. That the local residents and complainants also wanted to meet the Amicus Curiae, therefore they were given ample time to spell out their grievances in detail and as per the interaction with the residents of the aforesaid village, following facts are being brought to the kind notice of this Hon'ble Court.
>
> i. That one Sh. Ram Ashra S/o Tikku Ram, aged 36 years whose house is adjoining to the boundary wall of the factory is suffering from tuberculosis. Copies of the medial reports are collectively annexed as Annexure A-1 (Colly). His 12 years old daughter is also suffering from piles. His wife Smt. Sheela Devi was suffering from fever and has pain in

the abdomen from past 2 years. Due to constant health troubles he has abandoned the house and shifted to Saini Majra. The photograph of his abandoned house adjoining to the boundary wall of the respondent unit is being appended herewith as Annexure A-2.

ii. That one Sh. Birbal, S/o Tikku Ram, aged 34 years is suffering from cardiac disease. His medical report is attached herewith as Annexure A-3.

iii. That from past few years there has been tremendous increase in the number of cases of renal and gall bladder stones. The villagers have also reported huge number of cases of recurrences of stones following removal.

iv. That as stated by the villagers around 13 persons have died of cancer. There are several cases of pulmonary diseases in the surrounding areas.

v. That nearly all the villagers have stated that in the evening the air is filled with red shining dust and it causes irritation and watering of eyes. The red dust increases so much in night that it becomes difficult for them to open the eyes.

vi. That there is also sharp increase in cases of death of cattle. As stated by the villagers cattle shows common symptom of shivering and then collapses. The also stated that duration of lactation of local cows has unprecedently decreased. The psot mortem report of a buffalo of Smt. Karmi Devi clearly specifies that death is due to heavy metal toxicity. A copy of the same is annexed herewith as Annexure A-4.

vii. That the villagers further stated that the respondent company had blocked the water outlets with fresh soil. The roof of the factory was freshly painted, which is otherwise covered with red dust owing to the discharge of rd oxide. The photographs and videos pertaining to the same are collectively being placed on record as Annexure A-5 (colly).

9. That apart from M/s Fujikawa Power Ltd. (Respondent no.5) there are four other battery manufacturing units in Baddi i.e. Sukam, Eastman, A.S. Enterprise and Lipguard Luminous. As informed by the officials of the respondent unit, the unit is also engaged in some developmental activities in the area. They have donated computers and setup a laboratories for imparting basic computer education. The respondent unit has donated water filters to the villagers and is encouraging sports activities. A gaushala is being funded by the unit in the village; scholarships are also being given to the Meritorious Students. The unit has also promised to build a Community Centre in the village. A tree plantation drive was organized in cooperation with Saned Village Panchayat. The Unit donated solar lights to a village Panjehra, and similar proposal is for village Handa Kundi. The unit has also provided free ambulance service to the surrounding 9 villages for free medical facility at door step. Initiatives for blood donation camps and Swachh Bharat Abhiyan are also being taken up by the Unit. However, the residents of the village have denied any such developmental activities by the respondent unit and have claimed that this is a mere eyewash.

10. That in pursuance to my discussions with the officials of the State Pollution Control Board (respondent no.4) certain discrepancies/ shortcomings were found in the unit of respondent no.6 which need to be rectified immediately. The shortcomings which were found are as follows:-

i. That the containers storing concentrated H_2SO_4 (acid) are in open under a shed. A Bund wall (retaining wall) of an adequate height needs to be constructed in order to avoid any spillage or leakage. The required measures need to be taken to avoid any unintended escape of material from that area. Bunding failure can pose serious health hazards to the adjoining village. For the kind perusal of this Hon'ble Court, copy of the photograph of this area are laced on record as Annexure A-6.

ii. That the fume extraction system over the battery charging section needs to be installed. Suction hoods over the battery charging bays needs to be installed, apart from the terminal vapour arrestors which are presently installed by the unit. The entire suction should be passed through an online alkaline/caustic wet scrubber before final release into the atmosphere through a chimney/stack of appropriate height. The photograph of battery charging unit is annexed herewith as Annexure A-7.

iii. That the unit of Air Pollution control devices (APCDs), needs to be upgraded and additional APCD unit in the form of wet scrubber with online chemical dozing for suppressing any traces of lead in the stack emissions needs be installed.

iv. That the unit needs to upgrade by Zeor Liquid Discharge System (ZLD) where the entire waste water generated shall be reused/recycled/evaporated in the premises, no water shall be allowed to be discharged outside the unit and the unit shall only extract the makeup water from the bore-wells. This is an advanced technology that eliminates wastewater streams and leave behind clean water and sold salt crystals.

v. That an alkaline dozing system needs to be installed by the unit to neutralize the cooling water from the batter charging section.

vi. That the batter making unit needs to make provisions for observatory bore wells till the first water table with one well preferably at the downstream of the unit towards River Sirsa. The same shall be to ascertain any contamination in the ground water should the same happen at any later stage. The unit shall carry out self monitoring at regular intervals and the HPPCB shall also carry out regular sampling from the same.

vii. That the employees of M/s Fujikawa (respondent no.5) especially the one's working in the battery charging unit need to be thoroughly examined by a medical team to ascertain any alteration in their health due to discharge of pollutants."

8. Now, this report falsified the rosy picture, which the State; its instrumentalities and the project proponent were otherwise projecting before the Court.

9. Only when on 20.7.2017, the Court directed the Member Secretary of the H.P. State Pollution Control Board to remain present in Court, did the said respondent file an affidavit, admitting (a) report of the samples collected from ETP & STP were not conforming to the norms; and (b) also, in the samples collected at 4 locations in the adjoining village revealed that contents of lead, copper, cadmium and iron were there.

10. Hence, on 26.7.2017, the Court passed the following order:

"Learned Amicus Curiae invites our attention to the fact that on account of consumption of water downstream, cattle have died and the reason being multi organ failure due to heavy metal toxicity. Also, residents of local area, solely on account of the alleged emission of pollutants are suffering from pulmonary and other diseases.

In our considered view, the matter has not been examined by the State with the sensitivity which it ought to have exercised.

On a complaint filed by the local residents, this Court, taking suo motu cognizance had issued directions, asking the committee headed by Member Secretary, H.P. State Pollution Control Board to visit the spot and examine the correctness of the allegations of the complainant. From the affidavit that of the Senior Environmental Engineer, H.P. State Pollution Control Board, we do find some merit in the complaint. However, the affidavit categorically does not deal with the following aspect:-

As to whether the unit in question which is manufacturing lead batteries has violated any one of the provisions of the environmental laws or terms of letter of consent to operate?.

Let, Member Secretary, H.P. State Pollution Control Board file his specific affidavit indicating the aforesaid aspect. Secretary shall also deal with the averments made by the complainant, the status report/ suggestion that of the learned Amicus Curiae, as also the averments made in the affidavit dated 25th July, 2017 that of Senior Environmental Engineer, H.P. State Pollution Control Board. Also, he shall disclose as to what action stands taken by the board in ensuring complete and proper implementation of the environmental laws as also the terms of letter of consent to operate. List on 27.07.2017.

Authenticated copy."

11. From the affidavit dated 26.7.2017, filed by the Member Secretary, Pollution Control Board, it became quite apparent that suddenly the Board woke up from slumber and took action against the project proponent, with a direction to either close the project or set up a proper effluents treatment plant. Resultantly, on 27.7.2017, we passed the following order:

"Mr.Sanjay Sood, Member Secretary, H.P. State Pollution Control Board is present in Court.

From the affidavit dated 26th July, 2017, so filed by the Member Secretary, we find the complaint to be factually correct. During inspection various deficiencies were found. Also samples collected under the Water Act, 1974 and Air Act, 1981 did not meet the prescribed standards. We find the Member Secretary to have issued show cause notice, asking the polluter to take all remedial measures within one week.

At this stage, we have two options. Either to immediately close the unit or as directed by the Member Secretary wait for one week's time to enable the polluter to take all remedial measures for ensuring strict compliance of the environmental laws of the land. We are persuaded to opt for the second option on the assurance made out by Mr.R.K. Bawa, learned Senior Counsel, under instructions from Mr.Shivank Singh Panta, Advocate, that immediately all steps, in terms of directions issued by the Regulator as also obligation under the environmental laws shall be undertaken and definitely within a period of one week from today. In fact steps in that regard already stand taken.

Ms.Shreya Chauhan, learned Amicus Curiae, points out that there are four other units of similar nature, which are also operating in close vicinity. She submits that it would be only desirable that some inspection is carried out by the same Committee, which had inspected the unit of private respondent.

Mr.Dilip Sharma, learned Senior Counsel, states that latest by tomorrow, the Committee, already constituted, in terms of order dated 6th July, 2017, shall visit and inspect the other four units. As prayed for, in place of Senior Law Officer, HP State Pollution Control Board Mr.Sandeep Sharma, Assistant Law Officer shall remain present at the time of inspection. Also all necessary action, if so required under the provisions of environmental laws, shall be taken by the H.P. Pollution Control Board for ensuring that pollutants, in whatever form, are not released so as to endanger public life and environment.

Before the next date, respondent No.6 shall file an affidavit of compliance specifically dealing with the averments contained in the affidavit so filed by the Member Secretary, H.P. Pollution Control Board.

We request Ms.Shreya Chauhan, learned Amicus Curiae, to also remain present at the time of inspection. Mr.Dilip Sharma, learned Senior Counsel, states that Mr.Parshant Sharma, Advocate, shall also remain present in place of Ms.Nishi Goel, Advocate. Mr.Dilip Sharma further states that all arrangements for their travel etc. shall be made by the H.P. State Pollution Control Board.

List on 2nd August, 2017.

Authenticated copy."

12. We notice that the project proponent has filed its affidavit dated 1.8.2017, inter alia stating as under:

"4(A) .....I would like to bring it to the notice of this Hon'ble Court that the work of installation of Wet Scrubbers as Air Pollution control device in grid casting and Ball Mill sections has been installed with 90% completion. Connection to main stack is under progress, which shall be completed today....."

B. Anotehr issue, which was raised by the Member Secretary of the State Pollution Control Board in his affidavit, was regarding the observatory bore-wells. In compliance thereto, M/s Fujikawa Power after rallying all its troops got down to business and resultantly, the Observatory bore-wells up to first water table at all 04 corners of the factory have been provided and are in place now....."

C. One more issue which was pointed out at the time of inspection of the factory by the Member Secretary, State Pollution Control Board was a need to provide and raise bund walls in sulphuric acid storage area. M/s Fujikawa Power addressed the said issue on war footing and the construction work of Bund Walls in Sulphuric Acid Storage Area is also complete and further, an acid resistant lining has been provided in accordance with "I.S. 4262:2002 (Suphuric Acid – Code of Safety)"....."

13. Even subsequently, the Member Secretary, Pollution Control Board, has filed his affidavit, indicating the action taken against the following five industrial houses, which have established their units for lead acid battery manufacturing and related processes:

1. M/s Su Kam Power System Ltd, Plot No 07 IA Katha, Baddi, Tehsil Baddi, District Solan, HP.

2. M/s Geon International, Plot No.65 Bhatolikalan, Baddi, Tehsil Baddi, District Solan, H.P.

3. M/s AH Enterprises, Village Bhataulikalan, Tehsil Baddi, District Solan, H.P.

4. M/s Livguard batteries Pvt. Ltd. village Manpura, Baddi, Tehsil Baddi, District Solan, H.P.

5. M/s Eastman Auto Power Ltd Village Rakh Ram Singh, Nalagarh, Tehsil Nalagarh, District Solan, H.P.

14. We are informed that now these units are fully compliant of the environmental laws of the land and as such we are persuaded to close the present proceedings, which we do so, but with the following directions:

(a). The Principal Secretaries of Health and Irrigation & Public Health, to the Government of Himachal Pradesh, respondents No.2 & 3 respectively, shall have the entire area inspected. It should be done at least once every quarter and any signs of increase in the disease, directly related to the discharge of effluents, should be viewed seriously and appropriate action taken.

(b). The Chairman and the Member Secretary of the H.P. State Pollution Board shall ensure that every quarter all industrial units established in the area and more specifically five units, referred to supra, are inspected, for ensuring compliance of environmental laws.

15. A copy of this judgment be also sent to the concerned District Judge, who is otherwise Chairman of the District Legal Services Authority, for ensuring compliance. Also, he shall get the site inspected periodically from the Secretary of the District Legal Services Authority. Reports so submitted by him shall be examined and deficiencies, if any, shall be brought to the notice of the appropriate authority for taking appropriate action. The villagers be informed of the same and taken into confidence, so as to make them aware of their rights and corresponding duties and obligations to have the environment protected.

16. We place on record our appreciation for the assistance rendered by Ms Shreya Chauhan & Mr. Surender Thakur, Amicus Curiae.

Present proceedings stand closed, so also pending application(s), if any.

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BEFORE HON'BLE MR.JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Court on its own motion ....Petitioner

Versus

State of H.P. & Others ....Respondents

CWPIL No.15 of 2016
Date of decision: 14.12.2017

Constitution of India, 1950- Article 226- Court took suo motu cognizance of news item published in Amar Ujala qua non existence of motorable road to villages namely Dakolu, Odi, Bagain, Chagaintu, Larki and Jummuthach - people are facing hardship in their day to day life in absence of road- During the pendency of the petition, Affidavits filed by the HP PWD and respondent-State suggests that efforts are being made to lay the road – it was directed that every efforts should be made to construct road within one year from the date of passing of order- petition disposed of. (Para-10)

For the Petitioner: Mr.C.N. Singh, Advocate as Amicus Curiae,

For Respondents-State: Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan and Mr.Varun Chandel, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.

For Respondent No.7: Mr.Rajesh Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J. (Oral)

Taking suo motu cognizance of news item published in 'Amar Ujala', wherein it was reported that there is no motorable road to villages; namely; Dakolu, Odi, Bagain, Chagaintu, Larki and Jummuthach and people living in these villages are facing hardship in their day to day life, the Chief Justice of this Court treated the same as Public Interest Litigation.

2. Apart from aforesaid news item published in daily newspaper, this Court also received letter petition addressed to the Chief Justice of this Court from one Smt.Sunaya Devi resident of village Jummuthach, alleging therein that residents of villages; namely; Jummuthach, Bagain, Larki, Rachela, Dakolu, Karail, Dagroth, Kimunall, Bagaintoo, Post Office Kotighat, Tehsil Kumarsain, have no road facility and as such, it is difficult for them to reach the nearest place where shops are located to meet their daily requirements. Letter petitioner further averred that there is no provision to take sick/ailing patients to the hospital and as such they are compelled to take them to the hospital on the cot.

3. After having taken note of aforesaid news item as well as letter petition sent by villagers, this Court called upon learned Deputy Advocate General, representing the State of Himachal Pradesh to have instructions in the matter.

4. Superintending Engineer, 11th Circle, HPPWD, Rampur Bushahr in his affidavit also acknowledged that residents of villages, mentioned hereinabove, are not connected with any motorable road. However, he, in his affidavit, stated that villages; namely; Kimmunal, Karail, Dagroth, Bagaintoo, Dakolu are proposed to be connected through motorable road under Schedule Caste Component Plan, for which forest case under Forest (Conservation) Act, 1980 *(for short 'FCA')* for construction of road from Kotighat to Dakolu via Bagaintoo with budget code 2011-307-460 has been submitted online to forest authority. He further revealed in his affidavit that total length of proposed road is 5.510 Kms., out of which 2.900 Kms falls in Government land and 2.610 Kms. falls in private land. The gift deed of the private land has been received and approval under FCA is awaited from forest authority and the said road shall be constructed after the approval under FCA is received.

5. Pursuant to filing of aforesaid affidavit, this Court impleaded Ministry of Environment Forests & Climate Change, Government of India, *(for short 'MoEF&CC'),* as party respondent. Conservator of Forests in Regional Office (NCZ) of *'MoEF&CC'),* in his affidavit dated 25.05.2017 has revealed that proposal seeking diversion of 2.0992 of forest land in favour of HPPWD for the construction of link road from Kotighat to Dakolu via Bagaintoo (Kms.0/00 to 5/510) within the jurisdiction of Kotgarh Forest Division, District Shimla, Himachal Pradesh, stands processed and 'In principle' approval has been accorded in this case under the provisions of the FCA vide communication dated 10.04.2017. Conservator of Forests, *'MoEF&CC',* has also stated in his affidavit that no further proposal, save and except, seeking diversion of forest land for the construction of such road under the provisions of FCA has been received from the State of Himachal Pradesh.

6. In response to aforesaid affidavit, Executive Engineer, HPPWD Divison Kumarsain, District Shimla, H.P. has filed his affidavit to the following effect:-

> ***"2. That the respondent/deponent in compliance to the above orders of this Hon'ble Court have personally verified the factual position and status report with regard to the road connectivity of the area involved is submitted as under:-***
>
> ***(I) That the motorable road from Kimmunal, Karail, Dagroth, Bagaintoo, Dakolu has been proposed to be constructed under Schedule Caste Component Plan and provisions have been made in the budget code of 2011-307-407. The total length of this road will be 5.510 Kms out of***

which 2.900 Kms falls under the forest land and 2.610 Kms in private land. Gift deeds in respect of the private land have been received. The In-principal approval under FCA 1980 for the purpose of the construction of road to the said villages has been accorded by the Govt. of India on dated 10.04.2017 (Annexure-R-1) and further the NPV amounting to Rs.27,70,118/- has been deposited by PWD to the Forest Department on dated 18.08.2017. The D.F.O. Kotgarh was requested vide Executive Engineer, Kumarsain vide his letter No.PW-KMS-WA-Forest Case/2017-5240-41 dated 23.08.2017 (Annexure R-II) for necessary permission of felling of trees coming in the alignment of road. But the felling of trees has not been done by the forest department till date. Simultaneously, the tender for the formation cutting in 1.510 Kms were invited by the Executive Engineer, Kumarsain division and were opened on 11.08.2017 and further the work has been awarded to lowest contractor on dated 07.092017 (Annexure-R-III). But the work cannot be started till the felling of trees coming in the alignment of road is done by the forest corporation.

(II) That the survey of the Ghanapani to Pichla Ahar road has been completed by the deponent and the field book has been received from the Tehsildar Kumarsain & requisite gift deeds has been received from respective private land owners. The Forest case under FCA 1980 is being processed & the Digital Map of the road is under preparations.

(III) That the construction of road from Pichla Ahar to village Larki, Rachela, Bagain up to Jammuthach, it is submitted that the survey has been done on 26.11.2016. Total length of road is about 12.280 Kms which includes about 11.600 Kms of forest land and about 0.680 Kms is private land. This road at present is not covered under any scheme. Further construction of this road is possible only after Gahanpani to Pichla Ahar road is constructed."

7. Perusal of affidavit, having been filed by Executive Engineer, Kumarsain Division, clearly suggests that sufficient money is available for the construction of roads qua which permission under FCA has been granted by *'MoEF&CC'*. Affidavit further reveals that an amount of Rs.27,70,118/- stands deposited by Public Works Department *(for short 'PWD')* with the Forest Department. PWD has also made request to Forest Department for issuance of necessary permission for felling of trees coming in the alignment of the road. It also emerge from the affidavit that the cutting work qua 1.510 Kms has already been awarded to lowest bidder/contractor on 07.09.2017, but since necessary permission has not been granted by Forest Department for felling trees, work could not be started on the site.

8. Careful perusal of aforesaid affidavit further suggests that necessary steps are also being taken up by PWD for construction of other roads, named hereinabove, and work on the same shall also be started by PWD after having obtained necessary permission from the Forest Department as well as *'MoEF&CC'*.

9. After having carefully perused the aforesaid affidavit filed on behalf of respondents-State, we are satisfied that all possible necessary steps have been taken by the PWD Department for construction of roads in question and as such this Court sees no occasion to keep the present petition alive and as such deems it proper to close the same with the following directions that the:-

(1) Divisional Forest Officer, Forest Division, Kotgarh, Tehsil Kumarsain, District Shimla, H.P. shall issue necessary permission for felling of trees for the construction of link road from Kotighat to Dakolu via Bagnaitu immediately, preferably within a period of one week.

(2) Executive Engineer, HPPWD, Kumarsain Division shall ensure that proposal for diversion of forest land for construction of other roads, as mentioned in the petition, are submitted to *'MoEF&CC'* within two weeks, whereafter necessary orders shall be passed by Conservator of Forests, in Regional Office (NCZ) of *'MoEF&CC',* for diversion of forest land.

10. This Court hopes and trust that sincere efforts shall be made by the authorities concerned to construct roads, detailed hereinabove, within a period of one year from the date of passing of this order. Needless to say that letter petitioner shall be at liberty to approach this Court again in case needful is not done by the concerned authorities within stipulated time. This petition is disposed of in the aforesaid directions.

11. Registry is directed to send a copy of this judgment to the Divisional Forest Officer, Forest Division, Kotgarh, Tehsil Kumarsain, District Shimla, H.P., Executive Engineer, HPPWD, Kumarsain Division, District Shimla, Conservator of Forests in Regional Office (NCZ) of Ministry of Environment Forests & Climate Change, Government of India, for necessary action on their part as well as to the letter petitioner to enable her to take follow up action with the concerned authorities.

****

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

Shashi Pal ....Appellant.
Versus
Desh Raj and others ....Respondents.

FAO No. 391 of 2016
Decided on: 15.12.2017.

Code of Civil Procedure, 1908- First Appeal against Order- Order 1 Rule 10 CPC- The moot question is whether the learned First Appellate Court could have allowed an application under Order 1 Rule 10 CPC for impleading the party as a defendant, non-joinder of which had resulted in the dismissal of the suit by the learned Trial Court- **Held-** No- The lacuna in the suit cannot be permitted to be rectified in appeal by way of an application under Order 1 Rule 10, without adjudicating the appeal on merits, more particularly when the plaintiff has been non-suited on the grounds of non-joinder of necessary parties only- It was incumbent on the Learned 1st Appellate Court to first have returned a finding as to whether the suit was maintainable or not for want of necessary parties. (Para-8 to 11)

For the appellant. Mr. Dheeraj K. Vashisht, Advocate.
For respondents. Ms. Seema Guleria, Advocate for respondents No.1 to 4.
None for remaining respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)*

In the present appeal the moot issue involved is as to whether learned first appellate court, in an appeal filed before it against the judgment and decree passed by learned trial court, whereby the suit so instituted by the plaintiff was dismissed, inter alia, on the ground that the suit was bad for non joinder of necessary parties, could have had allowed an application under Order 1 Rule 10 of the Civil Procedure Code (in short 'CPC') for impleading that party as defendant, non joinder of which had resulted in the dismissal of the suit and thereafter have had remanded the matter back to the learned trial court for fresh adjudication.

2. In brief, facts necessary for adjudication of the present appeal are as under: A suit filed by respondents/plaintiffs (hereinafter referred to as 'plaintiffs'), inter alia, for declaration that they along with defendants were joint owners in equal shares of the suit land and further that a gift deed got executed by defendant from his father, Lachman Dass @ Lachoo, dated 27.8.1990 was illegal, null and void so also were mutations etc. entered on the basis of same was dismissed by learned trial court vide judgment and decree dated 28.12.2013, inter alia, on the ground that deceased Lachman Dass in addition to Harbans Lal and Hans Raj were also survived by his daughters, who was a necessary party for adjudication of the case and as she had not been impleaded as a defendant, the suit was not maintainable as all necessary parties had not been impleaded as defendants.

3. Judgment and decree so passed by learned trial court was assailed by way of appeal by the plaintiffs. During the pendency of the appeal, application was filed by the appellants/plaintiffs under Order 1 Rule 10 of the CPC to implead Smt. Bhajni Devi daughter of Lachman Dass as party defendant in the appeal.

4. Vide order dated 6.6.2016, application so filed was allowed by learned appellate court by holding that an application under Order 1 Rule 10 of the CPC could be filed at any stage. It was further held by learned appellate court that Smt. Bhajni Devi being one of the legal heirs of Lachman Dass, in her absence, no proper adjudication can take place qua inheritance of Lachman Dass.

5. Thereafter vide judgment dated 15.6.2016 learned appellate court remanded the case back to learned trial court with the direction that newly added proforma defendant Smt. Bhajni Devi be summoned as defendant. She be afforded of an opportunity to file her written statement and to lead evidence and learned trial court was directed to dispose of the matter within a period of six months.

6. Feeling aggrieved, defendant has filed the present appeal assailing both the orders so passed by learned appellate court dated 6.6.2016 as well as judgment dated 15.6.2016.

7. I have heard learned counsel for the parties and have also gone through the impugned order and judgment as well as the records of the case.

8. It is not in dispute that an application under Order 1 Rule 10 of the CPC for impleadment of party in proceedings can be filed and allowed at any stage during the pendency of proceedings. The same can also be done during the pendency of appellate proceedings, however, what has to be seen is that in case the suit of a party stands dismissed by learned trial court, inter alia, on the ground that the suit was bad for mis joinder of necessary parties, then can said lacunae in the suit be permitted to be filled up in appeal by way of an application under Order 1 Rule 10 of the CPC or not, without adjudication on merit in the main appeal?

9. Necessary party is a party in whose absence in a suit no decree at all can be passed and the suit is liable to be dismissed for want of necessary party. It is a well settled proposition of law that if a necessary party in the suit has not been so impleaded, then the plaintiffs have no right to maintain the suit. In other words, non joinder of necessary party in a suit is fatal.

10. Coming to the facts of this case, *dominus litus* obviously was with plaintiffs and plaintiffs in their wisdom opted not to array Smt. Bhajni Devi as party defendants in the civil suit. On this count an objection was raised by the defendant qua the maintainability of the suit. Objection so raised by defendants found merit with learned trial court and the said court dismissed the suit of plaintiffs by, inter alia, holding that the same was not maintainable as necessary party had not been impleaded as defendants. It is a matter of record that there was objection in the written statement itself by the defendant with regard to the maintainability of the suit. Not only this, during the pendency of the suit no application was filed by the plaintiffs to implead Smt. Bhajni Devi as a party defendant. In this view of the matter, once the plaintiffs had suffered a decree on account of non joinder of necessary parties, then in my considered view, in

appeal, learned appellate court could not have had permitted the said lacunae to have been filled up by the plaintiffs by allowing application so filed before it under Order 1 Rule 10 of the CPC for impleading that person as a party respondent/defendant, non impleadment of which led to the dismissal of the suit. This very important aspect of the matter has not been appreciated by learned appellate court while passing the impugned order and judgment.

11. No doubt, an application under Order 1 Rule 10 of the CPC can be filed and allowed at the appellate stage, but however, this does not means that because the court has got power to allow an application at appellate stage, therefore, such an application can be allowed by the court by divorcing itself from the facts of the case. In the present case, learned appellate court while allowing the application under Order 1 Rule 10 of the CPC and thereafter while remanding the case back erred in not appreciating that the suit of the plaintiffs, inter alia, stood dismissed as not maintainable for non joinder of necessary parties, judgment and decree so passed by learned trial court stood assailed before it. It was a ground to be decided by the said appellate court as to whether the findings returned by learned trial court that the suit was not maintainable for want of necessary parties were correct findings or not. Rather than doing this, appellate court adopted a shortcut and allowed application filed under Order 1 Rule 10 by simply assigning the reason that such an application can be allowed even at an appellate stage. While doing so, learned appellate court erred in not appreciating that when a suit itself stood dismissed by learned trial court as not maintainable for non joinder of necessary parties, then the judgment and decree so passed by learned trial court could not have been permitted to have been frustrated by the plaintiff by allowing an application so filed by plaintiffs under Order 1 Rule 10 of the CPC.

In view of above discussion, I hold that order dated6.6.2016 passed by learned appellate court vide which it had allowed application under Order 1 Rule 10 of CPC filed by present respondents and judgment dated15.6.2016 vide which it remanded back the case to learned trial court are not sustainable in law and the same are set aside. Appeal is accordingly allowed. The case is remanded back to learned appellate court with the direction that the appeal be decided by learned appellate court on merit on the grounds on which the judgment and decree passed by learned trial court stands assailed before it. Parties through their learned counsel are directed to appear before learned appellate court on 8.1.2018. Registry is directed to forthwith send the records of the case to learned appellate court.

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

State of Himachal Pradesh ...Appellant

Versus

Gian Chand Sharma and another ....Respondents

Cr. Appeal No. 510 of 2005
Decided on: December 15, 2017

Indian Forest Act, 1927- Section 41 and 42- Accused persons apprehended transporting Morchella (Guchhi) in a Maruti Car without any valid licence or permit- The learned trial Court acquitted the accused persons- It is held that prosecution has to connect all links of the evidence pointing towards guilt of the accused persons- link evidence in the present case missing- sample seals with which case property was sealed not produced- No evidence produced to establish who took the samples of seized articles to Divisional Forest Office who certified that the substance recovered was Morchella (Guchhi)- Certificate issued by the Divisional Forest Officer was also silent to this effect – evidence lacks inherent consistency - No illegality in the judgment passed by the learned trial Court – appeal dismissed. (Para-11, 12 and 14)

Case referred:

C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645

For the appellant: Mr. P.M. Negi, Additional Advocate General.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dissatisfied with the judgment of acquittal dated 19.7.2005, passed by Judicial Magistrate 1st Class, Court No.1, Mandi, Himachal Pradesh, in Cr. Case No. 59-III/2002, under Sections 41 and 42 of the Indian Forest Act,, whereby respondents-accused (hereinafter, 'accused') came to be acquitted of the charges framed against them under aforesaid Sections of Indian Forest Act, appellant-State has approached this Court by way of instant appeal filed under Section 378 CrPC, praying therein for the conviction of the accused after setting aside the judgment of acquittal recorded by the learned trial Court.

2. Facts as emerge from the record are that on 9.7.2002, police received a telephonic information at police post Darang, that two persons, were illegally transporting *Morchella* (*Guchhi*) in a Maruti Car bearing registration No. HP-32-0250. Said car was coming from Padhar to Darang. Police, after having received information, laid a *Naka* in front of police post. Car allegedly being driven by the accused was stopped by the police and on its search, one gunny bag kept on the backside of car and another gunny bag kept in the dickey were recovered. When gunny bags were opened, *Morchella* (*Guchhi*) was found in them. Since occupant of the car i.e. Hem Prabh and Gian Chand, failed to produce a valid permit for transporting *Morchella* (*Guchhi*), Investigating Officer Pratap Singh, PW-4 directed Constable Dinesh Kumar (PW-2) to call for a local witness and to bring scale. *Morchella* (*Guchhi*) was weighed on the spot. It was found to be 13 kg 250 grams in one bag and 14 kg 250 grams in another gunny bag. Investigating Officer took out 250 grams of *Morchella* (*Guchhi*) from each of the gunny bags for sample and sealed it in a separate parcel. Parcel and gunny bags were sealed with seal 'H'. Seal after use was handed over to witness, Puran Chand. Maruti Car mentioned above, alongwith documents and two gunny bags containing *Morchella* (*Guchhi*) was taken by the police into possession vide seizure memo Ext.PW-1/A. Subsequently, Pratap Singh, PW-4, sent a *Rukka* Ext. PW-4/A through Constable Lekh Ram, to the Police Station, on the basis of which FIR Ext. PW-4/B came to be registered against accused. After completion of investigation, *Challan* was presented in the competent Court of law, against accused, who being satisfied that prima facie case under Sections 41 and 42 of Indian Forest Act is made out against accused, put notice of accusation to them, to which they pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case against accused, examined as many as four witnesses. Accused in their statements recorded under Section 313 CrPC, denied the prosecution case in toto and claimed themselves to be innocent and also examined two witnesses in their defence.

4. Learned trial Court subsequently, vide judgment dated 19.7.2005, acquitted the accused of the charges framed against them. In the aforesaid background, appellant-State has approached this Court, by way of instant appeal, seeking herein conviction of the accused, after setting aside judgment of acquittal.

5. Mr. P.M. Negi, learned Additional Advocate General, while referring to the impugned judgment of acquittal recorded by learned Court below, vehemently argued that the same is not sustainable in the eye of law as the same is not based upon proper appreciation of the evidence as such, deserves to be quashed and set aside. Mr. Negi, further contended that bare

perusal of evidence led on record by the prosecution clearly suggests that the prosecution successfully proved beyond reasonable doubt that on 9.7.2002, vehicle being driven by accused was checked at *Naka* and on search, two gunny bags containing *Morchella* (*Guchhi*) were recovered. Mr. Negi, further contended that it stands duly proved that accused were not having any valid permit to transport the *Morchella* (*Guchhi*) and as such, they were rightly booked under Sections 41 and 42 of the Act *ibid*. While inviting attention of this Court to the statements adduced on record by the prosecution, Mr. Negi, contended that all the material prosecution witnesses have unequivocally stated that on 9.7.2002, two gunny bags containing *Morchella* (*Guchhi*) were recovered from the car being driven and occupied by the accused, as such, there was no scope left for the learned Court below to acquit the accused. While referring to the statement made by DW-1, Puran Chand, who was associated as an independent witness by the prosecution at the time of alleged recovery, Mr. Negi, contended that though he failed to support the prosecution case, but if his statement made in defence of accused is read in its entirety, it clearly suggests that vehicle being driven and occupied by the accused was apprehended at police *Naka* on 9.7.2002 and two gunny bags were recovered from them. While referring to the statement made by this witness namely Puran Chand, Mr. Negi, contended that bare perusal of same suggests that 27 kg 500 grams *Morchella* (*Guchhi*) was recovered from the car and same was shown to this witness, namely Puran Chand. Mr. Negi, further contended that record clearly reveals that at the time of effecting recovery from the accused, Investigating Officer had taken out 250 grams of *Morchella* (*Guchhi*) from each of the gunny bags and sealed the same with seal impression 'H' as such, learned Court below erred in concluding that no sample was drawn by the police at the time of effecting recovery. Mr. Negi contended that statement of PW-3, Divisional Forest Officer, further proves on record that gunny bags allegedly recovered from respondents-accused were containing *Morchella* (*Guchhi*) and as such, learned Court below erred in acquitting accused of the charges framed against them under Sections 41 and 42 of the Indian Forest Act.

6. Mr. Neeraj Gupta, learned counsel representing the accused, while refuting aforesaid submissions having been made by the learned Additional Advocate General, contended that there is no illegality or infirmity in the impugned judgment of acquittal recorded by the learned Court below, rather, same is based upon proper appreciation of evidence and as such, same deserves to be upheld. While referring to the material evidence adduced on record, Mr. Neeraj Gupta contended that sole independent witness associated by the police at the time of alleged recovery nowhere supported the prosecution case, rather, was given up by the prosecution on the pretext that he has been won over but there is nothing on record to substantiate aforesaid contention of the prosecution. While referring to the statement of DW-1, Puran Chand, who was associated as independent witness, Mr. Neeraj Gupta, contended that he has supported story of the prosecution to the extent that police had laid *Naka* on 9.7.2002 and many vehicles were stopped for checking but he specifically denied that two gunny bags containing *Morchella* (*Guchhi*) were recovered from the Maruti Car being driven and occupied by accused, as such, learned Court below rightly rejected the story of the prosecution. While referring to the other witnesses adduced on record by the prosecution, Mr. Gupta contended that even if statements, made by these witnesses are read in their entirety, juxtaposing each other, same reveals that there are inconsistencies and they have given different versions with regard to time, laying of *Naka* and presence of people, apart from police on the spot, as such, learned Court below rightly not placed reliance upon the same while ascertaining the guilt of the accused. Lastly, Mr. Gupta contended that mere drawing of sample if any from the recovered material was not sufficient to connect accused with the alleged recovery, rather, it was incumbent upon the prosecution to prove that samples allegedly drawn at the time of recovery were kept intact and same were not tampered with, but in the instant case, it has specifically come in the statement of PW-3, who later opined the recovered material to be a forest produce i.e. *Morchella* (*Guchhi*), that no seal was brought to him for comparison and as such, story, if any, of prosecution with regard to alleged recovery of *Morchella* (*Guchhi*) is wholly vitiated.

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

8. After having carefully perused record as well as impugned judgment of acquittal, recorded by learned trial Court, it is quite apparent that though the court below held accused not guilty of having committed offence punishable under Sections 41 and 42 of the Act *ibid*, but it after having perused the evidence led on record by prosecution, specifically arrived at conclusion that prosecution was able to prove that two gunny bags were recovered from Maruti Car bearing Registration No. HP-32-0250 being occupied/driven by accused. Since accused were acquitted, they did not choose to lay challenge to the aforesaid finding of the learned Court below and as such, this Court does not deem it necessary to go into that aspect of the matter, rather, this Court shall confine itself to the findings returned by the learned Court below qua another aspect of the matter that prosecution was not able to prove beyond reasonable doubt that gunny bags allegedly recovered from accused were containing *Morchella* (*Guchhi*) i.e. a forest produce.

9. Prosecution with a view to prove that gunny bags recovered from accused were containing *Morchella* (*Guchhi*), examined one Shri H.C. Katheria, Divisional Forest Officer (PW-3), who in his statement deposed that he at the relevant time was posted as Divisional Forest Officer Mandi. On 9.7.2002, Court had ordered to auction *Morchella* (*Guchhi*) weighing 27 kg 500 grams. He auctioned the same on 26.8.2002 for Rs.2,80,315/- and deposited the sale proceeds with the Government treasury. He also admitted that he had issued certificate, Ext. PW-3/A regarding *Morchella* (*Guchhi*). But interestingly, in cross-examination, he admitted that *Morchella* (*Guchhi*) was not recovered in his presence and police official had brought the same to him. He further stated in cross-examination that he can not say as to what seal was affixed on gunny bags. Though he stated that seal was broken in his presence, but he was unable to state that with which seal the gunny bags were sealed. He also stated in his cross-examination that gunny bags were weighed in his presence but he does not know who weighed the same.

10. PW-1, in his statement deposed that on weighment, 14 kg and 250 grams *Morchella* (*Guchhi*) from one gunny bags and 13 kg and 250 grams from another gunny bags was recovered and 250 grams *Morchella* (*Guchhi*) was taken out as sample and was sealed in separate parcel with seal impression 'H'. He further stated that seal 'H' was handed over to Puran Chand.

11. Similarly, other prosecution witnesses PW-2 and PW-4 also stated that police after having recovered gunny bags containing *Morchella* (*Guchhi*) sealed them with seal impression 'H' and seal was handed over to independent witness, Puran Chand. But PW-4, though in his examination-in-chief stated that during investigation, he had obtained certificate Ext. PW-3/A regarding *Morchella* (*Guchhi*) from the Divisional Forest Officer (PW-3), but in his cross-examination, he feigned ignorance as to who took *Morchella* (*Guchhi*) to Divisional Forest Officer. Though there appears to be some truth in the case of the prosecution that samples were drawn at the time of recovery and they were sealed with seal impression 'H', but there is nothing in the statement of any of the prosecution witnesses from where it can be inferred that sample was sealed and that it was sent to Divisional Forest Officer, for comparison, who subsequently issued certificate Ext. PW-3/A. In the case at hand, neither the prosecution has produced the sample allegedly taken at the time of recovery nor seal used by it at the time of drawing samples. Apart from above, it further emerges from the documentary evidence available on record that neither certificate Ext. PW-3/A bears any identification i.e. FIR number, seal, weight etc. nor PW-3 has stated anywhere that what seal was affixed on the gunny bags containing *Morchella* (*Guchhi*) which was subsequently auctioned by him. Whether gunny bags allegedly recovered from the possession of accused were containing *Morchella* (*Guchhi*), could only be proved by the prosecution by producing sample as well as seal allegedly used by it at the time of recovery. Apart from above, prosecution also could not extract from PW-3, who subsequently certified material allegedly recovered from the gunny bags to be a forest produce, that gunny bags were sealed with sample seal 'H' and same was not broken. But, as has been taken note above, PW-3 has nowhere stated anything with regard to the seal.

12. Leaving everything aside, prosecution has failed to examine witness, who allegedly took *Morchella* (*Guchhi*) to Divisional Forest Officer, Mandi for certification, rather,

Investigating Officer PW-4 also remained silent while deposing before the learned Court below that who actually took gunny bags to Divisional Forest Officer, PW-3, Divisional Forest Officer also has not stated anything specific with regard to how many bags were produced before him, rather, he feigned ignorance about the same as well as seal affixed on gunny bags. In the case at hand, prosecution failed to produce sample as well as seal allegedly used by it at the time of recovery and as such, story of recovery stands vitiated.

13. There is yet another aspect of the matter that even certificate, Ext. PW-3/A issued by PW-3, wherein he certified material recovered to be *Morchella* (*Guchhi*), does not bear FIR number, quantity of *Morchella* (*Guchhi*) and name of the person, who produced the same before him, for auction.

14. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others versus State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
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> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> 46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

15. Consequently, in view of detailed discussion made herein above, this Court sees no reason to differ with the judgment of acquittal recorded by the learned Court below, which appears to be based upon correct appreciation of evidence adduced on record.

16. Accordingly, the present appeal is dismissed. Judgment passed by the learned trial Court is upheld. Bail bonds, if any, furnished by the accused are discharged.

17. Case property, if not destroyed, be destroyed forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Mohinder Singh. .....Petitioner.

Versus

Smt. Preeto Devi & ors. .....Respondents.

CMPMO No. 542 of 2017
Date of decision: December 20, 2017.

Code of Civil Procedure, 1908- Civil Miscellaneous Petition- Challenging the order passed by the learned Civil Judge whereby applications under Section 72 of the Indian Evidence Act and under Sections 45 and 47 of the said Act were partly allowed- During the course of trial plaintiffs had moved two applications with a prayer to send the disputed thumb impression of the executant on the Will to the hand writing expert for comparison with his thumb impression on an affidavit alleged to have been executed by the executant on the order of mutation No.1037 dated 20.10.2004- The learned Trial Court allowed the application only vis-à-vis the comparison in respect of thumb impression on the mutation- Feeling aggrieved, defendant No.1 assailed the order- **The High Court Held-** that as per the provisions of Section 73 of the Indian Evidence Act, the signatures with which the disputed document was to be compared should have been either admitted by the opposite party or the Court for reasons to be recorded is satisfied that the signatures have been marked by the executant- **Further held** - that no doubt the defendant had not admitted the thumb impression of the executant on the mutation but the Court has recorded its satisfaction while concluding that the order of mutation is an attested copy and has come from the records maintained by the officials in the revenue department in the discharge of his official duties – It is only after recording satisfaction the learned Trial Court has allowed the comparison of the thumb impression on the order of mutation with the impression on the disputed Will- Consequently, order upheld. (Para-4)

For the petitioners : Mr. Sanjay Jaswal, Advocate.
For the respondents : Nemo.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Defendant No. 1 in the trial Count has assailed order dated 16.8.2017 Annexure P-7(colly) passed by learned Civil Judge (Junior Division), Indora in two applications i.e. one under Section 72 of the Indian Evidence Act and another under Sections 45 and 47 of the said Act.

2. The facts as disclosed from the record in a nutshell are that respondents No. 1 to 3 (plaintiffs in the trial Court) have filed the suit for seeking declaration that they are owners in possession of the suit land and the unregistered *'Will'* dated 20.11.2007 being forged and fictitious document is null and void hence not binding on them. The pleadings in the suit are complete. The same is at the stage of recording rebuttal evidence for which as per record was previously fixed for 15.9.2017. The plaintiffs have moved two applications with a prayer to sent the disputed thumb impression of executant Veeru on the *Will* to hand writing expert for comparison with his thumb impression on an affidavit allegedly executed by deceased Veeru and with his thumb impression on the order of mutation No. 1037 dated 20.10.2004.

3. Learned trial Court on having taken into consideration the pleadings of the parties has concluded that the so called affidavit executed by Veeru is not coming from proper custody i.e. the record maintained in the revenue department. However, the order of mutation being attested copy was found to be a genuine document and relevant for comparison of thumb impression of deceased Veeru on the disputed *Will*. Consequently, the prayer made by the

plaintiffs has been accordingly allowed and a Commission appointed for onwards transmission of the *Will* and order of mutation to hand writing expert for comparison and filing of report on 15.9.2017 vide order under challenge in this petition. The suit was also adjourned for recording evidence in rebuttal on the same day.

4. The complaint is that learned trial Judge could have not passed the impugned order as defendant No. 1-petitioner never admitted the thumb impression of deceased Veeru on the order of mutation. Such complaint, however, is not legally justified for the reason that in view of the provisions contained under Section 73 of the Indian Evidence Act the signature either should have been admitted by the opposite party or satisfaction that the same having been marked by the executant alone recorded by the Court. In the case in hand the petitioner-defendant No. 1, no doubt, has not admitted the thumb impression on the order of mutation to be that of Veeru. However, it is learned trial Court which has recorded its satisfaction while concluding that the order of mutation is an attested copy and coming from the record maintained by the official in the revenue department in the discharge of his official duties. It is after recording such satisfaction the prayer in the application for comparison of the thumb impression of deceased Veeru on the disputed *Will* with his thumb impression on the order of mutation has been allowed. It is worth mentioning that the report of hand writing expert in the matter shall not be a conclusive proof and rather a piece of evidence which has to be considered along with other evidence available on record and that too when the same has to be produced in evidence by the plaintiffs. In that event the petitioner-defendant No. 1 will also have an opportunity to rebut such evidence likely to come on record by way of report or the testimony of the local commissioner/hand writing expert. The petitioner-defendant No. 1, therefore, cannot be heard of any complaint against the order under challenge in this petition. The petition, as such, being devoid of any merits is dismissed.

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

6. An authenticated copy of this judgment be sent to learned trial Court for record.

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

Yashpal ...Petitioner

Versus

Narcotics Control Bureau ... Respondent

CrMP(M) No. 1381 of 2017
Decided on December 27, 2017

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 8, 20, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act- Petitioner charged under the aforesaid offences, for having been found in possession of 4.272 kg. charas from one of the rooms of the Hotel allegedly owned by the petitioner – Bail petition preferred- **Held-** that though the quantity of the contraband allegedly recovered from the hotel owned by the petitioner was commercial in nature, but that cannot be a sole ground to deny bail to him and that too for an indefinite period, especially when lease agreement placed on record suggests that at the time of search/ recovery of contraband, Hotel was in the occupation and possession of the other co-accused- Bail granted. (Para-11)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623

Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	Mr. N.S. Chandel, Advocate.
For the respondent	Mr. Ashwani Pathak, Senior Advocate with Mr. Sandeep K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Yashpal, who is in judicial lockup, has approached this Court by way of present petition under Section 439 CrPC, praying herein for grant of regular bail, in connection with Crime No. 57/2016 dated 31.12.2016, under Sections 8, 20, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act, registered by Narcotics Control Bureau, Sub Zonal Unit, Mandi, Himachal Pradesh.

2. Sequel to orders dated 3.11.2017 and 24.11.2017, Mr. Ashwani Pathak, learned Senior Advocate representing Narcotics Control Bureau, has made available complete record pertaining to search and arrest of bail petitioner. Apart from above, Narcotics Control Bureau has also filed its reply to the bail application moved on behalf of the bail petitioner, perusal whereof suggests that on 31.12.2016, hotel namely Yash Palace owned and possessed by bail petitioner was raided/ searched by the officials of Narcotics Control Bureau. At the time of search, one Shri Ram Prakash was present in the Hotel. Narcotics Control Bureau recovered 4.272 kg Charas from one of the rooms of the aforesaid hotel. On the same day i.e. 31.12.2016, at about 9 am, Investigating Officer A.C. Malla and other NCB officials came to the residential house of the bail petitioner and asked him to accompany them to their office at Mandi. They also disclosed to the bail petitioner that Charas had been recovered from his Hotel, Yash Palace. Bail petitioner informed the Investigating Officer that he had rented out said hotel to Ram Prakash on lease with effect from 9.5.2016 and same is valid till 8.4.2017, for a total consideration of Rs.5.00 Lakh and in this regard, he has also executed a lease agreement on 9.5.2016. However, the fact remains that aforesaid explanation rendered on record by the bail petitioner was not accepted by the NCB officials and, he was arrested and a case under Sections 8, 20, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act came to be registered against the bail petitioner as well as co-accused Ram Prakash and since then they are in judicial lock-up. Bail petitioner at the first instance approached learned Additional Sessions (Special) Judge, Kullu, District Kullu, Himachal Pradesh, by way of bail application, seeking therein bail but same was rejected by the learned Additional Sessions (Special) Judge, vide order dated 13.10.2017. In the aforesaid background, bail petitioner has approached this Court by way of instant bail petition, praying therein for grant of regular bail.

3. Mr. N.S. Chandel, learned counsel representing the bail petitioner, while referring to the record/status report filed on behalf of Narcotics Control Bureau, strenuously argued that no case is made out against the bail petitioner, who at the time of search and seizure, was not present in the hotel Yash Palace. while inviting attention of this Court to order dated 13.10.2017, passed by learned Additional Sessions (Special) Judge, Kullu, Mr. Chandel, contended that factum with regard to execution of lease deed inter se bail petitioner and other co-accused, Ram Prakash, was brought to the notice of the learned Additional Sessions (Special) Judge, but despite that bail was not granted. With a view to substantiate that bail petitioner had leased out his hotel in favour of the co-accused Ram Prakash, by way of agreement dated 9.5.2016. Mr. Chandel, also invited attention of this Court to agreement placed on record as Annexure P-1 (available at page-11 of the paper book), perusal whereof suggests that vide agreement dated 9.5.2016, present bail petitioner, who happened to owner-in-possession of the hotel namely Yash Palace, leased out said hotel on rent to Ram Prakash, for a period of eleven months i.e. upto 8.4.2017. While placing heavy reliance upon aforesaid agreement, learned counsel representing the bail petitioner

contended that since hotel, from where contraband was allegedly recovered was not with the bail petitioner at the relevant time, there was no occasion for the investigating agency to falsely implicate him in the case. Mr. Chandel, further contended that as the case of the Narcotics Control Bureau itself, bail petitioner was not present in the Hotel and he was called from his residence, whereafter, *Charas* was allegedly recovered from one of the rooms of the hotel and as such it can not be said that contraband was recovered from the conscious possession of the bail petitioner.

4. Mr. Ashwani Pathak, learned Senior Advocate duly assisted by Mr. Sandeep K. Sharma, Advocate representing Narcotics Control Bureau, while refuting aforesaid claim, contended that the lease agreement was never produced by the bail petitioner at the time of search in the hotel, rather, same has been placed before the this Court for the first time. Learned Senior Advocate further contended that neither during investigation nor at the time of presentation of accused and case property before the concerned Magistrate, bail petitioner produced lease agreement, now sought to be relied by him in the instant proceedings, as such, same can not be taken into consideration at this stage. Mr. Pathak, learned Senior Advocate, further contended that keeping in view the gravity of offence allegedly committed by bail petitioner and other co-accused, who is already in custody, present bail petitioner deserves no leniency, rather he needs to be dealt with severely. Mr. Pathak, learned Senior Advocate further contended that since commercial quantity of contraband has been recovered from the hotel room, owned and possessed by the bail petitioner, rigours of Section 37 of the Act *ibid* are applicable and petitioner is not entitled to be released on bail.

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

6. At this stage, it may be noticed that bail application on behalf of the present bail petitioner came to be filed before Additional Sessions (Special) Judge on 4.8.2017, wherein admittedly bail petitioner submitted before the Court below, rather, he produced a Photostat copy of agreement, allegedly executed inter se him and co-accused Ram Prakash on 9.5.2016, suggestive of the fact that Hotel Yash Palace owned by bail petitioner was leased out to the co-accused Ram Prakash but the same was not taken into consideration by the learned Court below. Order dated 13.10.2017 passed by learned Additional Sessions (Special) Judge, suggests that aforesaid aspect of the matter was not considered at all by it and learned Court below merely taking note of the commercial quantity of contraband allegedly recovered from the premises owned by the bail petitioner, proceeded to dismiss the application. During aforesaid arguments having been made by the learned counsel representing the parties, Mr. Ashwani Pathak, learned Senior Advocate had also raised issue with respect to genuineness and correctness of the agreement dated 9.5.2016 and as such, this Court, solely with a view to ascertain the correctness and genuineness of the document, which could be crucial for determination of rights of the parties, qua hotel in question, at the relevant time, requested the learned Additional Advocate General to get the same verified from the authorities concerned. Pursuant to order dated 8.12.2017, passed by this Court, learned Additional Advocate General, requested Deputy Superintendent of Police, Kullu, District Kullu, to get the lease agreement dated 9.5.2016, verified. Aforesaid Deputy Superintendent of Police vide communication dated 14.12.2017, addressed to the learned Additional Advocate General, submitted his report, which is taken on record. Perusal of report suggest that non-judicial stamp paper was purchased on 9.5.2016, by the bail petitioner from one Harpreet Singh, Stamp Vendor of District Courts Kullu. Said Shri Harpreet Singh, in his statement given to the police, acknowledged the factum with regard to purchase of non-judicial stamp paper on 9.5.2016. He also produced his register. As per certified copy of Notary Register, agreement between Yashpal and Ram Prakash was also executed on the same day i.e. 9.5.2016. As per statement of Shri Tehal Singh son of Shri Thakur Singh, resident of Village Kasol, Tehsil Bhunter, District Kullu, Himachal Pradesh, Hotel Yash Palace is being run on lease by accused Ram Prakash since May 2016. Report of Deputy Superintendent of Police further suggests that agreement in question was executed for the purpose for which non-judicial stamp paper was purchased on 9.5.2016.

7. After having carefully perused report submitted by Deputy Superintendent of Police as also relevant extract of Register maintained by Stamp Vendor and Notary, there appears to be considerable force in the argument of Mr. N.S. Chandel, learned counsel representing the bail petitioner that on 9.5.2016, agreement was executed inter se his client and Ram Prakash, whereby he had leased out Hotel Yash Palace to Ram Prakash for 11 months, for a total consideration of Rs.5.00 Lakh.

8. This Court also perused record of investigating agency, perusal whereof suggests that Ram Prakash during investigation disclosed that he had to pay an amount of Rs.5.00 Lakh to the bail petitioner on account of hotel business. Though statement made by Ram Prakash, if is read in its entirety, suggests that bail petitioner and Ram Prakash were running hotel business together but, it has specifically come in the statement of Ram Prakash that out of total proceeds of hotel business and illegal trade of narcotics/psychotropic substances, he had to pay Rs.5.00 Lakh to the bail petitioner.

9. At the cost of repetition, it may be observed that though there is no categorical statement on behalf of co-accused Ram Prakash that there was a lease agreement executed inter se him and the bail petitioner, but certainly, in his statement, he has admitted that he was under obligation to pay Rs. 5.00 Lakh to the bail petitioner on account of hotel business and trade of narcotics, meaning thereby that at the relevant time, hotel was being run and managed by co-accused Ram Prakash. Otherwise also, as per story put forth by the Narcotics Control Bureau, when hotel was raided/ searched only co-accused Ram Prakash was present in the Hotel and bail petitioner was subsequently called from his house. Inquiry got conducted by this Court with a view to ascertain correctness and genuineness of lease deed, allegedly executed inter se bail petitioner and co-accused Ram Prakash also suggests that on 9.5.2016, Hotel Yash Palace was leased out to co-accused Ram Prakash, who in lieu of the same had to pay an amount of Rs.5.00 Lakh to the bail petitioner.

10. Though aforesaid aspect of the matter is to be considered and decided by the learned trial Court on the basis of evidence adduced on record by investigating agency, but this Court, after having perused lease agreement dated 9.5.2016, which has been further verified by Deputy Superintendent of Police, Kullu, sees substantial force in the arguments of learned counsel representing the bail petitioner that at present there is no evidence to directly implicate the bail petitioner in the offence allegedly committed by co-accused Ram Prakash in the Hotel owned and possessed by the bail petitioner.

11. True it is that quantity of contraband allegedly recovered from the hotel owned by bail petitioner is commercial in nature, but that cannot be sole ground to keep the bail petitioner in custody that too, for indefinite period, especially when lease agreement placed on record suggests that at the time of search/ recovery of contraband, Hotel Yash Palace was in occupation and possession of co-accused Ram Prakash and as such, this Court sees no reason to let bail petitioner incarcerate in jail during pendency of the trial.

12. This Court also cannot lose sight of the fact that alleged contraband has not been recovered from the conscious possession of the bail petitioner, rather, he was subsequently called by the officials of NCB, on the basis of statement made by co-accused Ram Prakash that bail petitioner is the owner of the Hotel. But, as has been taken note above, lease deed dated 9.5.2016 executed inter se bail petitioner and co-accused suggests that for eleven months, Hotel Yash Palace was leased out to the co-accused by the bail petitioner. Otherwise, co-accused namely Ram Prakash, who was actually present in the Hotel at the time of search, has categorically stated in his statement given to the NCB that apart from hotel activities, he was earning money from illegal trade of narcotics. Above named co-accused is in custody.

13. Otherwise also, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the investigating agency by leading cogent and convincing evidence. There is no material placed on record by investigating agency suggestive of the fact that bail petitioner had been previously indulging in such illegal trade of narcotic substances and in the event of his

being enlarged on bail, he may flee from justice. Petitioner, who is a local resident of area, shall always remain available for investigation/ trail. Otherwise, the apprehension expressed by the investigating agency with regard to the bail petitioner fleeing from justice, can be met by putting bail petitioner to stringent conditions.

14. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

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

15. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.
>
> 112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> > (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

16. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC

severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

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

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, 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 nor 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 a 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 and 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 that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

18. 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 also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. Petitioner is local resident of Himachal Pradesh and shall remain available to face the trial and to undergo imprisonment, if any, which may be imposed on conclusion of the trial.

19. The Apex Court in **Prasanta Kumar Sarkar** versus **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.

20. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to his furnishing personal bonds in the sum of Rs.5,00,000/-(Rupees Five Lakh) with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate, 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.

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

22. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Appeal No. 450 of 2016
a/w Cr. Appeal No. 38 of 2017
Reserved on : 16.11.2017
Decided on: 29th December, 2017.

Cr. Appeal No. 450 of 2016

Khekh Ram ...Appellant.

Versus

Narcotics Central Bureau & Anr. ...Respondents.

Cr. Appeal No. 38 of 2017

Nilmani ...Appellant.

Versus

Narcotics Central Bureau& Anr. ...Respondents.

Code of Criminal Procedure, 1973- Criminal Appeal- Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 29- Appellants challenged their conviction and sentence passed by the learned Special Judge, whereby accused have been convicted and sentenced to undergo simple imprisonment for 15 years each along with fine of Rs.15,000/- each and in default to further undergo simple imprisonment for 8 months each under the aforesaid offences- On completion of the investigation, the Narcotics Control Bureau (NCB) had filed a complaint against one accused Nilmani, followed by a supplementary complaint against accused Khekh Ram- **High Court Held-** that supplementary complaint can only be filed after obtaining the leave of the Court- Since, in the present case, no permission had been sought- The trial held to have been vitiated against accused Khekh Ram- Complaint held to be not maintainable- Consequently, conviction and sentence based on such complaint set aside. (Para- 33 to 35)

Code of Criminal Procedure, 1973- Criminal Appeal- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 42- Further held- that compliance of Section 42 of the NDPS Act mandatory in nature, non-compliance is fatal to the prosecution- High Court reiterated the law laid down in State of Punjab vs. Balbir Singh- The other accused also acquitted.

(Para-63 and 64)

Code of Criminal Procedure, 1973- Criminal Appeal- Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 29- Further held- that non-association of independent witnesses despite availability deprecated- Further held- that in a case of chance recovery, non-association of independent witnesses cannot be undermined and brushed aside lightly- accused acquitted. (Para- 69 and 70)

Cases referred:
Hemant P. Vissanji and others vs. Mulshankar Shivram Rawal and another, 1991 Cri.L.J 3144
Ajit Narayan Huskar and others vs. Assistant Commissioner, 2002(4) KarLJ 107
S. Nagrajan vs. State in Crl. Revision Petition No. 321 of 2004
Vinod Gupta vs. Haryana State Pollution Control Board, 2016(1) RCR (Cri) 206
Amit Banerjee vs. Shri Manoj Kumar, Assistant Director, Enforcement Directorate, 2016 (2) JCC 1034
State of Rajasthan vs. Jag Raj Singh @ Hansa (2016) 11 SCC 687
Bhupender Chauhan vs. State of Himachal Pradesh 2015 (3) Shim.LC 1346,
Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145

For the Appellant(s) :	Mr.Sanjeev Kuthiala, Advocate, for the appellant in Cr. Appeal No. 450 of 2016.
	Mr. Ajay Kochhar & Mr. Vivek Sharma, Advocates, for the appellant in Cr. Appeal No. 38 of 2017.
For the Respondent(s) :	Mr. Ashwani Pathak, Sr. Advocate, with Mr. Sandeep Sharma, Advocate, for respondent No. 1 in Cr. Appeal No. 450 of 2016.
	Mr. V.S. Chauhan, Addl. A.G. with Mr. J.S. Guleria, Asstt. A.G. for the respondent/State in Cr. Appeal No.38 of 2017.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

The appellants being aggrieved by the judgment and conviction passed by the learned Special Judge, Kullu, whereby they have been convicted and sentenced to undergo rigorous imprisonment for the terms of 15 years each alongwith fine of Rs.1,50,000/- each, in default to undergo further simple imprisonment for the period of 18 months each for the commission of offence punishable under Sections 20 & 29 of the Narcotic Drugs & Psychotropic Substances (for short the '**NDPS Act'**) have filed the instant appeal.

2. The parties do not dispute that the case as set-out by the Narcotics Control Bureau (for short the 'NCB') has correctly been enumerated by the learned Special Judge, therefore, the same is extracted as such from the judgment.

3. The facts of the case as set-out by the NCB are that on 20.10.2014, a NCB team, consisting of A.C. Malla (PW9), Virender Singh, R.L. Negi, (PW10) Vinay Singh, all Intelligence Officers of NCB, Sub Zone Unit, Mandi, alongwith Sepoy, Surjit and Maheshwar as well as driver, Vijay Kumar were on surveillance duty in Kullu area. At about 6.30 p.m., a secret information was received by PW9, Shri A.C. Malla, who was posted as the Intelligence Officer in NCB Office Mandi, to the effect that on that day at about 8.30 p.m., accused Nilmani was likely to appear near a span owned by one Davinder Nath (PW5), installed at about one kilometer ahead of village Shat, towards Manikaran side. The said information was also to the effect that accused would signal three times with torch light towards other side of span and then, the persons from other side would sent contraband through span in trolley which will be received by accused Nilmani. PW9 Sh. A.C. Malla (I.O.) supplied the aforesaid information to Shri Nirbhay Singh (PW7), Superintendent (NCB), Zonal office, Chandigarh, on mobile phone, who directed him (A.C. Malla) on mobile to organize a surveillance operation and constitute a team consisting of above named officers and officials of NCB, for intercepting the accused, by placing 'NAKKA' in the said area. Thereafter, PW9 Shri A.C. Malla reduced the said information into writing, which is Ex.PW7/A, and it was supplied by him, on 22.10.2014, to Nirbhay Singh, Superintendent, NCB Zone Officer, Chandigarh, who made his endorsement on it.

4. On the directions of Nirbhay Singh (PW7), NCB officials' team went near to the said span and cordoned the spot. The place was isolated one, no local witness was available

nearby the spot. At about 8.30 p.m. accused Nilmani was found coming on foot from Shat village side nearer to the span. When he (accused Nilmani) reached near the span, he gave signal three times, with the help of torch, towards other side of the span. After 5-7 minutes of his signal, some material was sent through span trolley from other side of the span, which was received by him and lifted from the trolley. After taking the said material from the trolley, when accused Nilmani started running I.O. A.C. Malla and other officials of the team, who had cordoned the spot, came near to him and I.O. asked his name and address. On asking by the I.O., he disclosed his name as Nilmani son of Shri Atma Ram, resident of Jamot, P.O. Khokhan, Tehsil Bhunter, District Kullu, H.P. Then, I.O. A.C. Malla introduced himself as well as the members of the NCB team to accused Nilmani and apprised the accused about secret information received by him. Thereafter I.O. A.C. Malla asked accused Nilmani about the bag and 'BORU' and about the contents therein, but he kept mum. Upon this, a notice Ex.PW9/A was issued to accused Nilmani under Section 50 of the NDPS Act by the I.O. Through the said notice, Ex.PW9/A, accused Nilmani was apprised about his legal right to give his search either in presence of a Magistrate or a Gazetted Officer. Accused Nilmani consented to be searched by the NCB officials/team present at the spot and put his signatures on the notice Ex.PW9/A. I.O. waited for the presence of some local witnesses for about 5-7 minutes, but due to darkness and later hours, no one came at the spot. As such, I.O. associated R.L. Negi (PW10), Intelligence Officer and Surjit Singh (Sepoy) as witnesses, by issuing notice, Ex.PW9/B & Ex.PW9/C, to them, respectively. Both the aforesaid witnesses put their signatures on the respective notices and offered themselves to become witnesses to search and seizure. It was pitch dark at the spot and due to security reason, it was not possible to carry out proceedings at the spot. As such, accused Nilmani alongwith material and members of the NCB team were taken to NCB Zonal office, Mandi.

5. On reaching NCB office at Mandi, further proceedings were carried out by the I.O. I.O. first opened the bag, in which, dark brown colour substance, in the shape of biscuits and flat shaped was found. Thereafter 'BORU' was opened, in which, dark brown colour substance, in the shape of flat and biscuit was also found. The substance, in both bag and 'BORU' was wrapped with polythene wrappers. After that, I.O. first took some material from the bag for testing, and on testing, it was found positive of Charas. Likewise, some material was taken from the 'BORU', which, on testing was also found positive for Charas. I.O. thereafter took half material from the handbag by removing packing material and then the same was put in a polythene pack. It was weighed on electronic weighting scale and its weight was found to be 5.050 kilograms of Charas. Then, remaining half substance/Charas of the bag was also weighed on same electronic weighing scale and weight was also found 5.050 kilograms of Charas. Half of the Charas was taken from the 'BORU' and then put in a polythene pack by removing packing material and on weighting the same on electronic weighing scale, it was found 5.050 kilograms. Thereafter, remaining Charas of 'BORU' was also weighed in electronic weighting scale and found to be 4.630 kilograms. Thus, total Charas recovered from bag and 'BORU' was 19.780 kilograms. It was taken into possession in presence of aforesaid witnesses vide seizure memo Ex.PW9/D which was signed by accused Nilmani as well as witnesses and verified by the I.O.

6. Thereafter, I.O took 25-25 grams from each packet as representative samples and marked them in lots, like – A1, A2, B1, B2, C1, C2 and D1, D2. The remaining contraband (Charas), left in four packets was first heat sealed, then, put in a markin cloth bags, which were stitched in the office. Those bags were marked as Lot-A, Lot-B, Lot-C and Lot-D. The bag and packing material were separately put in polythene and then put in markin cloth and stitched and was marked as Lot-P. I.O. took seal 'Narcotic Control Bureau CHD-4' from Shri R.L. Negi (PW10) and put its impressions on sample packets by affixing four-four seals on each packet. Three-three impressions of same seal were put on Lot-A to Lot-D as well as on Lot-P. I.O. prepared test memo Ex.PW9/E on which seal impression of above seal was embossed. Impression of seal was also taken on 'panchnama' Ex.PW9/F, prepared by the I.O., which was signed by both witnesses and accused Nilmani on all pages. The seal, after use, was given back to Shri R.L. Negi. On Charas lots A to D, parcel marked as lot-P, as well as on sample packets, accused Nilmani as well as aforesaid witnesses put their signatures. The proceedings in the office were completed by the I.O.

at about 2.00 a.m. After completion of proceedings in the office, statement of accused Nilmani under Section 67 of the NDPS Act, Ex.PW9/G, was recorded by the I.O., on which, he put his signatures.

7. Thereafter, accused Nilmani was apprised about the offence committed and grounds of arrest vide memo. Ex.PW9/N, and then, arrested and intimation qua his arrest was given to his wife vide memo, Ex.PW9/K and 'jamatalashi' of accused Nilmani was taken vide memo Ex.PW9/J. The Investigation Officer moved an application, Ex.PW9/L, for medical examination of accused Nilmani and his OPD slip is, Ex.PW9/M. After medical examination, MLC Ex.PW9/N, was obtained. I.O. also prepared inventory, Ex.PW9/P. I.O. issued notice, Ex.Pw9/P, to witness R.L. Negi, who gave his statement, Ex.PW9/P1, which was also verified by the Investigating Officer. Notice, Ex.PW9/O, was given to witness, Surjit Singh, who gave his statement Ex.PW9/A1, to the I.O. in his own hand, which was signed by him and verified by the I.O.

8. Thereafter, case property was taken by the I.O. Shri A.C. Malla to Zonal unit, NCB, Chandigarh, on 21.10.2014, and it was deposited there with Superintendent/In-charge of NCB Godown, Shri Nirbhay Singh (PW7), vide receipt Ex.PW7/C dated 22.10.2014. Before taking case property to Zonal Unit Chandigarh, I.O. gave information qua the arrest of accused Nilmani to PW7 Nirbhay Singh, vide memo Ex.PW7/B. Thereafter, on the directions of Zonal Director, case file was handed over to Karambir Singh (PW8), Intelligence Officer, for further investigation, who on receipt of file, issued summons/notice Ex.PW8/A, to Mohar Singh through registered letter, postal receipt of which is Ex.PW8/B. But he did not join the investigation. Thereafter, second notice Ex.PW8/C was issued by the I.O. to Mohar Singh, but he failed to join the investigation. Subsequent notices, Ex.PW8/D, Ex.PW8/E and Ex.PW8/F, were also issued to him. Notice, Ex.PW8/G and Ex.PW8/H, were also issued to Amri Lal. On receipt of notice, Amar Nath gave his statement Ex.PW6/A, in his own hand to the I.O. Amar Nath gave statement to the effect that on 21.10.2014, when he was going to his field at place Kasladi, 4-5 persons met him there, who told him that Charas was recovered from one person at Chinjra and that Charas was belonging to one Lalu, who is also known with name Ram Lal alias Lal Chand. PW6 Amar Nath also told that he had not seen said Lalu in the village since the time when Charas was recovered, as he (Lalu) also belongs to the same village of PW-6. During the course of investigation, notice Ex.PW5/A, was issued by the I.O. to Davender Nath (PW5), who revealed to the police that on 20.10.2014, said Lalu came to him alongwith one bag and one 'BORU' and requested him to sent the same through his span to Chhinjra. PW5 sent the said bag and 'BORU' through his span to Chinjra and, thereafter, Lalu went away from the spot. Statement, Ex.PW5/B was given by PW-5 to the I.O. The statement given under Section 67 of the NDPS Act by PW-5 revealed about two mobile numbers, out of which, one was in the name of co accused Khekh Ram and second was in the name of one Ram Singh. Then PW-8 I.O. Karambir Singh got verification about said mobile numbers from Air-tel Company. One was found in the name of co accused Khekh Ram, SIM of which was issued by Davinder Singh (PW4), who runs a shop of recharge and activation, at Jari, Customer application form is Ex.PW3/K.

9. During investigation, IOs. PW8 and PW9 gave notices, Ex.PW4/A and Ex. PW4/B to PW4, who gave statement, Ex.Pw4/C, stating that he had activated SIM of mobile number 98168-25031, which was issued by him, in the name of co accused Khekh Ram. PW4 also gave statement, Ex.PW4/D, to the I.O. A.C. Malla, which was recorded during the investigation and recovery of Charas, stating that he runs a shop of SIM cards at Jari. I.O. (PW8) Karambir Singh collected call details of mobile phone numbers 98167-11354, Ex.PW3/B, 98168-25031, Ex.PW3/D, 98059-49470, Ex.PW3/A and 98165-59297, Ex.PW3/C from Ist October to 31 October, 2014 from PW-3 Davender Verma, Nodal Officer, Bharti Airtel, Kusumpti, Shimla. After supplying aforesaid call details, PW3 Davender Verma (Nodal Officer), also issued certificate, Ex.PW3/E, to the I.O. under Section 65-B of NDPS Act. PW3 Davender Verma also supplied customer application form of mobile No. 98059-49470 with ID proof. He also supplied customer application form, Ex.PW3/F, of mobile No. 98167-11354, having stamp of distributor, M/s Negi Studio and Communication, Sainj, as well as stamp of retailer, Budhi Singh prop. M/s Babloo

Communication with ID proof, Ex.PW3/G. PW3 also supplied customer application form, Ex.PW3/H, having stamp of distributor M/ Niraj Enterprises, Gandhinagar, Kullu, and also stamp of retailer Ansuya Store, and ID proof, Ex.PW3/J, of mobile phone No. 98165-59297. He also supplied customer application form, Ex.PW3/K, having stamp of distributor, M/.s Sharma Communication Main Bazar Jari, and also stamp of retailer M/s Davender Thakur Communication, Jari and ID proof, Ex.PW3/L of mobile No. 98168-25031.

10. During investigation, one Dola Singh gave his statement Ex.PW8/K to the I.O. Karambir Singh. Thereafter, I.O. issued summons to co accused Khekh Ram and one Ram Singh. Summons issued to Ram Singh were received un-served by the I.O. due to incorrect address. Notices issued to co accused Khekh Ram are Ex.PW8/K-1 to Ex.PW8/K-3. Thereafter I.O. Karambir Singh raided house of co accused Khekh Ram in presence of witness Moti Ram and memo Ex.PW8/L was prepared in this regard. Notice Ex.PW8/M was issued to witness, Moti Ram to become witness in the case. Proceedings under Section 81 and 82 of Cr.P.C. were initiated against co accused Khekh Ram, however, he surrendered before the court on 02.06.2015. The police custody of co accused Khekh Ram was obtained and his statement, Ex.PW8/N, was recorded by the I.O. Karambir Singh. 'Jamatalashi' of co accused Khekh Ram was done vide memo. Ex.PW8/O. As per statement. Ex.PW9/N. recorded by I.O. Karambir Singh, of co accused Khekh Ram, He (co accused) disclosed that mobile No. 98168-25031 was belonging to him and he had also supplied 2.2 kg of Charas to Mohar Singh and Amari Lal @ Rs.50,000/- per kg., and co accused Khekh Ram was knowing said Mohar Singh.

11. Co accused Khekh Ram was arrested vide memo, Ex.PW8/P, and intimation of his arrest was given to his wife on mobile phone vide memo Ex.PW8/Q. He was got medically examined by moving application Ex.PW8/R and after his medical examination MLC Ex.PW8/S was obtained. PW8 Karambir Singh, I.O. also gave information qua arrest of co accused Khekh Ram to Zonal Director, NCB, Chandigarh, namely, Sh. Postu Sharma, vide letter Ex.PW8/T. Photograph Ex.PW8/U of co accused Khekh Ram was taken by the I.O. and, thereafter, as per orders of Zonal Director, the case file was handed over by Shri Karambir Singh (I.O.) to another I.O., namely Shri A.C. Malla.

12. PW9 Shri A.C. Malla carried out further investigation in the case with respect to co accused Khekh Ram. Notices u/s 67 of the NDPS Act were also issued to suspect Amri Lal and Pradhan, Mohar Singh, but no incriminating evidence was found against them. During investigation, ID of co accused Khekh Ram with respect to mobile No. 98168-25031, was found genuine which was verified from M/s Sharma Communication, Jari whose proprietor was Davinder Singh (PW4), who disclosed that he had issued this mobile number to co accused Khekh Ram. Statement of Davinder Singh, Ex.PW4/D was recorded. During investigation, it came to the notice of PW-9 that main supplier was Ram Lal alias Lalu, who had sent the contraband through span of Davender Nath (PW5). As such, notice Ex.PW9/R alongwith receipt Ex.R1 and notice Ex.PW9/R-1 alongwith receipt Ex.R3 were issued to Ram Lal. Third notice Ex.PW9/R04, alongwith the receipt was also issued to him by I.O. A.C. Malla.

13. On 22.10.2014, four samples i.e. A2, B1, C1 and D1 were handed over to C. Sumit (PW2) by Superintendent, Nirbhay Singh (PW7) alongwith two test memos and covering letter, for taking the same to CRCL Delhi. In the morning of 24.10.2014, C. Sumit (PW2) deposited the aforesaid case property with CRCL, Delhi alongwith covering letter, Ex.PW2/A and obtained receipt of CRCL, Delhi, which was issued by Sh. Gyander Sexena (PW1), who received the case property in CRCL. The receipt was then handed over to Superintendent, Nirbhay Singh by PW2 Sumit, on his return. Shri Gyander Sexena (PW1) on receipt of samples, immediately allotted the same to Ajay Sharma and on the same day, he (PW1) kept the samples in strong room. On 4.12.2014, the samples were taken from the strong room for analysis by Shri Ajay Sharma under supervision of PW1 Sh. Gyander Sexena. Thereafter samples were analyzed and after analysis, PW1 issued report. Ex.PW1/A, on 9.12.2014. Shri Ajay Sharma also conducted analysis under the supervision of PW1. Case property i.e. sample parcels A1, B1, C1 and D1 right from its receipt in CRCL, upto analysis, remained in safe custody and not had been tampered

with in the hands of PW1 Sh. Gyander Sexena and PW2 C. Sumit. As per report of CRCL Ex.PW1/A, issued by Shri Gyander Sexena on the reverse of Test memo Ex.PW9/E sent alongwith sample parcels, A1, B1, C1 and D1 all four samples were found positive for Charas. Charas lot-A, Ex.P1, Charas Ex.P2, Lot-B Ex.P3, Charas Ex.P4, Lot-C, Ex.P5 and Charas Ex.P6 and Lot-D Ex.P7 and Charas, Ex.P8 are the same recovered from accused persons. Lot-P Ex.P9 and packing material, Ex.P10 are also the same. Samples A1, A2, Ex.P11 and P12, samples B1, B1, Ex.P13 and P14, samples C1, C2, Ex.P15 and P16 and samples D1, D2, Ex.P17 and P18 are also the same.

14. As per call details Ex.PW3/A to Ex.PW3/D accused Nilmani was in constant contact with co accused Khekh Ram and absconding accused Lalu. During investigation, it transpired before commission of offence under Section 20 of NDPS Act, accused Nilmani conspired with co accused Khekh Ram, who abetted the commission of offence by accused Nilmani and Charas was supplied by Khekh Ram to Nilmani.

15. After the completion of the investigation, the complaint was initially filed in the Court against accused Nilmani and then supplementary complaint was filed against accused Khekh Ram for disposal in accordance with law.

16. The accused were supplied with the copies of complaint and other record as required under the law. Upon consideration, accused Nilmani was charged for the commission of offence punishable under Section 20 of the NDPS Act while co accused Khekh Ram was charged for the commission of offence punishable under Section 29 read with Section 20 of the NDPS Act. Charges were read over and explained to them, to which they pleaded not guilty and claimed trial.

17. The complainant, in support of its case examined ten witnesses.

18. Statements of accused under Section 313 of Code of Criminal Procedure were recorded. They denied the case of the complainant and stated that false case had been made against them and the witnesses had also deposed falsely. One witness was examined in defence by co accused Khekh Ram.

19. The learned Special Judge after evaluating the records convicted the accused as aforesaid, constraining the convicts/appellants to file the instant appeal.

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

20. The first and foremost issue which comes to the front is whether there is any provision to file a supplementary complaint and if so can the same be filed without obtaining leave of the Court, as admittedly accused Khekh Ram has been convicted only on the basis of the supplementary complaint.

21. Indisputably, the complaint in this case was initially filed only against the accused Nilmani whereas supplementary complaint came to be filed thereafter against accused Khekh Ram. It is also not in dispute that since complaint was filed by a public servant acting in discharge of his official duties, therefore, the recording of preliminary evidence under Section 200 of the Criminal Procedure Code (for short the '**Code**') was dispensed with and after perusing the complaint and the documents, the learned Special Judge took cognizance only against Nilmani as he was sole accused.

22. Now adverting to the legal position as to whether a supplementary complaint that too without the leave of the Court could have been filed against the accused Khekh Ram. We notice that there is no unanimity of judicial opinion on the subject as would be evident from the further decisions.

23. However, before adverting to those decisions, it would be necessary to make note of certain provisions of the Code. 'Complaint' is defined under Section 2(d) in the following terms:-

"2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

Chapter 14 provides:

"190. Cognizance of offences by Magistrate.- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c)upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

24. At this stage, it would be apposite to take note of Sections 36C and 51 of the NDPS Act, which read thus:-

"36C. Application of Code to proceedings before a Special Court.

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

51. Provisions of the code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures

The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."

25. Indubitably, the provisions of the Code of Criminal Procedure, 1973 have been made applicable to the proceedings before the Special Court under the NDPS Act and similar provisions are contained in certain other statute like Central Excise and Salt Act, 1944, Food Adulteration Act, 1954 and Prevention of Money Laundering Act, 2002 etc.

26. In ***Hemant P. Vissanji and others vs. Mulshankar Shivram Rawal and another, 1991 Cri.L.J 3144***, while dealing with the case where the Magistrate has taken cognizance of the complaint for the second time the Hon'ble Bombay High Court held that the same was impermissible in law as the only course open to the Magistrate was to exercise powers under Section 319 of the Code and if satisfied of a prima facie case against the accused, issue process in the said complaint. It was observed as under:-

"[5] Mr. Vashi then pointed out that in the instant case, not only did the first complaint filed by the complainant against Mahadu Gopal and others vide criminal Case No. 745 of 1984 not disclose the fact that there were other unknown accused whose particulars were not available to the complainant at the time when the complaint was lodged, but that what is material is that the offence alleged in both the complaints i.e. Criminal Case No. 745 of 1984 against Mahadu Gopal and others and the complaint filed against the petitioners in Criminal Case No. 1004 of 1986 are identical. The Counsel contends that by permitting the Magistrate to take cognizance of the complaint a second time, there is serious prejudice to the

petitioners. He points out that the complainant may very well lead evidence before the trying Magistrate in his earlier complaint No. 745 of 1984 and satisfy the Magistrate that the offences alleged against the petitioners were committed by the petitioners. It is open then to the Magistrate to exercise powers under section 319 of the Code and if satisfied of a prima facie case against them, to issue process in the said complaint against the petitioners. While this course would require an examination of the evidence in support of the allegations against the petitioners, in the second Complaint No. 1004 of 1986, without any further ado the learned Magistrate has issued process against the petitioners. This, in the submission of the learned Counsel, would be an abuse of the process of law which is capable of being cured by invoking the inherent powers of the High Court saved under section 482 of the Code of Criminal Procedure. This contention is valid and needs to be accepted. Mr. Vashi drew my attention to the judgment of the Division Bench of our High Court in (Krishna Parasharam Karekar v. The State of Maharashtra)2, 80 Bombay Law Reporter 167, wherein our High Court pointed out that in order to exercise powers under section 319(1) of the Code what has to be considered is the evidence of witnesses recorded in the trial and not merely the police papers which are made available to the Court in the trial. This judgment, in my view, supports broadly the contention being advanced by Mr. Vashi.

27. In ***Ajit Narayan Huskar and others vs. Assistant Commissioner, 2002(4) KarLJ 107***, learned Single Judge of the Karnataka High Court while dealing with a similar issue under the Central Excise and Salt Act, 1944 with respect to filing of supplementary complaint observed that there was no provision in the Court for filing supplementary complaint and if any more accused were to be brought in, the only procedure known to law is by taking recourse to Section 319 of the Code by invoking the said provision at the appropriate stage. It is relevant to produce observations as contained in para-5, which reads thus:-

"5.At the outset, the procedure adopted by the learned Magistrate in permitting the additional accused to be brought in by way of what the complainant calls 'supplementary complaint' is to be found fault with. Here was the original complaint against two accused filed under Section 200 of the Criminal Procedure Code by the respondent. Learned Magistrate took cognizance. Complaint being from a public servant acting in discharge of his official duties, in view of Clause (a) of the proviso to Section 200 of the Criminal Procedure Code, complainant was not examined. On perusal of the complaint and the documents produced, learned Magistrate found sufficient ground to proceed and a direction issued to issue process against two accused, namely, ITC and Ashok Bhatia for offences under Sections 9 and 9-AA of the Act. Thereafter, if any more accused were to be brought in, the only procedure known to law in a proceeding like the one that was there before the learned Magistrate, was by taking recourse to Section 319 of the Criminal Procedure Code and by invoking the said provision at the appropriate stage. There was no scope under any of the provisions of the Criminal Procedure Code for the complainant to go on filing supplementary complaint(s) to bring in some accused at one point of time, and by the other supplementary complaint to bring in some other accused at another point of time, etc. Once the learned Magistrate has taken cognizance under Section 190(1)(a) of the Criminal Procedure Code upon a complaint presented under Section 200 of the Criminal Procedure Code and has directed issuance of process, the further course of action shall have to be governed by Chapter XIX or XX of the Criminal Procedure Code as the case may be. It is not legally permissible for the complainant to file what he calls 'supplementary complaint' and then bring in any other person as accused. In a case like the one that was there before the learned Magistrate initiated under Section 200 of the Criminal Procedure Code, the only course known to law to bring

in as accused someone not there at the initial stage, would be by invoking Section 319 of the Criminal Procedure Code at the appropriate stage. Entertaining, by the learned Magistrate, of the supplementary complaint, therefore, is not legally sustainable."

28. In ***S. Nagrajan vs. State in Crl. Revision Petition No. 321 of 2004***, learned Single Judge of Hon'ble Delhi High Court while dealing with case under Food Adulteration Act, 1954 was confronted with the situation whether a second complaint in respect of the same incident could be maintained. Negating the said contention, it was held that cognizance of the offence can only be taken in terms of Section 190 of the Code and such mode is on the basis of the complaint. Such cognizance of an offence can only be taken once, therefore, once the complaint is filed then second complaint was totally barred and accordingly the cognizance in the second complaint against the new accused persons could not have been taken. The relevant observations as contained in paragraphs 9, 14 and 15, reads thus:-

"9. Mr. Mathur, the learned senior counsel for the petitioner has raised three contentions. The first contention which has been raised by the learned senior counsel is that the cognizance of an offence can be taken only once. In the instant case, the complaint under Section 7 read with Section 16(1) (1A) of the Act was filed, of which cognizance was taken by the learned Magistrate and notice was issued to the three respondents, namely, Madan Lal of M/s.Popular Store, vendor-cum-proprietor or M/s.P.K.Agency supplier and National Diary Development Board, manufacturer. It was further contended that it was not open to the learned Magistrate to entertain the second complaint in respect of the same incident and issue notices to the accused persons afresh.

14. I find myself in agreement with the contentions raised by the learned counsel for the petitioner. The cognizance of an offence can be taken only in terms of Section 190 of Cr.P.C. One of the modes for taking cognizance is on the basis of a complaint. It may be also pertinent here to mention that a cognizance of an offence can be taken only once, therefore, once the complaint is filed under the Act, in the instant case, being the first complaint against the three accused, namely, Madan Lal of M/s.Popular Store, vendor-cum-proprietor or M/s.P.K.Agency supplier and National Diary Development Board, manufacturer, the second complaint was totally barred and accordingly the cognizance of the second complaint or the second offence in the second complaint against the new accused persons could not have been taken. The cognizance of the offence against the new accused persons in such an eventuality could be taken only during the course of trial in pursuance to Section 319 Cr.P.C. in case the evidence would have come up against them.

15. The petitioner in the instant case had rightly agitated before the learned Magistrate that the second complaint could not have been filed, and therefore, they ought to have been discharged in respect of the second complaint, but this request was rejected by the learned Magistrate on 26.9.2003. Curiously enough, the revision was also dismissed by the learned Sessions Judge by giving an erroneous interpretation to the provisions of law. The learned Additional Sessions Judge relied upon Section 173(8) Cr.P.C., which permits the filing of a supplementary charge-sheet in a police case. There is a distinct procedure prescribed under the Code of Criminal Procedure for a police case and a complaint case. The Magistrate or much less a court of Sessions cannot follow two different procedures and try an accused person by amalgamating two different procedures. So far as Section 173 (8) of Cr.P.C. is concerned, it appears under the Chapter XII of the Cr.P.C. under the heading „investigation", it comes into operation in a situation when an offence which is cognizable is registered by the police and an FIR is registered that the law envisages filing of a charge sheet and a supplementary charge sheet. When the cognizance is taken on the basis of a complaint, the Magistrate has to follow a procedure prescribed under Section 200, 202 and 204 and not under Section 173

Cr.P.C.This kind of amalgamation of two different kinds of procedures by the learned Sessions Judge has caused serious prejudice to the accused. The first complaint which was filed in the instant case was held by the learned Additional Sessions Judge to be permitted as a complaint against the vendor and the supplier, while as the second complaint can be treated against the manufacturer and the distributor. With utmost respect to the reasoning of the learned Sessions Judge, such an interpretation is erroneous. It is not open to the Judge to contend that the first complaint is against the vendor and the supplier specifically when the manufacturer was made a party in the first complaint itself. Moreover, under the Prevention of Food Adulteration Act only one complaint is filed by the Department against all the accused persons whether they are vendors, suppliers, distributors or manufacturers. There is no provision in Cr.P.C. for filing of a second complaint which may be akin to the filing of a supplementary charge-sheet in a police case. Therefore, I feel the reasoning given by the learned Magistrate as well as the learned Sessions Judge in this regard was totally erroneous. I am of the view that only the first complaint against the petitioner was sustainable."

29. In ***Vinod Gupta vs. Haryana State Pollution Control Board, 2016(1) RCR (Cri) 206***, the learned Single Judge of Hon'ble Punjab & Haryana High Court chose to follow the view taken by the Hon'ble Karnataka and Delhi High Courts, as would be evident from the following observations which reads thus:-

"12. Coming to the impugned summoning order (Annexure P-3), it has been found that the learned Magistrate failed to appreciate the abovesaid material aspect of the matter, about the non-maintainability of the additional complaint (Annexure P-1). The learned Magistrate fell in serious error of law, while exceeding his jurisdiction taking cognizance of the same offence for the second time, which was not permissible in law, because the cognizance of any offence can be taken only once, in terms of Section 190 Cr.P.C. Once the filing of additional complaint itself was not permissible, the impugned summoning order was an order without jurisdiction and the same cannot be sustained.

13. However, as fairly conceded by the learned senior counsel for the petitioners, the complainant-Board will be at liberty to move an appropriate application under Section 319 Cr.P.C., at the appropriate stage of criminal trial of the original complaint (Annexure P-5), for the purpose of summoning of other accused persons, including the petitioners, to face criminal trial as additional accused. In fact, it goes without saying that the prosecuting agency or the complainant in a complaint case, as in the instant matter, would always be at liberty to move the application under Section 319 Cr.P.C., however, at an appropriate stage of the criminal trial.

14. In the present case, the complainant-Board, instead of waiting for the appropriate stage of the criminal trial of its original complaint (Annexure P-5) and moving an application under Section 319 Cr.P.C., filed the impugned additional complaint (Annexure P-1), for which the complainant-Board was not entitled in law, such an additional complaint being not maintainable.

15. The above-said view taken by this Court also finds support from the above-said judgments relied upon by the learned senior counsel for the petitioners. The relevant observations made in para 14 of its judgment by Delhi High Court in S.Nagrajan's case , which can be gainfully followed in the present case, read as under:-

> *"I find myself in agreement with the contentions raised by the learned counsel for the petitioner. The cognizance of an offence can be taken only in terms of Section 190 of Cr.P.C. One of the modes for taking cognizance is on the basis of a complaint. It may be also pertinent here to mention that a cognizance of an offence can be taken only once, therefore, once the*

> *complainant is filed under the Act, in the instant case, being the first complaint against the three accused, namely Madan Lal f M/s Popular Store, vender-cum-proprietor or M/s P.K.Agency Supplier and National Diary Development Board, manufacturer, the second complaint was totally barred and accordingly the cognizance of the second complaint or the second offence in the second complaint against the new accused persons could not have been taken. The cognizance of the offence against the new accused persons in such an eventuality could be taken only during the course of trial in pursuance to Section 319 Cr.P.C. in case the evidence would have come up against them."*

30. However, the Hon'ble Jharkhand High Court in ***Narendra Mohan Singh & Anr. vs. Directorate of Enforcement, Cr.MP No. 2686 of 2013, decided on 22.03.2014***, while dealing with the case under the Prevention of Money Laundering Act, 2002, where the Magistrate had taken cognizance of the offence upon supplementary complaint held that the complaint referred to under Sections 44(1)(b) and 45 of the PML Act, it never prevents of filing of supplementary complaint as the reference of a complaint has been made in those provisions in the context that whenever a complaint filed by an authority authorized, court may take cognizance over it.

31. It was further held that in such situation it can be said that the supplementary complaint can be lodged in the same manner in which a supplementary chargesheet is submitted in a police case and in case a restricted meaning is given then result would be that even after filing of the complaint culpability of any person is found during investigation, he will not be prosecuted and this could never be the intention of the legislature. The relevant observations read thus:

> *"4. Incidentally, it was also submitted that the provisions as contained in Section 44 (1)(b) of the PML Act, 2002 does empower a Special Court to take cognizance of the offence under Section 3 upon a complaint made by the authority authorized in this behalf and at the same time proviso to Section 45 of the PML Act, 2002 does provide that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by the authority prescribed therein and, thereby, when both the provisions do stipulate that the cognizance can be taken only upon 'a complaint', contemplation never seems to be there to have more than one complaint and, thereby, there does not appear to be any scope for launching prosecution by way of a supplementary complaint. Since, the cognizance of the offence has been taken upon a supplementary complaint, the said order cannot be held to be sustainable in the eye of law.*
>
> *16. Going further into the matter, it be stated that the question has been raised over the maintainability of the supplementary complaint on the premise that the provisions as contained in Section 44 (1)(b) and 45 of the PML Act, refers to 'a complaint'. Even if such reference is there of 'a complaint', it never prevents of filing of supplementary complaint as the reference of a complaint has been made in those provisions in the context that whenever a complaint filed by an authority authorized, court may take cognizance over it.*
> *17. We have already noted the circumstances, under which a supplementary complaint has been lodged. In such situation, it can be said that it has been lodged in the same manner in which supplementary charge sheet is submitted in a police case. If such a restricted meaning as has been sought to be advanced then the result would be that even if after filing of a complaint culpability of any other person is found during investigation, he will not be prosecuted. This can never be the intention of the legislature."*

32. Likewise, a learned Single Judge of the Hon'ble Calcutta High Court in ***Amit Banerjee vs. Shri Manoj Kumar, Assistant Director, Enforcement Directorate, 2016 (2) JCC***

1034, in case under Prevention of Money Laundering Act, 2002, while dealing with the issue of filing of supplementary complaint held that the same could be filed after leave had been granted by the Court to conduct further investigation. It is apt to reproduce the relevant observations, which read thus:-

> *"21.Coming to the issue of filing of the supplementary complaint, I find that the said complaint was presented before the Special Court pursuant to the leave granted by the Special Court to conduct further investigation. Although the power to conduct further investigation is envisaged in Section 173(8) of the code relating to Police investigation under Chapter XII of the Code, the said powers would extend to investigation of a crime, cases where investigations are conducted under the special law conducted by any other agency under a special statute, namely PML Act, in view of the fact that 'investigation' as defined in Section 2(h) of the Code is to include investigation conducted by other agencies under special statutes as has been held in Directorate of Enforcement vs. Deepak Mukherjee (1994) 3 SCC 440."*

33. As noticed above, all the decisions on the subject as have been referred to above, have been rendered by the learned Single Bench. We cannot persuade ourselves to agree with the view taken by the Hon'ble High Courts of Bombay, Karnataka, Delhi and Punjab & Haryana High Court as we are inclined to hold that a supplementary complaint after having obtained leave of the court in given facts and circumstances of the case is legally maintainable in the same manner in which a supplementary charge-sheet is submitted in a police case. We also inclined to adopt the reasoning of the Hon'ble Jharkhand High Court where it held that, in case, a restricted meaning is given then result would be that even after filing of the complaint culpability of any other person is found during investigation, he would not be prosecuted, which can never be the intention of the legislature.

34. From the conspectuous of the aforesaid discussion, we have no hesitation to conclude even though there exists no specific provision in the Code of Criminal Procedure to file supplementary complaint in a complaint case, however, if on further investigation and with the express leave of the court, the culpability and the complicity of any other person is established the supplementary complaint be filed.

35. Indubitably, in this case the NCB has not obtained any further permission for further investigation or even placing on record the supplementary complaint. Therefore, the trial on the basis of such supplementary stands vitiated against the Khekh Ram and once the complaint itself held to be not maintainable, then obviously any conviction and sentence based on such complaint has essentially to be set aside.

36. Accordingly, Appeal No. 450 of 2016 is allowed and the impugned judgment of conviction and sentence passed by the learned Special Judge-I, Kullu on 26.09.2016, is set aside. The appellant is acquitted of the charges framed against him. He is ordered to be released forthwith if not required in any other case. Registry is directed to prepare release warrants immediately.

Cr.Appeal No. 38 of 2017

37. The learned counsel for the appellant has formulated following points for resolvement:-

i). Facts brought on record by the NCB falsify the case of the prosecution.

ii). Documents on record show that it was a mere paper work and nothing happened and no such incident took place at any point of time.

iii). NCB has miserably failed to connect the FSL report Ex.PW1/A with the alleged contraband.

iv). Respondent has failed to comply with Section 42(2) of the Act.

v). Non-joining of independent witness is fatal to the case of the NCB.

vi). NCB case is full of infirmities, discrepancies, embellishments and improvements etc.

vii). Appellant has been wrongly implicated while the real culprits let off by the respondents.

viii). Non-interrogation of the appellant casts serious doubt on the NCB story.

Point No. I.

38. It would be noticed that the case set-up by the NCB is that on 20.10.2014, PW9 S/Shri A.C Malla alongwith PW10 Roshan Lal Negi, Maheshwar Barwal, Varinder Singh, Vinay Singh and Surjeet Singh were on surveillance duty in Kullu area where when at about 6:30 p.m., PW 9 received an information that at about 8:30 p.m. one person, namely, Neelmani (herein after referred to as accused) was likely to appear near span situated at about 1 km from Shat village and would signal with torch light and thereafter the persons on the other side of the village would send contraband through span. This information was imparted to PW7 Sh. Nirbhay Singh by PW9 on his mobile phone and on his verbal directions barricade (nakka) in the said area was laid.

39. As per the further case of the NCB, at about 8:30 p.m., the accused appeared and gave the signal with the help of torch to the other side and the villagers accordingly sent some material through span. Such material was taken by the accused. He was cordoned off and thereafter apprehended. Notice under Section 50 of the NDPS Act was issued to him and the accused alongwith the bags were thereafter taken to Zonal Office, Mandi, where the bags were opened and the other proceedings were conducted. After his arrest vide jamatalashi memo Ext.PW9/H, a sim bearing No. 98167-11354 was recovered and this sim as per the case of the NCB was being used by the accused on that date when he was in touch with the other persons over this phone.

40. Now, in case, Ext.PW 3/B, the calls details of this phone numbers perused, these clearly falsify the case of the NCB inasmuch as these clearly reflect that the appellant was using this phone and was in consistent touch with number of persons from 8:30 p.m. on 20.10.2014 till 12:23 p.m. on 21.10.2014 and as many as 37 calls that were made. This fact assumes importance because it is during this time that the NCB claims to have conducted the proceedings of search and seizure. If that be so, it is difficult to comprehend that the petitioner even after his arrest would be allowed to use his mobile that too up till 12:23 p.m. of the next day i.e. 21.10.2014.

41. In addition to the above, we also notice that even though the case of the NCB is that they recovered the alleged contraband on 20.10.2014, but in case the memo of recovery is perused the same is dated 21.10.2014, which is not only contrary to the case set-up by the NCB but also contrary to the other documents like Panchnama Ext. PW-9/F, recovery-cum-seizure memo Ext. PW-9/D, Test memo Ext.PW9/E and the complaint of the NCB wherein the NCB officials have shown the date of recovery as 20.10.2014.

42. Now, in this background, in case, the statements of the NCB officials, namely, S/Shri Surjit Singh and Roshan Lal Ext. PW-9/Q-1 and Ext.PW-9/P-1 recorded under Section 67 of the NDPS Act and thereafter the statement of Sh. Roshan Lal Negi in the Court as PW-10 is perused, it would be noticed that these witnesses are silent about the receiving the alleged information and transmitting the same to PW-7 Superintendent, NCB at 6:30 p.m.

43. It is the case set-up by the NCB that these officials alongwith PW-9 Sh. A.C. Malla were present at Kullu area in routine surveillance and travelling to place Shat. It is further the admitted case of the NCB that officials of the NCB had already received information regarding the alleged contraband which they, in turn, had transmitted to PW-7. Then why these witnesses in their statements under Section 67 of the NDPS Act have no uttered a single work about the receiving or transmitting the said information. This casts serious doubt on the story of the NCB.

Point No. II

44. As per the case set-up by the NCB that no proceedings were conducted on the spot because it was dark and the accused was taken to Zonal Office, Mandi where search and seizure proceedings were conducted. PW-9 claimed to have issued two notices Ext.PW-9/A, the option given to the appellant under Section 50 of the NDPS Act and Ext. D-2, notice given to the appellant under Section 67 of the NDPS Act. In D-2, it has been specifically written that 19.780 kgs. of Charas has been recovered from the appellant and directions were issued to him to appear before PW-9 and interestingly the place of issuance of this notice is mentioned as 'Shat'. If that be so, then how come the weight of the contraband finds mention in this notice when it is the specific case of the NCB that search, weighing and seizure took place at Zonal Office, Mandi and not at village Shat.

45. Now, in case notice under Section 50 of the NDPS Act Ext.PW9/A is perused, even in this notice the place of issuance of notice is village Shat which again contradicts the very case of the NCB that accused was taken to Zonal Office, Mandi, immediately after his apprehension.

46. This fact has been categorically admitted by PW9 in his statement before the Court when he states "I do not obtain written consent of the accused in compliance to provisions of Section 50 of the NDPS Act."

47. In addition to this, it would be noticed that seizure memo Ex.PW-9/D, wherein the date, time and place of seizure has been written as 20.10.2014, 20:40 hours at Shat, which is again contrary to the case set-up by the NCB as according to it no proceedings had been conducted at Shat.

48. Apart from above, we may notice certain other discrepancies in the documents which have been produced before this Court; (i) Memo Ext.PW-9/E does not contain any date when the same was prepared; (ii) In Panchnama Ex.PW-9/F, the time of receiving the information and the time of reaching is tampered with; (iii) PW-9/G is the statement of the accused recorded under Section 67 of the Act wherein the date has been changed from 21 to 20 to show the arrest of the appellant.

49. Thus, it stands approved on record that the NCB has fabricated the documents or else these documents ought to be in consonance with the case set-up by it.

Point No. III

50. Even though the NCB form in triplicate have been placed on record but the same are in compete contradiction to the oral testimonies of the NCB witnesses as well as memo Ext.PW-9/D. The seizure memo is completely silent about the taking of samples marked as Lot A-1, B-1, C-1 and D-1 which were alleged to have sent for analysis. It only reflects about one gunny bag and one hand bag being seized while there is no reference in seizure memo about the samples.

51. Further, as per the complaint, seal used for sealing the bulk and samples was "NARCOTICS CONTROL BUREAU-4". The samples were deposited in the godown vide receipt Ext.PW-7/C were having the seal "NARCOTICS CONTROL BUREAU-4".

52. Whereas the register maintained in the godown is placed on record Ext.PW-7/D also shows that case property sealed with seal "NARCOTICS CONTROL BUREAU-4".

53. The samples were sent to laboratory through NCB forms annexed with report Ext.PW-1/A and NCB Ext.PW-9/E and the seal mentioned therein which was allegedly tallied by PW1 is different from the seal and bear impression of seal was "NARCOTICS CONTROL BUREAU-CHD-4" for which the report has been given.

54. There is no explanation on record as to how the impression of seal was changed.

55. It is only in the Court that it was claimed that the seal of CHD-4 was used but when PW10 was confronted on this aspect by the defence, he admitted in his statement Ext.PW-9/P-1, that he had not mentioned the word CHD-4 while mentioning the seal.

56. That apart, there is no mention of affixing the seal with impression CHD-4 in the statement of Sh. Roshan Lal Negi recorded under Section 67 of the NDPS Act Ext.PW9/P-1 of the Sh. Roshan Lal Negi from whom the alleged seal was allegedly taken.

57. Furthermore, there is no explanation as to why the case property deposited in the godown vide receipt Ext.PW-7/C having seal "NARCOTICS CONTROL BUREAU-4" was not sent to laboratory and the samples having seal impression "NARCOTICS CONTROL BUREAU CHD-4" was sent for obtaining report Ext.PW1/A.

Therefore, in such circumstances, the arguments of the learned counsel for the appellant that possibility of tampering cannot be ruled out does carry substantial force.

Point No. IV

58. It is the case set-up by the NCB that its officials had prior information, however, the statements and documents on record clearly go to show that paper work was done later only to show the arrest of the appellant in a manner as alleged by the NCB and the information was neither reduced in writing nor transmitted to the superior officers at the time and date as alleged by the NCB.

59. It is the specific case of the NCB as averred in the para-3 of the complaint that on 20.10.2014 NCB team was on routine surveillance duty at Kullu and at about 18:30 hrs 'Secret' specific information was received by Sh. A.C. Malla, I.O. that a person, namely, Nilmani @ Nitu aged 30-35 years will arrive between 8:30 p.m. and 9:00 p.m near a span (luggage carrying trolley from one valley to another side) situated at around half to 1 km. ahead to Shat village towards Manikaran and he will signaled the torch on off thrice towards village situated at other side of the hill and the villagers will end 15-20 kgs. charas in span towards Nilmani @ Nitu and he will pick up the contraband. The said information was given on mobile and also reduced into writing and laid before the Superintendent, Narcotics Control Bureau, Chandigarh. The Superintendent telephonically directed A.C Malla, I.O. to organize a surveillance operation and constitute a team of NCB for intercepting the accused.

60. Now, in case, the evidence is adverted, then it would be noticed that oral and documentary evidence available on record falsify the case of the NCB that any such information was received or transmitted to the superior officer. The complainant states that the information was given on mobile and reduced in writing and laid before the Superintendent who telephonically directed Sh. A.C. Malla to organize a surveillance operation and constitute a team of NCB for intercepting the accused.

61. We may at this stage notice in the following facts and circumstances of the case, which create serious doubt in the case of the NCB:

a) the information Ex.PW-7/A is dated 22.10.2014 and not 20.10.2014 and releasing this discrepancy, PW-7 while entering witness box improved his version qua receiving of the information and introduced another story by stating that the said information was received through FAX, which is Ext.PW7/A and the same was received by him on 20.10.2014 around 11:00 p.m. However, when Ext.PW-7/A is perused, the same admittedly is not a FAX message and not even an original copy and, therefore, in the given circumstances, the NCB has withheld the best evidence which calls for an adverse inference.

b) There are no call details of the officials who sent the information under Section 42 of the Act and the person who received the same to substantiate the factum of calling and receiving of calls as alleged by them.

c) PW-9 even though tried to support the version of PW-7 regarding the sending of the FAX message but has candidly admitted in his cross-examination that Ext.PW-7/A is not a FAX copy and further admit that the FAX copy has not been placed on record.

d) As per PW9, the case property was taken by him to Zonal Unit, NCB Chandigarh on 21.10.2014 and was deposited with PW-7, who issued receipt Ext.PW-7/C in this regard.

It would also be noticed that in case PW-9 had visited PW-7 on 21.10.2014 then why the information under Section 42(2) of the NDPS Act was not placed before him on 21.10.2014 itself and came to be placed before him subsequently on 22.10.2014.

e) It is the case set-up by the NCB that the apprehension, search and seizure was conducted after sun set and before sun rise. Therefore, as per the mandate of law, PW-9 was required to write his reasons of believe in the said information as to why warrants could be obtained without affording the opportunity for escape, however, no such reasons find mention in Ext.PW7/A.

f) The time of receiving the information and apprehension of the appellant in Panchnama Ex.PW-9/F has been tampered with.

62. Adverting to compliance of Section 42 of the Act, it will apposite to extract the entire provision which reads thus:

"42. Power of entry, search, seizure and arrest without warrant or authorization

(1) *Any such officer (being an officer superior in rank to a peon, sepoy or constable) to the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any Narcotic Drug, or Psychotropic Substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset –*

(21) *enter into and search any such building, conveyance or place;*

(22) *in case of resistance, break open any door and remove any obstacle to such entry;*

(23) *seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and*

(24) *detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act;*

PROVIDED that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances

granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of Sub-Inspector;

PROVIDED FURTHER that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Whereas an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

63. Now, as regards the compliance of the aforesaid Section 42, there can be no quarrel with the proposition that what it requires is that where an official takes down an information in writing under sub-section (1) is required to sent a copy thereof to his immediate officer. That apart, Section 42(1) indicates that any authorized officer can carry out search between sunrise and sunset without warrant of authorization. The scheme indicates that in event the search has to be made between sunset and sunrise the warrant would be necessary unless officer has reasons to believe that a search warrant or authorization cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief has contemplated by proviso to sub-section (1) of Section 42 or sub-section (2) of Section 42 was recorded by any other officials of the NCB to proceed to carry on the search.

64. What would be the effect of non-compliance of Section 42 was a subject matter of consideration in a recent judgment of the Hon'ble Supreme Court in ***State of Rajasthan vs. Jag Raj Singh @ Hansa (2016) 11 SCC 687*** wherein the facts were quite identical to the one involved in the present case and it was observed as under:

"9. The NDPS Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. This Court had occasion to consider the provisions of NDPS Act in large number of cases. This Court has noted that the object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly.

This Court in State Of Punjab vs Balbir Singh, 1994 3 SCC 299, in paragraph 15 has made the following observations:

"15.The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial."

10. To the similar effect are the observations of this Court in Saiyad Mohd. Saiyad Umar Saiyed & others vs. The State Of Gujarat, 1995 3 SCC 610. Following was stated in paragraph 6 of the said judgment:

"6. It is to be noted that under the NDPS Act punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than IO years but which May extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is Proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit ar- ticles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate."

[11] *In the present case, Section 42 is relevant which is extracted as below:*

" 42. Power of entry, search, seizure and arrest without warrant or authorisation.-(l) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

> *(2) Where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."*

12. The High Court has come to the conclusion that there is breach of mandatory provisions of Section 42(1) and Section 42(2) and further Section 43 which was relied by the Special Judge for holding that there was no necessity to comply Section 42 is not applicable. We thus proceed to first examine the question as to whether there is breach of provisions of Section 42(1) and Section 42(2). The breach of Section 42 has been found in two parts. The first part is that there is difference between the secret information recorded in Exh. P-14 and Exh. P-21 and the information sent to Circle Officer, Nohar by Exh. P-15. It is useful to refer to the findings of the High Court in the above context, which is quoted below:

> *" From the above examination, it is not found that Exh. P-14 the information which is stated to be received from the informer under Section 42(2) of Act or Exh. P-21, the information given by the informer which is stated to be recorded in the Rozanamacha, copy whereof has been sent to C.O. Nohar, who was the then Senior Officer, Rather, Exh. P-15, the letter which was sent, it is not the copy of Exh. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found in the present case that section 42 (2) of Act, 1985 is complied with."*

13. What Section 42(2) requires is that where an officer takes down an information in writing under sub-Section (1) he shall sent a copy thereof to his immediate officer senior . The communication Exh. P-15 which was sent to Circle Officer, Nohar was not as per the information recorded in Exh. P 14 and Exh. P 24. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

14. Another aspect of non-compliance of Section 42(1) proviso, which has been found by the High Court needs to be adverted. Section 42 (1) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made following observations :

> *"Shishupal Singh PD-11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing HR 24 4057 under Section 42(1), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso*

of Section 42(1). Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best witness in this regard, who has not stated any fact in his statement regarding compliance of proviso to Section 42(1) and Section 42(2), sending of copy of reasons to believe recorded by him to his senior officials."

20. After referring large number of cases, this Court recorded conclusion in paragraph 25 which is to the following effect:

"25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his

immediate official superior. If there is total non- compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions 'of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non- compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

25. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non- compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.

Point No. V

65. It is more than settled that non-joining of independent witnesses is not always fatal to the case of the NCB and would depend on the facts and circumstances of each case.

66. Now, adverting to the facts of the case, it would be noticed that the admitted case of the NCB is that information was received by PW-9 at 6:30 p.m. when he was in Dhalpur area in

Kullu from where he reached the alleged spot where the accused is said to have been apprehended. The Dhalpur area is a part of the Kullu Bazaar and in the month of October obviously would be crowded with people at that time and, therefore, PW9 had ample time and opportunity to associate independent witnesses, especially, if the events unfolded in the manner as projected by the NCB.

67. In this backdrop, it would be necessary to advert to the testimony of PW-9, the relevant portion whereof are extracted below:-

> *"Secret information was received by me in Dhalpur area. It is correct that Shat is seven kilometers away from Bhunter. Manikaran chowk is at a distance of eight kilometers from Dhalpur, where diversion leads to Shat. Kullu is District Headquarter and police station is there. Bhunter starts at a distance of 200 meters from Manikaran chowk. Bhunter is Tehsil Headquarter. Nagwain is also Tehsil headquarter which is just away from Bhunter. There is police station at Aut, which is on road head like police station of Bhunter. Our office is in a rented building at Mandi. Owner resided in the said building. Tea stall is there in the ground floor. There are houses surrounding the building at Mandi. It is correct that another tea shop at a distance twenty yards away from our office. Tehsil office is also nearby to our office. I did not associate any person from the locality, while carrying out proceedings in the office. We sent in a vehicle to Shat. We took about half an hour to cover distance from Bhunter chowk to Shat. I did not sent any of the official of our team to call for witnesses from locality at Shat. Self stated place was isolated and it was pitch dark. I did not try to associate Gazetted Officer of Magistrate from Kullu, when I received the information, how could I have associated these persons in such circumstances."*

68. Likewise PW5 Davinder Nath has candidly admitted the availability of independent witness at or near the place of occurrence, as would be evident from his statement, relevant portion of which extracted below:-

> *"There is abadi of about 50-60 families in village Shat. It is correct that there are 2-3 houses below the span and one house is on upper side, but none is residing in the house. However, 2-3 houses below the span are occupied by the persons. Houses are visible from the road at the point of span. Towards Manikaran, Chhinjra village is also situated from span. Chhinjra village is having good population. At a distance of 100 meters away from span, there is abadi towards Jari. I used to come Bhunter bazaar. Bhunter bazaar is situated towards both sides of river. Hathithan is just adjoining to Bhunter and Hathithan bazaar runs in 1 km area. At place Bhunter, there is police station and Tehsil headquarters." "In October, apples season is in full swing and day and night transportation of apple cartons through span takes place including ration and other articles."*

69. From the aforesaid statement, this Court has no difficulty in concluding that despite availability of independent witnesses, the NCB did not choose to associate them even though they were having a vehicle driven by its driver Vijay Kumar who was part of the raiding party.

70. It needs to be noticed here that the instant is not a case of chance recovery, therefore, non-association of independent witnesses cannot be undermined and brushed aside lightly, more particularly, in light of what has been discussed above and has otherwise come on record.

71. Similar question came up before the learned Division Bench of this Court in ***Bhupender Chauhan vs. State of Himachal Pradesh 2015 (3) Shim.LC 1346***, wherein it was observed as under:-

> *"Now for discerning from the evidence on record, for rendering an apt conclusion that the Investigating Officer despite availability of independent witnesses had*

omitted to endeavour to elicit their participation in the apposite proceedings, at the site of occurrence, for hence rendering them to be flawed as well as vitiated, an advertence to the testimony of PW-1 is required to be made. The testimony of PW-1 C. Sohan Lal as existing in his cross-examination portrays an admission on the part of this witness that the house of Ex-President of Panchayat Kotla is located between Larji Mour and Village Thuari. Moreover, there also exists an admission in his cross-examination qua the existence of three houses near the house of Dola Singh, whose house is located at a distance of 100 meters from Chour Nallah (site of occurrence). Apart from the fact that this witness has deposed qua the existence of habitation in close proximity and vicinity of the site of occurrence, the association of whose inhabitants could have been, hence, elicited by the Investigating Officer in the apposite proceedings at the site of occurrence, this witness in his cross-examination has further deposed that the Investigating Officer had not made any arduous efforts to solicit the participation of independent witnesses in the apposite proceedings. The aforesaid evidence renders open or gives leeway to an inference that the Investigating Officer despite existence of habitation in the proximity and vicinity of the site of occurrence had willfully not made either arduous or assiduous efforts to solicit the participation of the independent witnesses in the opposite proceedings. Lack of sincere efforts on the part of the Investigating Officer to solicit the participation of independent witnesses in the apposite proceedings at the site of occurrence, sequels an apt deduction that the Investigating officer was goaded by an oblique motive to do so or he intended to smother or hide the truth qua the genesis of the prosecution version which hence stands flawed as well as vitiated.

14. Reinforcing strength to the aforesaid inference as derived from the factum deposed by PW-1 that despite existence of habitation in close proximity or vicinity of the site of occurrence, the Investigating Officer having willfully omitted to join inhabitants thereof in the apposite proceedings at the site of occurrence as such rendering the genesis of the prosecution version emaciated, is lent by the further factum as exists in the cross-examination of the Investigating Officer of his omitting to join independent witnesses in the apposite proceedings at the site of occurrence despite existence of a village in close vicinity to the site of occurrence. As a sequitur the inference as has hereinabove ensued on a discerning appraisal of the evidence of PW-1 C. Sohan Lal and the evidence existing in the cross-examination of the Investigating Officer, obviously then tilts the scale of justice in favour of the accused, besides shreds apart the evidentiary value of the testimonies of the officials witnesses even though they have deposed in unison and in consistency qua the factum of the apposite proceedings having been with legal aptness concluded at the site of occurrence."

Point No. VI to VIII

72. It is vehemently argued by the learned counsel for the appellant that there are major contradictions, inconsistencies, embezzlement and improvement in the NCB case.

73. As regards the apprehension ofthe appellant in case the averments made in complaint, more particularly para-6 are adverted to, then as per the case of the NCB at about 8:30 p.m., a person came and signaled to the other side by torch and after about 5-7 minutes some material came in span from the other end and the person picked up the same and started moving towards Shat village. The NCB team cordoned off the person immediately. However, if the statement of PW9 is now perused, he clearly states that after picking up the material accused started running and team cordoned off the area and thereafter he went near to the person and asked his name and address. This version is not supported by PW10 who states that this person immediately on lifting of the articles came to be apprehended by the team.

74. Now, adverting to the contention of the appellant that real culprits have been let off.

75. It is vehemently argued by the learned counsel for the appellant that the admitted case of the NCB is that contraband belonged to one Lalu @ Lal Chand @ Ram Lal, Mohar Singh and Amri Lal and for this reliance is placed on the testimony of PW-9 who states "thus during investigation, it was revealed that main supplier was Ram Lal alias Lalu." Similarly, PW8 Karambir Singh also states "source disclosed to me that contraband was belonging to Mohar Singh and Amri Lal. I did not initiate any proceedings under Sections 81 and 82 Cr.P.C. against both Mohar Singh and Amri Lal."

76. Apparently, there is no explanation on record why the NCB did not initiate proceedings under Sections 80 and 82 of the Cr.P.C. against the aforesaid persons as was done for arresting co-accused Khekh Ram. This assumes importance when it has come on record that there was doubt on the integrity of NCB officials for letting off the real culprits which fact has been candidly admitted by both the I.Os. PW8 in his cross-examination has correctly stated that it was correct that inquiry was done regarding money transaction done to let off real culprits. Likewise PW-9 also stated that "Inquiry was done by the department regarding some allegations of money transactions having taken place allegedly letting off real culprits."

77. Apart from above, there is no explanation forthcoming as to why the accused was sent to judicial custody on the same day of his arrest without any efforts by the NCB official to interrogate him on any aspect of the case. PW9 in his statement has admitted that no inquiries were made qua this aspect of the case, as is evident of the statement which is extracted below:-

> *"I do not enquire about the settlement amount of the contraband. I did not inquire who made the payment. I did not inquire to whom payment was made and on which date. I did not inquire at what place settlement was made. I did not inquire with whom settlement was made and what transpired during settlement. I moved application Ext.D-1 for judicial custody of accused."*

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, the Hon'ble Supreme Court observed as under:-

> "6. Section 27 of the Act reads thus:
>
> *"27. Punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance or consumption of such drug or substance Whoever, in contravention of any provision of this Act, or any rule or order made or permit issued thereunder, possesses in a small quantity any narcotic drug or psychotropic substance, which is proved to have been intended for his personal consumption and not for sale or distribution, or consumes any narcotic drug or psychotropic substance, shall, notwithstanding anything contained in this Chapter, be punishable-*
>
> > *(a) Where the narcotic drug or psychotropic substance possessed or consumed is cocaine, morphine, di-acetyl-morphine or any other narcotic*

drug or any psychotropic substance as may be specified in this behalf by the Central Government, by notification in the Official Gazette, with imprisonment for a term which may extend to one year or with fine or with both; and (b) Where the narcotic drug or psychotropic substance possessed or consumed is other than those specified in or under Cl. (a) with imprisonment for a term which may extend to six months or with fine or with both

(2) Where a person is shown to have been in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, shall lie on such person,"

Explanation- (1) For the purposes of this section "small quantity" means such quantity as may be specified by the Central Government by the notification in the Official Gazette.

In general possession of any narcotic drug or psychotropic substance has been prohibited by S. 8 of the Act and any person found in possession of the same contrary to the provisions of the Act or any rule or order, made or permit issued thereunder is liable to be punished as provided thereunder to imprisonment for a term which shall not be less than 10 years and shall also be fined which shall not be less than Rs. 1 lac. S. 27 of the Act, however, is an exception whereby lesser punishment is provided for illegally possessing any "smaller quantity" for personal consumption of any narcotic drug or psychotropic substance. Under this Section the following ingredients should be fulfilled:

"(a) The person has been found in possession of any narcotic drug or psychotropic substance in "small quantity";

(b) Such possession should be in contravention of any provision of the Act or any rule or order made or permit issued thereunder; and

(c) The said possession of any narcotic drug or psychotropic substance was intended for his personal consumption and not for sale or distribution."

The first explanation to this Section lays down that the small quantity means such quantity as may be specified by the Central Government by a notification. By virtue of the notification issued on 14-11-85 for the purpose of this Act 5 gms. or less quantity of Charas shall be the small quantity. Explanation 2 further lays down that the burden of proof that the substance was intended for the personal consumption and not for sale or distribution, lies on such person from whose possession the same was recovered. As held, above in the instant case the prosecution has proved that the quantity seized from the accused was less than 5 gms. Therefore it is within the meaning of "small quantity" for the purpose of S. 27.

7. *Then the other ingredient that has to be satisfied is whether the substance found in possession of the appellant was intended for is personal consumption and not for sale or distribution. No doubt as the Section lays down the burden is on the appellant to prove, that the substance was intended for his personal consumption. As to the nature of burden of proof that has to be discharged depends upon the facts and circumstances of each case. Whether the substance was intended for personal consumption or not has to be examined in the context in which this exception is made. In the instant case the accused though in general has taken a plea of denial but his examination under S. 313, Cr.P.C. by the Magistrate reveals that there was such a plea namely that it was meant for his personal consumption. In the judgment of the trial Court it is noted that the accused made an application on 23-3-90 stating that the piece said to have been recovered from him was less than 5 gms. and not 12 gms. as alleged and that the application was written and*

signed by the appellant himself. The prosecution case itself shows that he was having this substance in a pouch along with a chillum (smoking pipe) and smoking material. The averments made by the appellant in the application and as extracted by the trial Court would themselves show that it was meant for his personal consumption. The above surrounding circumstances under which it was seized also confirm the same. The appellant is a foreigner and as a tourist appears to have carried this substance for his personal consumption. We are aware that the menace of trafficking in narcotic drugs and psychotropic substance has to be dealt with severely but in view of the provisions of S. 27, we are unable to hold that the small quantity found with the appellant was not meant for his personal consumption and that on the other hand it was meant for sale or distribution. Therefore the appellant is liable to be punished as provided under S. 27 of the Act.

81. Thus, what can be deduced from the aforesaid discussion is that:-

(i) Even though the specific case set-up by the NCB is to the effect that the accused had been apprehended at about 8:30 p.m. on 20.10.2014 and as per PW-10 he was not allowed to go anywhere till 21.10.2014 at 2:00 a.m. and had not contacted anyone on his mobile phone nor he receive any call. However, the call details clearly prove that he was in constant touch with number of persons from 8:30 p.m. on 20.10.2014 till 12:23 p.m. on 21.10.2014 and as many as 34 calls had been made.

(ii) The contraband alleged to have been recovered on 20.10.2014 but in case the memo of recovery Ex.PW9-D is perused, the same is dated 21.10.2014.

(iii) The witnesses S/Shri Surjit Singh and Roshan Lal whose statements have been recorded under Section 67 of the Act and available as Ext.PW-9/Q-1 and Ext.PW9/E are conspicuously silent about the receiving of the secret information and transmitting the same to the PW-7, Superintendent, NCB at 6:30 p.m. on 20.10.2014.

(iv) It is the specific case set-up by the NCB that no proceeding whatsoever conducted on the spot i.e. 'Shat' because it was dark, therefore, the accused was taken to Zonal Office, Mandi where search and seizure proceedings were conducted. PW9 has claimed to have issued two notices Ext.PW-9/A i.e. option given to the appellant under Section 50 of the NDPS Act and Ext.D-2, notice given to the appellant under Section 67 of the NDPS Act and in both these notices, the place of issuance is mentioned as 'Shat'.

(v) Memo Ext. PW9/A does not contain any date when the same was prepared.

(vi) In Panchnama Ext.PW9/F, the time of receiving information and the time of reaching is tampered with.

(vii) In Ext.PW9/G, the statement of the accused under Section 67 of the Act, the date has been tampered with and changed from 21.10.2014 to 20.10.2014 to show the arrest of the accused.

(viii) The seals alleged to have been used are different from those exhibited on the record.

(ix) The information Ex.PW-7/A is dated 22.10.2014 and not 20.10.2014 and realizing this discrepancy, PW-7 while entering witness box improved his version qua receiving of the information and introduced another story by stating that the said information was received through FAX, which is Ext.PW7/A and the same was received by him on 20.10.2014 around 11:00 p.m. However, when Ext.PW-7/A is perused, the same admittedly is not a FAX message and not even an original copy and, therefore, in the given circumstances, the NCB has withheld the best evidence which calls for an adverse inference.

(x) There are no call details of the officials who sent the information under Section 42 of the Act and the person who received the same to substantiate the factum of calling and receiving of calls as alleged by them.

(xi) PW-9 even though tried to support the version of PW-7 regarding the sending of the FAX message but has candidly admitted in his cross-examination that Ext.PW-7/A is not a FAX copy and further admit that the FAX copy has not been placed on record.

(xii) As per PW9, the case property was taken by him to Zonal Unit, NCB Chandigarh on 21.10.2014 and was deposited with PW-7, who issued receipt Ext.PW-7/C in this regard.

It would also be noticed that in case PW-9 had visited PW-7 on 21.10.2014 then why the information under Section 42(2) of the NDPS Act was not placed before him on 21.10.2014 itself and came to be placed before him subsequently on 22.10.2014.

(xiii) It is the case set-up by the NCB that the apprehension, search and seizure were conducted after sun set and before sun rise. Therefore, as per the mandate of law, PW-9 was required to write his reasons of believe in the said information as to why warrants could be obtained without affording the opportunity, however, no such reasons find mention in Ext.PW7/A.

(xiv) The entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each had been sent. Therefore, even assuming that the case set-up by the NCB is proved to the hilt even then it is only 100 grams of charas that can be said to have been recovered from either of the accused for which the maximum conviction would be about one year and concededly the appellants have undergone more than the aforesaid said period in custody.

(xv) There is no explanation forthcoming as to why the accused was sent to judicial custody on the same day of his arrest without any efforts by the NCB official to interrogate him on the vital aspects of the case.

82. It is cardinal principle of criminal jurisprudence that "graver the offence, stricter the proof." The purpose of criminal court is not to convict any accused facing the trial but to do justice.

83. On the basis of what we have observed above, we have no hesitation to conclude that the NCB has miserably failed to lead cogent, reliable and satisfactory evidence to prove the guilt of the accused beyond reasonable doubt.

84. Accordingly, we find merit in this appeal and the same is allowed. The impugned judgment of conviction and sentence passed by the learned Special Judge-I, Kullu on26.09.2016, is set aside. The appellant is acquitted of the charges framed against him. He is ordered to be released forthwith if not required in any other case. Registry is directed to prepare release warrants immediately.

****

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

Preet Kumar ..... Petitioner

Versus

State of Himachal Pradesh ..... Respondent.

Cr.MP(M) No. 1471 of 2017

Date of Decision No.01.01.2018

Code of Criminal Procedure, 1973- Section 439- Section 302 read with Section 120-B of I.P.C.- Bail petitioner in custody for the last nine months for allegedly having committed offences under the aforesaid provisions of the I.P.C.- Bail application moved before the High Court – **Held** – Gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the Court while exercising its discretion- No evidence forthcoming during examination of witnesses, suggesting direct involvement of the petitioner- Moreso the other accused already enlarged on bail- Bail allowed. (Para-16 to 21)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra & another (2014)16 Supreme Court Cases 623
Manoranjana Sinh alias Gupta versus CBI 2017(5) SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner: Mr. K.S. Thakur, Advocate.
For the respondent: Mr. P.M.Negi, Additional Advocate General, with Mr. R.K.Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Preet Kumar, who is in custody for the last nine months, has approached this Court for grant of regular bail under Section 439 of the Code of Criminal Procedure, in case FIR No,71 of 2017, dated 01.04.2017, under Sections 302 and 120-B of the Indian Penal Code, registered at Police Station, Sarkaghat, District, Mandi, Himachal Pradesh.

2. ASI Anjan Pal, Police Station, Sarkaghat, has come present in Court alongwith the record of the case. Mr. P.M.Negi, learned Additional Advocate General, has also placed on record status report prepared on the basis of the investigation carried out by the investigating agency. Record perused and returned.

3. Perusal of the record/status report suggest that FIR, detailed hereinabove, came to be lodged at the behest of Shri Prithvi Raj i.e. father of deceased Pankaj Kumar, who in his statement recorded under Section 154 Code of Criminal Procedure, alleged that his son namely Pankaj Kumar has been murdered by Preet Kumar son of Sh. Nand Lal and Sanjay Kumar, son of Sh. Achhar Singh, who at the time of alleged incident were present with deceased Pankaj Kumar.

4. On the basis of aforesaid complaint, case under Section 302 and 120-B of Indian Penal Code came to be registered against the bail petitioner Preet Kumar, Sanjay Kumar and Joginder Pal alias Kalu. During the investigation, police found involvement of present bail petitioner Preet Kumar as well as co-accused Joinder Pal @ Kalu in the alleged incident and accordingly they were arrested. As per police version, above named accused were seen with deceased Pankaj Kumar just before the alleged incident. Two persons namely Smt. Roshani Devi and Shri Anmol Dhiman disclosed to the police that they had seen Pankaj Kumar in the company of Joginder Pal @ Kalu and present bail petitioner namely Preet Kumar. Co-accused namely Joginder Pal @ Kalu approached this Court by way of Cr.MP(M) No.1360 of 2017 for grant of regular bail, this Court after having perused the record/ status report filed in that case enlarged the above named co-accused Joginder Pal on bail vide order dated 03.11.2017. Instant bail petition having been preferred on behalf of petitioner Preet Kumar came to be listed before this Court on 6.12.2017, on which date, notices were issued to the respondent/State with a direction to make available complete record. On 18.12.2017, Mr. K.S. Thakur, learned counsel

representing the bail petitioner, while inviting attention of this Court to the statement of complainant Prithvi Raj made before the learned trial Court, contended that no case is made out against the bail petitioner under Section 302 of the Indian Penal Code and he has been falsely implicated in the case and as such, he deserves to be enlarged on bail.

5. This Court after having perused the statement allegedly made by complainant Prithvi Raj before the Court below, directed learned Additional Advocate General, to ascertain the authenticity and correctness of copies of statements, if any, made by complainant Prithvi Raj as well as other witness namely Smt. Roshani Devi.

6. Mr. P.M.Negi, learned Additional Advocate General, on 29.12.2017 after having obtained the instructions of investigating Officer, stated that copies of the statements placed on record are genuine and correct as per record.

7. Mr. K.S.Thakur, learned counsel representing the petitioner, while referring to the record/status report, especially statement made by complainant Prithvi Raj (PW-2), strenuously argued that no case much less under Section 302 of Indian Penal Code is made out against the bail petitioner. While making this Court to travel through the statement of PW-2, i.e. Prithvi Raj, learned counsel contended that it has nowhere come in his statement that his son i.e. deceased Pankaj Kumar was murdered by present bail petitioner as well as other co-accused Joginder Pal. Mr. Thakur, further contended that it is ample clear from the statement made by complainant that bail petitioner himself informed the complainant, who happened to be father of the deceased, that his son is lying unconscious on the road and thereafter he accompanied him to the spot. Mr. Thakur, further contended that it clearly emerge from the statement of PW-3 that when complainant saw deceased Pankaj Kumar on road, he was highly intoxicated and was not in a position to even stand. Mr. Thakur, further contended that even postmortem report placed on record, clearly suggests that at the time of unfortunate accident, deceased Pankaj Kumar was highly intoxicated and blood alcohol concentration was found to be 261.44 MG% and urine alcohol concentration was found to be 263.93 MG% as per the report of the chemical examiner.

8. Lastly, Mr. Thakur, contended that injuries which resulted in the death of deceased Pankaj Kumar i.e. ***"irreversible haemorrhagic shock secondary to blunt trauma thorax***" could only occur due to accident. While referring to postmortem report, Mr. Thakur, forcibly contended that there is no mention, if any, of any external injury on the body of deceased Pankaj Kumar, save and except certain abrasions. While inviting attention of this Court to the statement of PW-3, Smt. Roshni Devi, Mr. Thakur, contended that she nowhere stated that she saw bail petitioner as well as other co-accused giving beatings, if any, to the deceased Pankaj Kumar, rather it has come in her statement that deceased Pankaj Kumar was weeping and at that time bail petitioner and other co-accused Joginder Pal were accompanying him. She further stated before the learned court below that when she enquired about the reason of weeping deceased Pankaj Kumar and others gave no answer.

9. Mr. Thakur, further contended that it is quite apparent from the statement of PW-3 that unfortunate incident happened in the month of April, at about 7:00 PM and there was no dark. PW-3, Smt. Roshni Devi in her cross-examination further admitted that deceased Pankaj Kumar was drunk and bail petitioner was helping him to stand up. She further admitted the suggestion put to her that Preet Kumar was saying to the deceased that stand up otherwise I am going to my house. She further stated before the Court below that complainant Prithvi Raj was called by accused Preet Kumar within five minutes and during that period she remained standing on the retaining wall in front of her house. Mr. Thakur, further invited attention of this Court to the statement of PW-2, where he admitted suggestion put to him that he suspected bail petitioner as well as other co-accused Sanjay Kumar, but as has been noticed above, no case was registered against the Sanjay Kumar, who happened to be son of PW-3, Smt. Roshni Devi. Mr. Thakur, while praying for enlargement of petitioner on bail, contended that since other co-accused namely Joginder Pal has been already enlarged on bail, present petitioner also deserves to be enlarged on bail. Mr. Thakur, submitted that since bail petitioner is a local resident of the area, there is no likelihood of his fleeing from justice and he shall always remain available for trial.

10. Mr. P.M.Negi, learned Additional Advocate General, while opposing the aforesaid prayer having been made by Mr. K.S. Thakur, learned Counsel, representing the bail petitioner, contended that no definite conclusion at this stage, can be drawn merely on the basis of statements made by PW-2, Prithvi Raj and PW-3, Smt. Roshni Devi because other material witnesses are yet to be examined. Mr. Negi, while inviting attention of this Court to the record/status report, strenuously argued that there is ample evidence available on record suggestive of the fact that bail petitioner namely Preet Kumar was in the company of deceased Pankaj Kumar at the time of accident and as such, his involvement in the alleged crime cannot be ruled out. Mr. Negi, further contended that since it stands duly established on record that bail petitioner was last seen in the company of deceased, bail petitioner owe an explanation how the deceased suffered injuries, which ultimately led to his death. While making prayer for rejection of bail having been filed by the petitioner, Mr. Negi, contended that keeping in view the gravity of offences allegedly committed by bail petitioner, he does not deserve any leniency, rather needs to be dealt with severely. Mr. Negi, further contended that material prosecution witnesses are yet to be examined and in the event of petitioner's being enlarged on bail, there is possibility that he may influence remaining prosecution witnesses or dissuade them to depose against him. Mr. Negi, lastly contended that if in the given facts and circumstances of the case, this Court intends to release the bail petitioner on bail, he may be directed to make himself available for trial as and when required by the trial Court.

11. I have heard learned counsel representing the parties and have carefully gone through the record made available.

12. After having carefully perused the record/status report as well as submissions made on behalf of the learned counsel for the parties, this Court finds that at present there appears to be no direct evidence adduced on record against the bail petitioner suggestive of the fact that he alongwith other co-accused Joginder Pal @ Kalu hatched conspiracy to kill deceased Pankaj Kumar, rather there is overwhelming evidence adduced on record by the prosecution, perusal whereof, suggest that present bail petitioner and deceased Pankaj Kumar were good friends and they had good family relation .

13. True, it is that there is evidence available on record, which indicates that deceased Pankaj Kumar was last seen in the company of bail petitioner Preet Kumar and co-accused Joginder Pal, but that cannot be a sufficient ground to conclude that both the accused named above, hatched criminal conspiracy, if any, to kill deceased Pankaj Kumar. As has been noticed hereinabove, it has categorically come in the report of postmortem that deceased Pankaj Kumar was highly intoxicated. Similarly, injury suffered by him, which ultimately led to his death, cannot be caused due to scuffle if any, between the bail petitioner and deceased, rather same could only be caused due to fall or accident. Interestingly, site plan prepared by the investigating agency, suggests that deceased Pankaj Kumar suffered injury after being hit by some vehicle. Investigating agency has also took into possession bus, which allegedly hit deceased Pankaj Kumar, but till date no report has been procured from RFSL with regard to marks, if any, of the bus or on the clothes of deceased Pankaj Kumar.

14. Leaving everything aside, this Court finds from the record that driver, who was allegedly driving the bus in question at the relevant time has denied the factum with regard to accident. He has stated to the investigating agency that on the relevant date bus had come late. Statement of PW-2, Prithvi Raj (complainant) nowhere indicates that present bail petitioner Preet Kumar as well as co-accused Joginder Pal hatched criminal conspiracy, if any, to kill deceased Pankaj Kumar, rather it has come in his statement that immediately after alleged incident bail petitioner Preet Kumar informed him and he accompanied him to the spot. In his statement, it has specifically come that when he reached the spot, deceased Pankaj Kumar was trying to stand, but he was unable to stand. Though, there is no whisper with regard to intoxication of deceased Pankaj Kumar in the statement of PW-2, but if same is read in conjunction with the statement of PW-3, it clearly emerge that deceased Pankaj Kumar was highly intoxicated that's why he was unable to stand up, as has been clearly admitted by PW-2 in his statement. It also emerge in the

statement of PW-2 that he lodged the complaint against the present bail petitioner and not co-accused Joginder Pal merely on suspicion. Moreover, it is not understood that when person namely Sanjay Kumar was also named by complainant, why his name was lateron deleted from the column of accused .

15. Another witness PW-3, Smt. Roshni Devi has also nowhere supported the case of the prosecution, rather it has also come in her statement that she saw bail petitioner Preet Kumar asking deceased Pankaj Kumar to go to home, otherwise he would go to his house. She has further stated in her statement that deceased Pankaj Kumar was intoxicated and bail petitioner Preet Kumar and other co-accused Joginder Pal were trying to make him stand.

16. Though, aforesaid aspect of the matter is to be considered and decided by the court below on the basis of entire evidence adduced on record by the investigating agency, but this Court after having perused the record as well as depositions so far made by material prosecution witnesses i.e complainant and another so called eye witness PW-3, finds considerable force in the argument of Mr. K.S.Thakur, learned counsel representing the petitioner that at present there is no evidence of direct involvement of bail petitioner in the crime allegedly committed by him as well as co-accused and as such, this Court sees no reason to keep the present bail petitioner in jail for indefinite period during the pendency of trial, especially when other co-accused has been already enlarged on bail. Nothing has been placed on record by the investigating agency, which could persuade this Court to agree with the contention of learned Additional Advocate General that in the event of petitioner being enlarged on bail, there is every likelihood of his fleeing from justice. Bail petitioner being local resident of the area shall remain available for trial as has been stated by learned counsel representing the bail petitioner.

17. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; wherein it has been 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."***

18. 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.

19. Law with regard to grant of bail is now well settled. The apex Court in ***Siddharam Satlingappa Mhetre versus State of Maharashtra and others,*** (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in *Gurbaksh Singh Sibbia vs. State of Punjab,* (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> ***"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.***
>
> ***112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:***
>
> > ***(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;***
> >
> > ***(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;***
> >
> > ***(iii) The possibility of the applicant to flee from justice;***
> >
> > ***(iv) The possibility of the accused's likelihood to repeat similar or the other offences.***
> >
> > ***(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.***
> >
> > ***(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.***
> >
> > ***(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;***
> >
> > ***(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;***
> >
> > ***(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;***

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

20. In ***Sundeep Kumar Bafna versus State of Maharashtra*** **& another** (2014)16 Supreme Court Cases 623, wherein it has been held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation

of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

21. 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 vs. 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 nor 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 and 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."

22. The Apex Court in **Prasanta Kumar Sarkar** versus **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.

23. 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 bonds in the sum of Rs.50,000/- with one local surety in the like amount to the satisfaction of concerned Judicial Magistrate, with following conditions:

(a) He shall make herself 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 and he will deposit his passport with the Investigating Agency;

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

25. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The petition stands accordingly disposed of.

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

Pawan Dixit ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 1570 of 2017
Decided on January 2, 2018

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Petitioner alleged to have committed offences punishable under the aforesaid provisions of the N.D.P.S. Act- Bail application under Section 439 Cr.P.C filed before the Hon'ble High Court- **The High Court Held-** that the other co-accused from whose conscious possession the contraband was recovered already released on bail and the present petitioner having been implicated on the statement of the said accused and only a case under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 having been made out against the present petitioner, he requires to be released on bail. (Para-6)

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985- Further held- that even otherwise the quantity allegedly recovered from the co-accused was less than commercial and as such, the rigors of

Section 37 would not apply even in the case of the petitioner- Moreso because he has been booked only for having committed offences punishable under Sections 21 and 29 of the N.D.P.S. Act- Petitioner held entitled to bail. (Para-7)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623
Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Prem P. Chauhan, Advocate.
For the respondent	:	Mr. R.K. Sharma, Deputy Advocate General. HC Jai Singh No. 39, I/O Police Station, Sadar, District Kullu, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant bail petition filed under Section 439 CrPC has been preferred by the bail petitioner namely Pawan Dixit, who is in custody since 12.9.2017, for grant of regular bail in FIR No. 176/17 dated 1.8.2017, under Sections 21 and 29 of the Narcotic Drugs & Psychotropic Substances Act, registered at Police Station, Sadar, District Kullu, Himachal Pradesh.

2. Sequel to order dated 26.12.2017, HC Jai Singh has come present with the record. Mr. R.K. Sharma, learned Deputy Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency, perusal whereof suggests that FIR mentioned above, came to be registered at the behest of HC Jai Singh, who alleged that on 11.8.2017, police patrolling party saw a person namely Harsh Kumar, coming from Akhara side on foot. Since above named person became perplexed after seeing the police, he was stopped but he made an attempt to run away from the place and in this process, he threw one packet. Above named person was subsequently apprehended by the patrolling party near the place of alleged occurrence. On search of the packet allegedly dropped by the person namely Harsh, same was found to be "Heroin", which subsequently, on weighment came to be 9.20 grams. Above named person later on disclosed to the police that he is a drug addict and had purchased "Heroin" as recovered from his custody by the police, from one person at Delhi. He also disclosed that the bail petitioner (Pawan Dixit) accompanied him to that person at Delhi. On the aforesaid disclosure made by Harsh, a case came to be registered against the bail petitioner under Sections 21 and 29 of the Narcotic Drugs & Psychotropic Substances Act. On 12.9.2017, i.e. after one month of registration of FIR, present bail petitioner came to be arrested and since then he is in custody.

3. Mr. Prem P. Chauhan, learned counsel representing the bail petitioner, while referring to the record/ status report strenuously argued that no case, if any, is made out under Sections 21 and 29 of the Act *ibid* against the bail petitioner, as such, he deserves to be released on bail. Mr. Chauhan, further contended that as per own story of the investigating agency, "Heroin" weighing 9.20 grams was recovered from co-accused Harsh, who has already been released on bail by the learned Sessions Judge, Kullu. Mr. Chauhan, further contended that though there is nothing on record to prove involvement of the present bail petitioner in the crime allegedly committed by him as well as other co-accused, but even if the quantity of contraband, which is less than 'commercial' quantity, allegedly recovered from the co-accused Harsh is taken into consideration, present bail petitioner deserves to be enlarged on bail. Lastly, Mr. Chauhan,

contended that as per investigation carried out by the investigating agency till date, it has nowhere come that contraband, if any, was ever recovered from the conscious possession of the bail petitioner, rather, role imputed/ascribed to him is that he accompanied co-accused Harsh to the person at Delhi, who later on gave "Heroin" to Harsh. While making prayer for enlargement of bail to the bail petitioner, Mr. Chauhan, contended that the bail petitioner is a local resident and shall always remain available for trial/investigation and there is no likelihood of his fleeing from justice. Mr. Chauhan, contended that bail can not be denied to the bail petitioner on the ground that some FIR's were lodged against him in the past, because present case is required to be decided on the basis of investigation carried out in the present case.

4. Mr. R.K. Sharma, learned Deputy Advocate General, while opposing the aforesaid prayer, having been made on behalf of the bail petitioner, contended that it has specifically come in the investigation that the person namely Harsh, who is a drug addict, was taken to Delhi by the bail petitioner and as such, his involvement in the instant case can not be ruled out. Mr. Sharma, further contended that though there is nothing on record to suggest that contraband was recovered from conscious possession of the present bail petitioner, but taking note of his past conduct, especially when he has been found involved in so many cases under Narcotic Drugs & Psychotropic Substances Act, statement having been made by the co-accused Harsh can not be brushed aside, solely on the ground that contraband was recovered from conscious possession of Harsh and not from the bail petitioner. Leaned Deputy Advocate General, contended that in the event of petitioner's being enlarged on bail, there is every possibility of his fleeing from justice, and he may make an attempt to dissuade the prosecution witnesses from deposing against him. However, Mr. Sharma, contended that in case this Court, after having perused record, is inclined to grant bail to the present bail petitioner, he may be put to stringent conditions so that his presence is secured during trial.

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

6. Perusal of record suggests that 9.20 grams of "Heroin" came to be recovered from the conscious possession of the co-accused namely Harsh , who has been already enlarged on bail by learned Sessions Judge, Kullu. Investigating agency, on the basis of a statement made by co-accused Harsh has registered present case against the bail petitioner under Sections 21 and 29 of the Narcotic Drugs & Psychotropic Substances Act. At present, there is no direct evidence to suggest involvement of the present bail petitioner in the crime. Apart from above, investigating agency has also not placed on record any evidence in support of claim of co-accused Harsh that present bail petitioner accompanied him to Delhi, from where he allegedly purchased "Heroin" from some unknown person. Though aforesaid aspect of the matter is to be considered and decided by the learned trial Court on the basis of evidence to be adduced on record by the prosecution, this Court, after having taken note of the fact that main accused, from whose conscious possession "Heroin" was recovered, stands already enlarged on bail, sees no reason to keep the bail petitioner in custody for indefinite period.

7. Leaving everything aside, quantity allegedly recovered from co-accused, is less than commercial and by now, it is settled that rigors of Section 37 of the Act *ibid* are applicable in cases registered under Sections 19, 24 and 27A, as well as offences involving 'commercial' quantity. Conditions as contained under Section 37 of the Act *ibid* do not apply to any other offence. In the instant case, petitioner has been booked for having committed offence punishable under Sections 21 and 29 of the Act *ibid*, and quantity involved is less than commercial quantity as such, present bail petitioner is also entitled for bail like the other co-accused.

8. So far as argument having been made by the learned Deputy Advocate General that taking note of previous conduct of the bail petitioner, he is not entitled to bail is concerned, this Court is of the view that registration/ pendency of such cases, if any, against bail petitioner is of no consequence as far as his legal right to be admitted on bail in the case at hand is concerned. Moreover, as has been taken note above, there is no direct involvement of present

petitioner in the case, because contraband has been recovered from the conscious possession of co-accused Harsh, who subsequently named present bail petitioner, but there is nothing on record adduced by the investigating agency that they, after having received information from co-accused, recovered narcotic substance, if any, from the conscious possession of the bail petitioner. As far as another apprehension expressed by the learned Deputy Advocate General with regard to petitioner's fleeing from justice, in case bail is granted to him, is concerned, same can be met by putting bail petitioner to stringent conditions.

9. Otherwise also, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the investigating agency by leading cogent and convincing evidence. There is no material placed on record by investigating agency suggestive of the fact that in the event of enlarging the bail petitioner on bail, he may flee from justice. Petitioner, who is a local resident of area, shall always remain available for investigation/ trail. Otherwise, the aforesaid apprehension expressed by the investigating agency can be met by putting bail petitioner to stringent conditions.

10. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been 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."

11. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision

in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

12. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could

have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be

contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

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

> **"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, 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 nor 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 a 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 and 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 that 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."**

14. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. Petitioner is local resident of Himachal Pradesh and shall remain available to face the trial and to undergo imprisonment, if any, which may be imposed on conclusion of the trial.

15. The Apex Court in **Prasanta Kumar Sarkar** versus **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.**

16. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to his furnishing personal bonds in the sum

of Rs.5,00,000/-(Rupees Five Lakh) with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate, with following conditions:

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

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

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

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

(e). He shall deposit passport, if any, held by him, with the Investigating Officer.

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

18. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Sachin Datta Rathod ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 1564 of 2017
Decided on January 2, 2018

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 505(2), 124A, 419, 420, 511 and 201 IPC- Petitioner alleged to have committed offences punishable under the aforesaid provisions of the I.P.C.- Bail application under Section 439 Cr.P.C filed before the High Court- **The High Court Held-** that the gravity of the offence alone cannot be a ground to deny bail to the petitioner, rather competing factors are required to be balanced by the Court while exercising its discretion in this behalf, as the guilt of the petitioner is yet to be proven by the prosecution by leading cogent and convincing evidence- Freedom of the bail petitioner cannot be curtailed merely on the apprehension of the Investigating Agency.

(Para-6 and 7)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623
Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218

Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Desh Raj Thakur, Advocate.
For the respondent	:	Mr. R.K. Sharma, Deputy Advocate General. ASI Gopinder Paul, Police Station, East, Shimla, District Shimla, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Sachin Datta Rathod, who is in custody since 1711.2017, has approached this Court by way of instant petition under Section 439 CrPC, praying therein for regular bail, in case FIR No. 126/17 dated 7.11.2017 under Sections 505(2), 124A, 419, 420, 511 and 201 IPC, registered at Police Station, East, Shimla, District Shimla, Himachal Pradesh.

2. Sequel to order dated 26.12.2017, ASI Gopinder Paul has come present with the record. Mr. R.K. Sharma, learned Deputy Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency, perusal whereof suggests that FIR detailed herein above, came to be lodged at the behest of complainant namely Harbans Lal, Election Officer, who after having received complaints from the candidates contesting elections to Himachal Pradesh State Legislative Assembly, reported the matter to the police that one candidate received a telephonic call from mobile No. 070930-34540. The person speaking from aforesaid number claimed that he could manipulate the results of the Assembly elections in their favour by sabotaging/ manipulating the EVMs/VVPATs. Police, on the basis of aforesaid statement made by the complainant under Section 154 CrPC, lodged a formal FIR as stated above. Record reveals that in the investigation, police found involvement of the present bail petitioner and accordingly, registered a case against him under various provisions of law, as have been taken note above. Bail petitioner came to be arrested on 17.11.2017, whereafter, he approached learned Sessions Judge, Shimla, for grant of bail. Same was rejected vide order dated 12.12.2017. Perusal of order dated 12.12.2017, passed by learned Sessions Judge suggests that since investigation was at initial stage and certain reports were yet to be received by the investigating agency, learned Court below rejected the bail of the bail petitioner on the ground that enlargement of bail petitioner, at this stage, may hamper investigation.

3. Mr. Desh Raj Thakur, learned counsel representing the bail petitioner, while referring to the record/status report contended that investigation in the case is complete and nothing is required to be recovered from the bail petitioner, as such, he deserves to be enlarged on bail. Mr. Thakur, further contended that though perusal of record /status report clearly suggests that no case is made out against the bail petitioner, but otherwise also, investigation is complete and nothing is required to be recovered from the bail petitioner, because he has already made available required documents as well as instrument allegedly used by him while spreading rumour with regard to EVM's/VVPATs.

4. Mr. R.K. Sharma, learned Deputy Advocate General, while opposing aforesaid prayer having been made on behalf of the bail petitioner contended that keeping in view the gravity of offence allegedly committed by the bail petitioner, he does not deserve any leniency, rather deserves to be dealt with severely. Learned Deputy Advocate General, while referring to the record/ status report contended that it has specifically come in the investigation that bail petitioner made a series of calls to the candidates contesting elections to the Himachal Pradesh State Legislative Assembly, assuring them to manipulate result in their favour by hacking/sabotaging EVM's/VVPAT's. Mr. Sharma, while fairly conceding that investigation is complete and nothing is required to be recovered from the bail petitioner contended that in the event of petitioner's being enlarged on bail, there is every likelihood of his fleeing from justice, as he hails from State of Maharashtra. Learned Deputy Advocate General, further contended that as

per record of the investigation, bail petitioner is a habitual offender and cases have been already registered against him in the State of Maharashtra. Mr. Sharma, further contended that in case, this court intends to grant bail to the bail petitioner, he may be put to stringent conditions so that his presence is secured during trial.

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

6. Perusal of record suggests that bail petitioner contacted several candidates contesting elections to Himachal Pradesh Vidhan Sabha and claimed that he could manipulate the result of Assembly elections in their favour by hacking/sabotaging the machines, but record also reveals that investigation in the case is almost complete and nothing is required to be recovered from the bail petitioner. Guilt, if any, of the bail petitioner for having committed offence punishable under aforesaid provisions, is yet to be proved by prosecution by leading cogent and convincing evidence, as such, freedom of bail petitioner can not be curtailed merely on the apprehension of the investigating agency that in the event of petitioner being enlarged on bail, he may flee from justice, especially when there is no material placed on record by the investigating agency in support of such apprehension. However, aforesaid apprehension with regard to petitioner fleeing from justice, can be met by putting bail petitioner to stringent conditions, as has been stated by the learned counsel representing the bail petitioner.

7. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

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

8. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all

circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

9. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court.

But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but

vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

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

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, 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 nor 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 a 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 and 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 that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. 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 also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

12. The Apex Court in **Prasanta Kumar Sarkar** versus **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.

13. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to his furnishing personal bonds in the sum of Rs.1,00,000/-(Rupees One Lakh) with two sureties in the like amount, one local surety and one

from the State of Maharashtra, to the satisfaction of concerned Chief Judicial Magistrate, with following conditions:

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

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

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

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

(e). He shall deposit passport, if any, held by him, with the Investigating Officer.

14. It is clarified that if the petitioner misuses the liberty or violate 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 petition alone.

The petition stands accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Jiwan Singh. .....Petitioner.

Versus

Saroj Bala. .....Respondent.

CMPMO No. 133 of 2017.
Date of decision: January 03, 2018.

Code of Civil Procedure, 1908- Order 6 Rule 17 read with Section 151 CPC- An amendment of pleadings sought on the ground that written statement filed earlier in the suit by one Advocate Shri A.K. Saini had not been filed by the petitioner/defendant as he had never engaged Shri A.K. Saini as an Advocate- Apparently, a fresh written statement and a counter claim also had been filed by the petitioner/defendant through one Shri P.C. Sharma, Advocate- However, oblivious of the said fact learned Trial Court vide an order dated 11.2.2014 had dismissed an application, seeking to take off the record the written statement filed earlier by Shri A.K. Saini, Advocate- In fact, the aforesaid order was never challenged by the defendant- Nevertheless issues had come to be framed on 22.11.2012, taking into consideration the fresh written statement filed by the petitioner/defendant through Shri P.C. Sharma, Advocate- **Held**- That the entire proceedings from that stage i.e. the stage of framing of issues in the suit stood vitiated – Further Held- that once the petitioner/defendant had disputed the question of the engagement of Shri A.K. Saini, Advocate to defend him in the suit and also vis-à-vis the filing of the written statement, the best available course to the learned Trial Court was to have accorded the permission to take off such written statement from the record and allow the petitioner/defendant to file fresh written statement – petition disposed of accordingly. (Para-2 to 4)

For the petitioner : Mr. Dheeraj K. Vashisht, Advocate.
For the respondent : Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Order under challenge in this petition has been passed on 13.12.2016 in an application filed under Order 6 Rule 17 read with Section 151 CPC in case No. 107/09 by learned Junior Civil Judge, Court No. I, Una.

2. What could this Court gather from the perusal of the record and the submissions made on both sides, in a *nut shell* is that the petitioner-defendant did not engage Shri A.K. Saini, Advocate to defend him in the suit which was filed by the respondent-plaintiff for declaration and also permanent prohibitory injunction against the petitioner-defendant. The written statement to the suit filed through Shri A.K. Saini, Advocate, on the face of it demonstrate that the entire plaintiff's case as set out in the plaint has been admitted as correct. According to the petitioner-defendant the written statement has not been filed by him. Though he admit his signature thereon, however, it is clarified that the same were obtained on blank papers for the purpose of compromising the dispute. It seems to be so because the signature of the petitioner-defendant are not above the typed word "defendant" but below it. It seems to have done for adjustment of the space on the paper used for typing out the written statement which was got signed from the defendant when blank. The petitioner-defendant, no doubt, has filed the fresh written statement and the counter claim also through Shri P.C. Sharma, Advocate, however, Learned trial Court vide order passed on 11.2.2014 has dismissed the application filed with a prayer to take off the record the written statement filed earlier by Shri A.K. Saini, Advocate. No doubt, the petitioner has not assailed that order any further and may be due to learned trial Court has initially framed the issues in the suit on 22.11.2012 on taking into consideration the fresh written statement filed by the petitioner-defendant through Shri P.C. Sharma, Advocate. In view of the fresh written statement was not on record of the learned trial Court, issues based on the same could have not been framed. Therefore, the entire proceedings from that stage in the suit stood vitiated.

3. True it is that the issues so framed were ordered to be struck off by learned trial Court vide order dated 14.2.2017 passed in an application filed for the purpose by the respondent-plaintiff during the pendency of the application for amendment in the written statement filed by Shri A.K. Saini Advocate. However, in a situation when in the opinion of this Court, the entire proceedings from the stage of framing issues on 22.11.2012 stood vitiated, there is no need to elaborate various stages in the suit after that stage including dismissal of the application filed by the petitioner-defendant for seeking permission to take off from the record the written statement filed through Shri A.K. Saini, Advocate nor the order passed in the application filed by the respondent-plaintiff for seeking modification or alteration of issues as the issues were framed on the basis of the pleadings particularly the written statement which was not on record. There is also no need to discuss the question of desirability of filing an application for seeking amendment in the written statement dismissed vide order under challenge in this petition and suffice would it to say that quashing of proceedings in the suit from the stage of framing issues on 22.11.2012 on the basis of the pleadings which were not on record would serve the ends of justice.

4. At the same time as already noticed in the order passed on 30.8.2017 in this petition once the petitioner-defendant has disputed the question of engagement of Shri A.K. Saini, Advocate to defend him in the suit and also the filing of written statement through Shri Saini by him, the best available course to the trial Court was to have accorded the permission to take off such written statement from the record and allow the petitioner-defendant to file fresh written statement.

5. Now this Court order that the written statement filed by Shri A.K. Saini, Advocate shall be treated to be off the record. As a result thereof the petitioner-defendant shall have the right to file fresh written statement and the one he filed through Shri P.C. Sharma, Advocate on 15.12.2009 shall be his written statement to the suit. The suit shall now to proceed further from the stage of affording opportunities to the plaintiff for filing replication to the written statement and written statement to the counter claims to the respondent-plaintiff. Since the suit pertains to the year 2009, it is expected from the parties on both sides to render all assistance to the Court to dispose of it finally at the earliest preferably by *31st December, 2018.*

6. The parties through learned counsel representing them are directed to appear in the trial Court on *17.1.2018.*

7. This petition is accordingly disposed of, so also the pending application (s), if any.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Prem Lal .....Petitioner.
Versus
Sh. Rajinder Kumar .....Respondent

CMPMO No. 213 of 2016
Decided on: 03.01.2018

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 7 Rule 14 readwith Section 151 C.P.C.- Application under Order 7 Rule 14 preferred seeking permission to place on record a copy of Misal Hakiyat Bandobast Jadid and copy of a judgment and a decree passed in a previous suit- Application dismissed by the trial Court and hence the petition- **High Court Held-** that such an application at a belated stage and that too in respect of documents which are not necessary for the adjudication of the controversy cannot be taken on record if they are not in consonance with the pleadings on record- Consequently, CMPMO dismissed. (Para-2)

For the petitioner: Mr. K.S. Banyal, Sr. Advocate with
Mr. Ajinder Mehta, Advocate.
For the respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The petitioner herein was the plaintiff in the trial Court. He is aggrieved by the order, Annexure P-7 passed by learned Civil Judge (Junior), Court No.2, Palampur in an application under Order 7 Rule 14 read with Section 151 of the Code of Civil Procedure, registered as CMA No. 136 of 2016 in Civil Suit No. 293/2011. He has approached learned trial Court for seeking permission to produce on record of the suit, copy of Misal Hakiyat Bandobast Jadid and copy of judgment and decree passed by trial Court itself in previously instituted Civil Suit bearing No. 341/92 titled Prem Lal Vs. Roshan Lal and others, on the grounds *inter-alia* that the same are essentially required for the just decision of the case. The application was resisted and contested on the grounds inter-alia that the same being belated cannot be allowed at the stage when the suit is already ripened for hearing arguments. Also that, petitioner-plaintiff could have produced the documents in question at an appropriate stage during the proceedings in the main suit. Learned trial Court on appreciation of the rival contentions has concluded that since the filing of application has been delayed and as the documents were available from the very beginning with the petitioner-plaintiff, hence the application cannot be allowed nor the

permission to produce the same on record granted. In view of the copy of latest Jamabandi already on record the Misal Hakiyat Bandobast Jadid, according to learned trial Court is not required for the just decision of case.

2. On taking into consideration the given facts and circumstances of the case, in the considered opinion of this Court, learned trial Court has not committed any illegality and irregularity in dismissing the application for the reason that the prayer for producing the documents in question on record is not only belated but the same are also not required for just and effective decision of the case. As already held by learned trial Judge, the latest Jamabandi of the suit land is already on record. Otherwise also, nothing is there in the pleadings in the plaint as to how Misal Hakiyat Bandobast Jadid is a necessary document for the purpose of adjudication of the controversy in the main suit. As regards, the copy of judgment and decree passed in the previously instituted suit, again there is no pleadings in the plaint that the same pertains to the suit land or the previously instituted suit had any nexus with the present litigation. It is well settled that evidence beyond the pleadings should not be permitted to be produced. Above all, certified copy of judgment and decree can otherwise also be produced/cited in the Court during the course of arguments.

3. Having said so, there is no merit in this petition and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

****

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

Raja Ashok Pal Sen ...Plaintiff.

Versus

Smt. Raj Kumari Indira Mahindra and others ...Defendants.

OMPs No. 24 & 217 of 2015
in Civil Suit No. 4 of 2007
Date of order: 03.01.2018

Code of Civil Procedure, 1908- Order 1 Rule 10- Order 22 Rule 10- Suit for declaration claiming therein that plaintiff has become absolute owner qua the share of defendant No.1 (sister) in consequence of exchange whereby plaintiff relinquished his property at Goa, Panji in favour of defendant No.2, son of defendant No.1- The agreement of sale entered by the defendant No.1 with applicant and with one Shri Anil Kumar qua the suit property during the pendency of the suit, records that sale shall be executed only after the disposal of the present suit- applicant sought to be impleaded as co-defendant- Held- that agreement to sell does not confer any title or right in the suit property- Applicants have no interest in the suit property as per aforementioned condition incorporated in the agreement as well as provisions contained in Section 52 of the Transfer of Property Act- They cannot claim to be impleaded as independent defendants having right to file the written statement- Further held that order 22 Rule 10 CPC has to be read supplementing the provision of Order 1 Rule 10 CPC, a party if not necessary party under Order 1 Rule 10 CPC cannot be impleaded by invoking the provision contained in Order 22 Rule 10 CPC- No merits in the application - application disposed of accordingly.

(Para-36, 37, 39, 42 and 43)

Cases referred:

Jagannath Mahaprabhu versus Pravat Chandra Chatterjee and others, AIR 1992 Orissa 47

Patel Chaturbhai Shambhudas and another versus State of Gujarat and another, AIR 1996 Gujarat 40

Baijnath and another versus Smt. Ganga Devi and another, AIR 1998 Rajasthan 125

Munivenkatamma and others versus Ramaiah, AIR 2001 Karnataka 292

Razia Begum versus Sahebzadi Anwar Begum and others, AIR 1958 Supreme Court 886
Thomson Press (India) Limited versus Nanak Builders and Investors Private Limited and others, (2013) 5 Supreme Court Cases 397
Khemchand Shankar Choudhari versus Vishnu Hari Patil, (1983) 1 Supreme Court Cases 18
Amit Kumar Shaw versus Farida Khatoon, (2005) 11 Supreme Court Cases 403
Anokhe Lal versus Radhamohan Bansal and others, AIR 1997 Supreme Court 257
Santa Singh Gopal Singh and others versus Rajinder Singh Bur Singh and others, AIR 1965 Punjab 415 Full Bench,
Sardar Hari Bachan Singh versus Major S. Har Bhajan Singh and another, AIR 1975 Punjab & Haryana 205

For the plaintiff:	Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisth, Advocate.
For the defendants:	Ms. Seema K. Guleria, Advocate, for defendants No. 1 and 2. Mr. Rakesh Dogra, Advocate, for defendant No. 3. Mr. G.R. Palsra, Advocate, for defendants No. 4 and 9 to 11 and for applicant in OMP No. 217 of 2015. Mr. Surinder Saklani, Advocate, for defendants No. 5 to 8. Ms. Bhavna Dutta & Mr. Sandeep Dutta, Advocates, for applicants in OMP No. 24 of 2015.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

During pendency of the present suit filed by the plaintiff seeking decree of declaration in his favour, two applications being OMPs No. 24 and 217 of 2015 have been filed wherein applicants are claiming their entitlement for impleading them as defendants in the suit for entering into two different agreements to sell executed by defendants No. 1 and 9 in favour of applicant(s) in OMPs No. 24 and 217 of 2015, respectively.

2. Both these applications are being disposed of by this common order as common question of facts and law is involved in these applications.

3. In order to determine both these applications, it is necessary to give a brief resume of the case herein.

4. In the present suit, plaintiff and defendant No. 1 are real brother and sister, defendant No. 2 is son of defendant No. 1 and defendant No. 3 was Special Power of Attorney of defendant No. 1, who has executed sale deeds of the suit property in favour of defendants No. 4 to 11.

5. Plaintiff has filed this suit claiming that defendant No. 1 had relinquished her share in the suit property, inherited by her after the death of their parents, in favour of the plaintiff and the said relinquishment was in lieu of surrender of ownership right by the plaintiff in favour of defendant No. 2 (son of defendant No. 1) in the property situated at Panji, Goa, pursuant to deed of family settlement executed on 10th November, 2000, and, thus, seeking declaration to the effect that plaintiff is absolute owner of the suit property and that cancellation of mutation No. 146, dated 18th August, 2000, vide order, dated 31st August, 2005, wherein relinquishment of share in favour of plaintiff by defendant No. 1 was attested, is illegal and wrong and that sales/transfers made in favour of defendants No. 4 to 11 with respect to the suit property are illegal, null and void and not binding on the plaintiff. He has also sought decree for pre-emption of the suit property.

6. Earlier, joint written statement was filed on behalf of defendants No. 1 and 3 on the affidavit of defendant No. 3 claiming that defendant No. 1 was within her rights to dispose of

the property falling in her share in accordance with law. However, in the meanwhile, plaintiff was permitted to amend the plaint and amended plaint was filed on 14th June, 2008, whereafter defendant No. 1 filed a separate written statement disowning the sales/transfers made by defendant No. 3 in favour of defendants No. 4 to 11, claiming that she, i.e. defendant No. 1, appeared to have been defrauded by the plaintiff on account of the fact that her signatures seem to have been obtained on certain documents on account of her blind faith and confidence in the plaintiff being her elder brother and also that defendant No. 3 was appointed as General Power of Attorney by her on persuasion of plaintiff as she was unable to visit the suit property frequently due to medical reasons and defendant No. 3 was confident and consequentially well known to the plaintiff and late wife of plaintiff, Mrs. Kiran Kumari. However, selling of part of property of defendant No. 3 has been admitted but it is claimed that sale deed, dated 24th April, 2008 was executed by defendant No 3 by concealing the material facts as she (defendant No. 1) never intended to sell the heritage temple and the said sale deed was executed without her knowledge and after knowing about the said sale deed through newspapers, she immediately objected it with revenue authorities and froze and rendered her General Power of Attorney inoperative, which was executed by her in favour of defendant No. 3 and cancelled the said General Power of Attorney in accordance with law as defendant No. 3 had not only misused the General Power of Attorney but had also caused irreparable loss to her by selling the property never intended to be sold by her. Further that she has not received any consideration for the said sale deed.

7. OMP No. 24 of 2015 has been filed under Order 1 Rule 10 of the Code of Civil Procedure (for short "CPC") by the applicants, namely Shri Dinesh Kumar, Sh. Vishal Chaddha and Shri Madho Prasad, for impleading them in the main suit as additional defendants claiming them necessary party for effective and complete adjudication of suit on the ground that they, alongwith one Shri Anil Sharma, through their Special Power of Attorney Shri Madho Prasad, had entered into an agreement to sell with defendant No. 1-Smt. Raj Kumari Indira Mahindra executed on 17th May, 2014 with respect to suit property.

8. OMP No. 217 of 2015 has been filed under Order 1 Rule 10 CPC by one Shri Subhash Thakur for impleading him as co-defendant in the suit on the ground that during pendency of the civil suit, defendant No. 9 Shri Khub Ram has entered into an agreement to sell, dated 4th July, 2015 with respect to Khub Ram's share to the extent of 1946.76 sq. mtrs. for a consideration of ₹ 50,00,000/-, which stands paid to defendant No. 9 and as the agreement to sell will depend upon the outcome of this civil suit, he is a necessary party to be impleaded as defendant in the suit for proper and effective adjudication of the suit.

9. Earlier, these applications were filed under Order 1 Rule 10 CPC read with Section 151 CPC and were allowed on 18th November, 2015 after converting the same into applications under Order 22 Rule 10 CPC. The said order, dated 18th November, 2015, was assailed in LPAs No. 204 and 205 of 2015, preferred by the plaintiff, which were decided on 21st March, 2016 whereby after setting aside order, dated 18th November, 2015, impugned in the LPAs, the applications were ordered to be restored to its original number with a direction to decide these applications under Order 1 Rule 10 CPC afresh after hearing the parties.

10. Thereafter, applicant(s) had filed application(s), being OMP No. 291 of 2016 and 230 of 2016, seeking amendment in the title clause of this application(s) to the following effect:

> *"Application under Order 1 Rule 10 of the Code of Civil Procedure read with Section 151 of CPC alongwith Order 22 Rule 10 CPC to implead applicants as additional defendants (co-defendants) in the suit."*

11. The said amendment was allowed and now these applications are to be decided accordingly.

12. The application, OMP No. 24 of 2015, is being contested by the plaintiff on the ground that the agreement(s) to sell, entered into by defendant No. 1 with the applicants and one Shri Anil Kumar, was executed during the pendency of the suit violating the interim order whereby defendants were restrained from alienating or encumbering the suit property and for the

said violation, the plaintiff has initiated action against defendant No. 1 under Order 39 Rule 2-A CPC. Further that the agreement does not create any interest in the property in favour of the applicants.

13. The application, OMP No. 217 of 2015, is being contested by the plaintiff on the ground that any agreement of sale has never been entered into between the applicant and defendant No. 9 and the alleged agreement of sale appears to have been entered into to set up false and frivolous claim to the suit property. Further that the plaintiff has initiated action against defendant No. 9 and the said Shri Subhash Thakur under Order 39 Rule 2-A CPC for violating the interim order whereby defendants were restrained from alienating or encumbering the suit property and that the alleged agreement does not create any interest in the property in favour of the applicant.

14. Defendant No. 1, by filing application(s), had prayed for considering the reply(ies) filed to the unamended application(s) as reply to the amended application(s). However, as per record, reply by defendant No. 1 has been filed only to OMP No. 24 of 2015 and there is no reply of defendant No. 1 to OMP No. 217 of 2015. In any case, agreement to sell, on the basis of which application in OMP No. 217 of 2015 is claiming his right for impleadment, is not between the said applicant and defendant No. 1, but has been executed by defendant No. 9 Khub Ram. The said defendant has also not filed reply to the said application, rather, applicant-Subhash Thakur has preferred his application through the counsel Mr. G.R. Palsra, who is also representing defendant No. 9.

15. Defendant No. 1, in reply to OMP No. 24 of 2015, has opposed the impleadment of applicants in the said application as defendants by stating that the agreement to sell does not confer any title on the applicants and the said agreement is subject to outcome of present civil suit and in case outcome of the civil suit goes against the applicants, then they will have right to receive the payment made by them. Further, in case decision goes in favour of defendant No. 1, applicants will have right to file suit for specific performance in case she (defendant No. 1) does not comply with agreement to sell. It has specifically been stated in the reply that before finalization of present suit, the applicants have no right in the suit property as the right of the applicants in the agreement to sell is already subject to outcome of the civil suit, as has been mentioned clearly in clause 7 of the said agreement.

16. I have given consideration to the arguments addressed by the learned counsel appearing on behalf of the respective parties and have also gone through the record.

17. Civil Suit was filed in the year 2007. Last order directing parties to maintain status quo with respect to nature and possession as well as alienation of the suit property till disposal of the suit was passed in OMP No. 13 of 2010 on 30th July, 2010.

18. Agreements to sell, on the basis of which applicants in the applications are claiming their right for impleadment, have been placed on record with the respective applications. Agreement between defendant No. 1 and applicants in OMP No. 24 of 2015 was executed on 17th May, 2014, and agreement, subject matter of OMP No. 217 of 2015 was executed on 4th July, 2015.

19. In agreement executed by defendant No. 1 in favour of the applicants in OMP No. 24 of 2015, it has specifically been mentioned as under:

> *"WHEREAS NOW the first party and second party who have knowledge of Civil Suit No. 4 of 2007 and Civil Suit No. 38 of 2009 have entered into agreement to sell and THEREOF THE AGREEMENT WITNESS that:-*
>
> *xxx xxx xxx*
>
> *4. That the second parties have further agreed that their rights will be subject to final outcome of Civil Suit No. 4 of 2007 and Civil Suit No. 38 of 2009 (New case no. 7 of 2013) pending in Additional District Judge (II), Mandi, H.P. and will bear the expenses of litigation of the aforesaid suits.*

5. That the second parties have knowledge of the Civil Suit No. 4 of 2007 pending before Hon'ble High court of H.P. and Civil Suit No. 38 of 2009 (New Case No. 7 of 2013) title as "Indira Mahindra Vs. Devendar Jamwal & others" pending in the Court of Ld. Additional District Judge (II), Mandi, H.P. and contents thereof and have further agreed that in the event of said suits being decided against First Party, the Second Parties will not claim refund of any amount paid as consideration in any form and the same shall stands forfeited to and in favour of the First Party.

6. … … …

7. That the sale will be completed within 1 month from the date of final outcome of Civil Suit No. 4 of 2007 and in case the sale deed is not executed within stipulated period the FIRST PARTY will forfeit the consideration amount."

20. In the agreement executed by defendant No. 9, subject matter of OMP No. 217 of 2015, in clause 4, it has been mentioned as under:

"4. That the first party will execute and registered Sale Deed in favour of the second party after the decision of Civil Suit No. 4 of 2007 titled as Raja Ashok Pal Sen Versus Smt. Indra Mahendra and others pending disposal before the Hon'ble High Court of Himachal Pradesh."

21. The agreements in question have been executed during the existence and operation of interim order directing the parties to maintain status quo not only with respect to nature and possession but also qua alienation of the suit property till disposal of the suit. Further, in these agreements, pendency of the present civil suit has been clearly mentioned and acknowledged by the applicants with specific clauses that these agreements are subject to final decision of the main civil suit.

22. An agreement to sell only gives right to buyer to enforce his legal right for execution of sale deed, but subject to the conditions agreed upon between the parties. In present case, in both the agreements, there is a specific condition that sale deeds shall be executed only after final decision of Civil Suit No. 4 of 2007, i.e. the present suit. Applicants are not transferees. Their status is not of buyers but of prospective buyers. The title of the property in question has not been transferred yet.

23. It would be relevant to reproduce the provisions of Order 1 Rule 10 CPC, Order 22 Rule 10 CPC and Sections 52 and 54 of the Transfer of Property Act as under:

*" **ORDER I***

PARTIES TO SUITS

.....

10. Suit in name of wrong plaintiff. *-*

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted thought a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties. *- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name, of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to*

enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended. *- Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.*

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

…….

10. Procedure in case of assignment before final order in suit. *- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.*

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Sections 52 & 54 of

The Transfer of Property Act

52. Transfer of property pending suit relating thereto. *- During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*

Explanation. - For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction; and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

xxx xxx xxx

54. "Sale" defined. *- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*

Sale how made. *- Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale *- A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.*

It does not, of itself, create any interest in or charge on such property."

24. Reliance has been placed by the applicants upon judgment rendered by the Full Bench of Orissa High Court in case titled as **Sri Jagannath Mahaprabhu versus Pravat Chandra Chatterjee and others,** reported in **AIR 1992 Orissa 47,** wherein, keeping in view the fact that transferee is vitally interested in the litigation, it was held that Court, in its discretion, can implead him as a proper party under Order 22 Rule 10 (1) CPC. It has specifically been held in this judgment that plaintiff is not bound to make transferee a party but the Court has discretion in the matter which must be exercised and an alienee would ordinarily be joined as a party to enable him to protect his interest. It is further been held that assuming that alienee/transferee is not a proper party, he may be impleaded as an assignee under the provisions of Order 22 Rule 10 (1) CPC and even if an application has been filed under Order 1 Rule 10 CPC, labelling of the application being misconceived, the Court should ignore the labelling of the application as one under Order 1 Rule 10 CPC and treat the same as one filed under Order 22 Rule 10 (1) CPC, if the ingredients thereof are satisfied.

25. Applicants have also relied upon judgment passed by the Gujarat High Court in the case titled as **Patel Chaturbhai Shambhudas and another versus State of Gujarat and another,** reported in **AIR 1996 Gujarat 40,** but the ratio of law laid down in the said judgment is not applicable to the present case as in the said case, plaintiffs had filed a suit for declaration against the State claiming ownership and possession of the suit land. During the pendency of the said suit, an application was filed by the applicant therein to implead him as a defendant by claiming his ownership and possession on account of existence of Samadhis of his ancestors, where members of his community were visiting for seva-puja and worship. This case is distinguishable on facts which are not similar to the case in hand.

26. Even, in this judgment, it has been held that ordinarily, Court should not direct the plaintiff to join a third party in exercise of its power under Order 1 Rule 10 (2) CPC against the will of the plaintiff, compelling him to file a suit against such third party and to amend the plaint. Only in exceptional cases, where addition of new defendant is found absolutely required to enable the Court to effectively and completely adjudicate upon the matter in controversy between the parties, a person be added as defendant even against the opposition of the plaintiff.

27. Ratio of law laid down by the High Court of Rajasthan in the case titled as **Baijnath and another versus Smt. Ganga Devi and another,** reported in **AIR 1998 Rajasthan 125,** relied upon by the applicants, is also not applicable to the present case, as in the said case, applicant, who was seeking impleadment as a party, was daughter of deceased defendant and was not impleaded as a party despite the fact that being daughter of deceased defendant, she was having a right in the property in dispute and was a necessary party to the suit. It was not a case of transfer, assignment, creation or devolution of interest by the defendant by executing any agreement to sell in favour of the third party.

28. Similarly, judgment of the High Court of Karnataka delivered in case titled as **Munivenkatamma and others versus Ramaiah,** reported in **AIR 2001 Karnataka 292,** relied upon by the applicants, is also distinguishable on facts as in the said case, there was a dispute with respect to entitlement to a share in the compensation on the basis of title in the property, wherein the applicants had sought their impleadment as parties alleging that they had also got title over the land in dispute as the land was granted to their elder brother, who was claiming exclusive right in the property, in the capacity of head of the joint family. It was not a case wherein during pendency of the suit, property in dispute was alienated or proposed to be alienated by an agreement like agreement to sell.

29. Pronouncement of the apex Court in case titled as **Razia Begum versus Sahebzadi Anwar Begum and others,** reported in **AIR 1958 Supreme Court 886,** relied upon by the applicants, is also of no help to them as in the said case, plaintiff had filed a suit for declaration against defendant claiming the status of his wife and her entitlement to receive 'Kharch-e-Pandan' on the basis of such status, wherein applicant and her minor son had filed an application claiming to be lawful and legally wedded wife and son of defendant, whereas the defendant had conceded entire claim of the plaintiff for the declaration sought by her. In those peculiar facts and circumstances, the applicants were permitted to be added as defendants.

30. Applicants have also relied upon pronouncement of the apex Court in **Thomson Press (India) Limited versus Nanak Builders and Investors Private Limited and others,** reported in **(2013) 5 Supreme Court Cases 397,** wherein it has been held that transferee/purchaser *pendente lite* may be impleaded in pending suit for specific performance of prior agreement to sell/contract for sale filed by buyer against original owner/transferor/seller *pendente lite*. Further, after considering judgments in **Khemchand Shankar Choudhari versus Vishnu Hari Patil,** reported in **(1983) 1 Supreme Court Cases 18,** and **Amit Kumar Shaw versus Farida Khatoon,** reported in **(2005) 11 Supreme Court Cases 403,** it has been held that purchaser/transferee of entire estate, subject matter of the suit, is entitled to be added as a party-defendant to the suit for specific performance filed against the original owner/ transferor/seller.

31. The present suit is not a suit for specific performance but a suit for declaration of title on the basis of alleged relinquishment of share of defendant No. 1 in favour of the plaintiff. Further, in present case, transfer in favour of applicants is yet to have taken place on execution of sale deeds, which, as per terms and conditions of the agreements to sell, are yet to be executed after final decision of the civil suit. Therefore, at this stage, it cannot be said that the applicants, being transferees, have become title holder in the suit property. Viewed thus, ratio laid down in this judgment is not applicable to the case in hand.

32. Plaintiff has relied upon pronouncement of the apex Court in case titled as **Anokhe Lal versus Radhamohan Bansal and others,** reported in **AIR 1997 Supreme Court 257,** wherein it has been held that where impleading third party involves *de novo* trial, such impleadment normally should not be allowed. In this case, applicants were directed to be impleaded in a revision pending in the High Court despite the fact that suit was not pending when the said revision was taken up for hearing. It has been observed in this judgment that in such eventuality, the revision should only have been dismissed as infructuous. However, in principle, it has been held that the Court should have been very circumspect in dealing with an application of a third party seeking leave to become party in the suit when the plaintiff, who is the *dominus litis* of the suit, is in opposition to it.

33. Defendant No. 1 has relied upon judgment pronounced by the Full Bench of Punjab High Court in the case titled as **Santa Singh Gopal Singh and others versus Rajinder Singh Bur Singh and others,** reported in **AIR 1965 Punjab 415 Full Bench,** wherein, discussing the doctrine of *lis pendens,* it has been held that the principle, being that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent, is based not on the doctrine of notice but of expediency and the effect of maxim is not to annul the conveyance but only to render it subservient to the rights of the parties to the litigation.

34. Learned counsel for defendant No. 1 has also referred to para 41 of the said judgment wherein Justice Dua, despite having dissent with the majority judgment, has reiterated doctrine of *lis pendens* in different manner, but to the similar effect stating that the true foundation of *lis pendens* embodied in Section 52 of the Transfer of Property Act appears to be public policy and necessity, and this doctrine holds mainly to prevent circumvention of Court's judgments by disposition of or dealing with the property in controversy, and if circumvention were permissible, a person would hardly enforce his legal rights through Court action.

35. Defendant No. 1 has also relied upon another pronouncement of Punjab and Haryana High Court in the case titled as **Sardar Hari Bachan Singh versus Major S. Har Bhajan Singh and another,** reported in **AIR 1975 Punjab & Haryana 205,** wherein, relying upon the judgment passed in **Santa Singh Gopal Singh's case (supra),** the same principle has been reiterated.

36. It emerges from provisions of law and established law of land that doctrine of *lis pendens* embodied in Section 52 of the Transfer of Property Act is intended to strike at attempts by parties to the litigation to circumvent the jurisdiction of a Court, in which the dispute of rights or interest in immovable property is pending, by dealing, that may remove the subject matter of litigation from the ambit of the power of the Court to decide a pending dispute, or which may frustrate its decree. The rule is not based on doctrine of notice, but on expediency, i.e. the necessity of final adjudication. For applicability of this doctrine, it is immaterial whether the alienee *pendente lite* had, or had not, notice of pending proceedings. In the principle of *lis pendens,* being a principle of public policy, no question of good faith or bona fide arises.

37. In present case, transfer is not complete yet and as such, applicants cannot be termed as transferees. The applicants have only entered into agreements to sell in which specific conditions have been agreed upon between the parties that sale deeds in pursuance to these agreements shall be executed only after the decision of present suit. Even a transferee *pendente lite* is considered to be a representative in interest of the transferor who is a party to the suit and is also a person bound by decree, even if he was not made a party in the suit. This condition is in consonance with doctrine of *lis pendens* but does not entitle applicants to become party to suit only on the basis of it claiming that by virtue of this, interest in suit property has devolved upon applicants.

38. It is also canvassed on behalf of the plaintiff that for execution of agreements to sell during the pendency of suit after injunction order against any kind of alienation, proceedings under Order 39 Rule 2A CPC have also been initiated against defendants No. 1 and 9 wherein these defendants have taken defence that agreements to sell is not a transfer but an agreement for transfer after final adjudication of the case. This factual aspect has not been disputed.

39. Placing of Rule 10 in Order 22 CPC itself is self explanatory about scope and purpose of this Rule. Order 22 CPC deals with substitution of original parties on account of change in status of the parties, like, on account of death, marriage and insolvency etc. Rule 10 in this Order deals with procedure in similar situation in case of assignment, creation or devolution of interest before final decision in the suit where a third person enters into shoes of either plaintiff or defendant and has become capable to sue or to be sued in the lis. Right of a person to become a party in a suit in case of assignment, creation or devolution of any interest during the pendency of a suit under this Rule is to be considered keeping in view the framework and scope of Order 22 CPC.

40. Further, Order 22 Rule 10 CPC does not confer any right upon a person to become a party on account of assignment, creation or devolution of any interest automatically. Rather, the language of this Rule provides that suit 'may' (not 'shall') be continued by or against the person to or upon whom such interest has come or devolved, that too, 'by leave of the Court'. Therefore, Court, in the given circumstances, may or may not permit such assignee or interested person to become a party to the suit depending upon nature and manner of assignment, creation or devolution of interest to or upon a person sought to be impleaded and keeping in view doctrine of *lis pendens,* such assignment, creation or devolution of interest must not be purely self invited, that too, having knowledge of pendency of suit. This Rule is meant, definitely, for bona fide assignment, creation or devolution of interest which certainly should be inevitable for transferee.

41. This Rule empowers the Court to replace the plaintiff or defendant to avoid the multiplicity of the litigation but definitely, it cannot be made a tool to multiply claims or compel the plaintiff to amend its suit time and again where defendant may, so as to frustrate the claim of

plaintiff, keep on assigning, creating or devolving interest on third parties, who are not having any interest in the suit property at the time of filing of the suit.

42. Provisions of Order 22 Rule 10 CPC can be invoked in a situation where the assignment, creation or devolution of any interest in suit property is not designed to frustrate the claim of either party and further, where the original suit cannot be effectually and completely adjudicated in absence of such person having interest in the suit property. Order 22 Rule 10 CPC cannot be used as substitution of Order 1 Rule 10 CPC but to supplement it. Provisions of Order 22 Rule 10 CPC are to be read in conjunction with provisions of Order 1 rule 10 (2) CPC, which empower the Court to strike out or to add any party as necessary in order to enable the Court to adjudicate upon effectually and completely to settle all questions involved in the suit.

43. I am unable to agree with the proposition propounded by applicants that a person, not found to be a necessary party under Order 1 Rule 10 CPC, can be impleaded as a party by invoking the provisions of Order 22 Rule 10 (1) CPC, for the reason that Order Rule 10 CPC empowers the Court to add or delete parties to the lis whereas Order 22 Rule 10 CPC provides procedure for substitution of parties (plaintiff or defendant) in case of assignment before final order in the suit providing that in cases of assignment, creation of devolution of any interest during the pendency of a suit, suit may be continued by or against the person to or upon whom such interest has come or devolved. It does not give right to a person to or upon whom such interest of defendant has come or devolved to become a party even if his presence is not necessary for purpose of final adjudication of suit. It provides a procedure for continuation of suit and certainly continuation of a suit means right to the plaintiff to continue a suit against the person and not a right to such interested person to become a party in the suit.

44. Any right to become a party to the suit is certainly to be governed by the provisions of Order 1 Rule 10 CPC. It is also clear from the provisions of Order 22 Rule 10 CPC wherein it has been provided that suit 'may' be continued and that too, 'by leave of the Court', which indicates that such interested person has no right to claim for his addition/substitution as a party either as a plaintiff or defendant as a matter of right. There is another aspect of the issue that provisions of Order 22 Rule 10 CPC can also not have an overriding effect on the doctrine of *lis pendens,* as provided in Section 52 of the Transfer of Property Act. These provisions only enable the Court to deal with such a situation where it 'may' have become necessary to add such interested person as a party for effective and efficacious adjudication of the suit.

45. Applicants are not transferees. It is clear from the provisions contained in Section 54 of the Transfer of Property Act, as reproduced hereinabove, that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties and it does not, of itself, create any interest in or charge on such property. Even, had they been transferees, they would have been bound by the decree passed in main suit on the basis of doctrine of *lis pendens*, more particularly, when there are specific conditions in their agreements to sell that these agreements shall be enforceable only after final adjudication of present suit.

46. The issue involved in present suit is as to whether plaintiff has become owner of the share of defendant No. 1, inherited by her after death of their parents, on account of relinquishment of rights in the property by her in favour of plaintiff and if so, it's effect on sale deeds, executed prior to filing of suit, in favour of defendants No. 4 to 9 by defendant No. 3 being Power of Attorney of defendant No. 1. Defendant No. 1 has refuted any such relinquishment as claimed by the plaintiff.

47. Applicants, who are claiming their interest in the suit property on the basis of agreements to sell, can enforce these agreements to sell against defendants No. 1 and 9, only after their title is determined finally in the suit. For the said purpose, defendants are the best persons to defend the suit and to prove the title on the suit property. Even if the applicants are to be permitted to become co-defendants in present suit, their right flowing from the agreements to sell is not to be adjudicated and cannot be executed in present suit as it would be a claim

against a co-defendant and in case their agreements to sell are permitted to be made subject matter of the present suit, plaintiff would be unnecessarily compelled to assail the agreements to sell entered upon between the applicants and defendants No. 1 & 9, in execution of which he has no role. Rather, it might be an attempt on the part of defendants to enter into such agreements and to create a mess so as to prolong the present suit for indefinite period frustrating the claim of plaintiff. 'X' cannot be compelled to file a complaint to adjudicate cause or future dispute between 'Y' and 'Z'.

48. The apex Court, in **Thomson Press (India) Limited's case (supra),** had permitted a transferee to be added as a party on the ground that the original defendant might have lost interest to defend the suit on account of transfer of his interest to third party and to protect the interest of third party, the transferee was permitted to be added as a party so as to enter into the shoes of defendant to defend the suit on merits.

49. In present case, as discussed hereinabove, applicants are not transferees and there is no allegation of the applicants that defendants are not conducting the case effectively so as to frustrate the agreements to sell entered by the said defendants with them. Rather, defendant No. 9 and applicants in OMP No. 217 of 2015, who are claiming their right on the basis of agreement to sell entered into with defendant No. 9, are being represented by the same Advocate. Applicants in OMP No. 24 of 2015 have also not alleged any laxity on the part of defendant No. 1 in contesting the suit. In absence of any such plea and genuine proof, it cannot be inferred in the vacuum that original defendants have lost interest in defending the suit.

50. Terms and conditions of agreements to sell, basis for the applications seeking impleadment of applicants as defendants, establish that these applicants are having full faith in original defendants No. 1 and 9 as they, as claimed in the agreements, have paid entire sale consideration to these defendants without waiting for final adjudication of the suit, that too, without having any term and condition with regard to refund of such sale consideration even in case of defeat of the defendants in the suit. Rather, in agreement, subject matter in OMP No. 24 of 2015, entire sale consideration has been agreed to be forfeited in favour of defendant No. 1 in eventuality of defeat of the said defendant in the suit. It reflects the high degree of faith and confidence deposed by the applicants in defendants No. 1 and 9. Therefore, plea of the applicants based on the pronouncement of **Thomson Press (India) Limited's case (supra)** is also not sustainable.

51. So far as multiplicity of litigation is concerned, keeping in view the nature and claim of the suit, this plea is also not available to the applicants. Applicants are deriving their rights from agreements to sell, execution of which has not been denied by defendants No. 1 and 9, rather, despite having a specific clause in the agreement to sell with regard to forfeiture of sale consideration, defendant No.1, in its reply to the application (OMP No. 24 of 2015) has stated that in case of her defeat in the suit, the applicants shall be entitled to refund of the amount paid in agreement to sell.

52. Applicants in OMP No. 24 of 2015 have claimed that it has come to their knowledge that the parties to the suit are re-selling the suit property to some third person and, thus, they have filed the said application. Even if the apprehension of the applicants is treated to be true, it does not give any right to the applicants to become a party in the present suit for their claim against co-defendant in a suit filed by someone else. For this purpose, the applicants will have appropriate remedy somewhere else and not in this suit.

53. There cannot be a suit within suit between co-defendants in a suit filed by plaintiff against one of the defendants. Applicants have no direct right or conflict of interest with the plaintiff. Conflict, if any, may arise between defendants No. 1 and 9 with the applicants after adjudication of the present suit either for specific performance of agreements to sell or for refund of consideration amount. It is not a case where the applicants have been taken by a surprise qua the pendency of the suit or disputed title of defendants No. 1 and 9. As evident from terms and conditions of the agreements, the applicants were very much aware about the pendency of the

suit and to the best of their prudence, claimed to have paid entire consideration and have agreed to be bound by the final decision of the suit.

54. In case the applicants are permitted to become defendants, they would have only limited right to defend the suit on the basis of defence available to defendants No. 1 and 9 and they can be permitted to lead evidence only on the issues already framed on the basis of claim and counter claim of plaintiff and original defendants. They cannot be permitted to lead evidence qua the agreements executed *inter se* the defendants during pendency of the suit. It would be absurd proposition if applicants are allowed to file written statement introducing their dispute in the suit with other defendants in a suit of plaintiff *inter se* original defendants, that too, on account of agreements executed between applicants and defendants after having knowledge of pendency of suit which cannot be permitted. Therefore, impleadment of applicants as defendants is not warranted as in any case, even if applicants are permitted to become a party by entering into the shoes of original defendants, they will be having limited rights to contest the suit on the stand already taken by original defendants. Where there is no allegation against the original defendant with regard to contesting the suit effectively or any material on record reflecting loss of interest of the original defendant in contesting the suit, it would be not only against the interest of justice but also resulting into multiplicity of the parties unnecessarily causing inordinate delay in adjudication of the suit.

55. In view of above discussion, applicants are not necessary parties to be impleaded as defendants to adjudicate upon the suit effectually and completely, rather, their impleadment will hamper the proceedings of present suit.

56. Status of applicants does not warrant invoking of Order 22 Rule 10 CPC for arraying them as defendants and continue the suit against them as, at present, they are not having any right in the suit property for which suit may have been permitted to be continued by the plaintiff, against them after substituting defendants No. 1 and 9.

57. The combined reading of Order 1 rule 10 CPC, Order 22 rule 10 CPC and the rule embodied in Section 52 of the Transfer of Property Act, I find that the applicants are neither entitled to nor required to be permitted to contest the claim as co-defendants in present suit. Hence, both the applications are dismissed.

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

Vivek Ummatt ....Petitioner.

Versus

Surinder Kaur ....Respondent.

Civil Revision No. 100 of 2016
Decided on : 3.1.2018

Code of Civil Procedure, 1908- Section 151- Civil Revision- Order 11 Rule 12- Rent Control Act- Petitioner filed an application under Order 11 Rule 12 seeking to permit discoveries of an agreement dated 27.7.1992, purportedly executed inter-se the deceased husband of the non-applicant and the petitioner herein- Application dismissed by the learned Rent Controller- Hence, the present revision- **Held-** that an original agreement inter-se the party relating to the demised property was essential for the effective adjudication of the lis – Oblivious of the family settlement agreement inter-se the parties had to be evaluated by the learned Rent Controller, especially vis-à-vis the comparative evidentiary worth of both the documents and their comparative probative worth had to be assessed to clinch the issue- Consequently, the impugned order set aside- Revision allowed. (Para-3)

For the petitioner: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondent: Mr. G.S. Rathoure, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

During the pendency of Rent Petition RBT No. 245/2 of 15/2012, before, the learned Rent Controller concerned, the applicant/respondent herein, tenant in the hitherto demised premises, instituted an application, cast under the provisions of Order 11 Rule 12 read with Section 151 CPC, (i) wherein he sought an order, from, the learned Rent Controller, of, the landlady being directed to permit discoveries vis-à-vis the tenant/petitioner herein, of, originals, of, an agreement of 27.7.1992, purportedly executed inter-se the deceased husband, of the non-applicant, namely one Sh. Amrik Singh, AND the petitioner herein (ii) under agreement whereof, he had agreed to provide in the re-constructed building concerned, accommodation(s) to the applicant/ petitioner herein. The aforesaid agreement, was, averred in the application to be both just and essential, for settling the issue appertaining, to the right(s) and entitlement(s) of the applicant, in the re-constructed building. The non-applicant had instituted reply thereto, wherein she proceeded to deny the existence, of, original, of, aforesaid agreement, also denied, of, original thereof being in her possession.

2. Under the impugned order, a dis-affirmative verdict was recorded upon the apposite application by the learned Rent Controller and being aggrieved therefrom, the applicant is led to assail it, before this Court, by his casting the instant petition herebefore.

3. The learned Judge, has, apparently falling into grave error by making a conclusion (i) that the aforesaid agreement was neither just nor essential, for, hence an effective adjudication being meted upon the apposite lis. The reasons' for his making the aforesaid conclusion, is, grooved (ii) upon, under a family settlement, occurring inter-se the respondent herein vis-à-vis the deceased landlord, exclusive rights in the re-constructed building being bestowed upon her. However, even if, in the aforesaid family settlement, exclusive right(s) in the re-constructed building stand bestowed upon the respondent herein, (iii) nonetheless agreement, if any, executed inter-se the petitioner herein vis-à-vis the deceased landlord, was also along with, the aforesaid family settlement enjoined to be borne in mind, (iv) besides was in conjunction therewith enjoined to be evaluated, especially vis-a-vis the comparative evidentiary worth(s), of each. Importantly also thereupon issue(s) were enjoined to be struck vis-à-vis the apposite agreement (v) whereafter evidence was enjoined to be adduced thereon, by the contesting litigants', (vi) AND preeminently, upon, their conjoint appraisal, the comparative probative worth(s), of, both was enjoined to be assessed, (vii) AND for tangible reasons' the evidentiary worth, of, one or the other, was, also to be clinchingly rested. Contrarily, the learned trial Judge, has, in a slip shod manner and without application of mind, proceeded, to come to a conclusion, that, the aforesaid agreement was neither just nor essential, for deciding the controversy, (viii) even when for the aforestated reasons, the evidentiary worth thereof, was, yet alongwith, the evidentiary worth of the family settlement rather enjoined to be conjointly evaluated, appraisals, of, evidentiary worth(s) whereof, would occur, only after completing the aforesaid procedural steps. In aftermath, the learned Rent Controller if he deems fit, may at an appropriate stage, strike, an issue appertaining to the agreement aforestated.

4. In aftermath, the impugned order, suffers, from a gross perversity and absurdity. Accordingly, the petition is allowed and the impugned order is quashed and set aside. It is made clear that in case the respondent herein, does not on oath, after hers receiving the interrogatories, from, the petitioner herein, hence mete answers thereto, thereupon the consequences thereof, borne In Order 21 Rule 11 CPC, shall be imperatively entailed upon her. All pending applications, also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Court on its own motion ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWPIL No.200 of 2017
Date of decision:04.01.2018

Constitution of India, 1950- Article 226- Public Interest Litigation- Letter petitioner informed the Court about the illegal mining at Village Kothi on Sunni-Luhri Road- Authorities responsible for checking the illegal mining did not take action despite repeated requests of the petitioner and other residents of the area- **Held**- that District Mining Officer and police should conduct raids regularly to check illegal mining – petition disposed of. (Para-6)

For the Petitioner: Mr.Saurav Rattan, Advocate as Amicus Curiae.
For Respondents-State: Mr.Ashok Sharma, Advocate General with Mr.M.A. Khan and Mr.Varun Chandel, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.(Oral)

Taking cognizance of letter dated 3rd August, 2017, sent by a person; namely; Dalpat Ram, resident of Village Kothi, Post Office Ogli, Tehsil Sunni, District Shimla, H.P., addressed to the Chief Justice of this Court highlighting therein damage being caused to the Government land on account of illegal mining done by certain miscreants, this Court, while treating the aforesaid letter as Public Interest Litigation, directed learned Additional Advocate General to have instructions in the matter.

2. Letter-petitioner specifically alleged that on Sunni-Luhri Road, at village Kothi, illegal mining of the sand is being carried out, as a consequence of which, huge and extensive damage/loss is being caused to the State Government of Himachal Pradesh. Letter-petitioner further alleged that there is no check from any authorities of the Government of Himachal Pradesh on large scale extraction of sand from the Government land. Petitioner also alleged that Government land is/was being encroached upon, but, no action is being taken by the authorities concerned. Since, authorities, responsible for checking illegal mining, failed to take action, pursuant to the repeated requests sent by the petitioner as well as other residents of the area, petitioner approached this Court by way of instant letter petition.

3. Perusal of affidavits, having been filed by the Deputy Commissioner and Superintendent of Police, Shimla, clearly suggest that the averments contained in the letter petition, as have been taken note above, are factually correct. Pursuant to order dated 16th November, 2017, passed by this Court, Deputy Commissioner, Shimla directed the Superintendent of Police, Shimla, SDO(C), Shimla Urban, District Mining Officer and Tehsildar Shimla to inquire the matter and to take immediate steps to stop illegal mining. Pursuant to aforesaid direction issued by Deputy Commissioner, Tehsildar, Sunni submitted report vide communication dated 6th December, 2017 detailing therein as under:-

> ***"3.(1) That the spot inquiry of the matter has been conducted through Naib-Tehsildar, Jalog, Sub-Tehsil Jalog, District Shimla, who reported that during enquiry it is found that the public path bearing Khasra No.593/1 measuring 0-04-14 hectare has been damaged due to extraction of sand in adjoining private land.***

(2) That there is no illegal construction/fencing found upon the Govt.land in mauja Kothi bearing Khasra No.593, 594,595,591 but these number has been found damaged due to extraction of sand and some portion of khasra numbers 39 has also been found damaged due to extraction of sand by the local private land owners. The Public path from Village Kothi extend towards Satluj river, which is also used by the local inhabitants for carrying out the dead bodies to cremation ground which is set up near Satluj river. Now the Gram Panchayat Ogli recently has constructed a new Public path from main road towards Village Kothi which is being used by the local public. Presently General public is not facing any problem of path due to this common path.

(3) That the permission for mining of sand from private land has been issued by the department of industries to Shri Birbal S/o Sh.Paras Ram R/o Village Kothi on dated 15.12.2016 for extraction of sand from private land for the purpose of construction of house. Other private land owners whose land is adjoining to Public path have not shown any permission for the extraction of sand during enquiry. (The report received from Tehsildar Sunni is annexed as Annexure-R/2)".

4. The District Mining Officer, Shimla vide communication dated 12th December, 2017 submitted compliance report and informed that area in question was visited by him alongwith field staff on 19th August, 2017 and no one was found/seen indulged in illegal/unlawful mining activities on the spot. The District Mining Officer specifically reported that since the spot is located adjacent to the road and good quantity of sand is available in small pockets in the area i.e. in the Government as well as private land, thus making the area very accessible and sensitive to carryout illegal mining. Aforesaid officer also reported to Deputy Commissioner that the matter has already been taken with Forest Department, Police and Public Works Department to keep check on illegal mining in this particular area and Mining Guard, Basantpur has also been directed to increase frequency of raids in the area to stop illegal mining completely.

5. Perusal of affidavit, having been filed by Superintendent of Police, Shimla, further suggests that in order to curb illegal mining activities/transportation, necessary directions have been issued to Station House Officer, Police Station, Sunni and Incharge Police Post Julog to take effective and coercive measures for stopping illegal mining activities and also conduct surprise checking to nab the culprits. During the year 2017, total 70 challans have been made in the jurisdiction of Police Station Sunni and fine amount of Rs.67,000/- has been realized by the Police authority by compounding nine numbers of challans and remaining 61 challans were sent to learned Court for initiating criminal proceeding against the violators. Police has also registered an FIR No.79 of 2017, dated 7th December, 2017 under Sections 341, 427, 34 IPC and Section 21(1) of the Mine and Minerals (Regulation and Development) Act, 1957, which is pending investigation.

6. After having perused aforesaid affidavits filed by Deputy Commissioner and Superintendent of Police, Shimla, which clearly suggest that special campaign has been launched throughout the area to curb the illegal mining activities and to detect illegal mining in the entire district, this Court sees no occasion to keep the present petition alive and as such the same is closed. However, before parting, this Court wishes to pass following orders/directions:-

(i) Deputy Commissioner, Shimla shall have the meeting with the State Geologist to explore possibility of getting such sites surveyed and thereafter auctioned them in terms of Rules occupying the field so that no loss is caused to the public exchequer.

(ii) Necessary directions may also be issued to the District Mining Officer and Police to conduct raids on the aforesaid sand quarries regularly so that illegal mining is

detected and loss and damage to ecology as well as public exchequer is avoided/prevented.

7. We also wish to place on record appreciation qua the efforts put in by Mr.Saurav Rattan, Advocate, Amicus Curiae, who, on the instructions of this Court, contacted letter petitioner and obtained necessary feed back.

8. Registry is directed to send a copy of this judgment to the Deputy Commissioner, Shimla for necessary action as well as to the letter petitioner to enable him to take follow up action with the concerned authorities.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Courts on its own motion .....Petitioner.

Versus

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

CWPIL No.223 of 2017
Date of Decision: 04.01.2018

Civil Writ Petition- Public Interest Litigation- A letter petition moved by the Pardhan of a Gram Panchayat that the resolutions passed by the Gram Panchayat are not being taken seriously by the concerned authorities- **High Court Held-** that the provision of Sections 5 and 9 of the Himachal Pradesh Panchayati Raj Act, 1994 and the affidavit of Deputy Secretary (Panchayati Raj) shows that - Resolutions sent by the Gram Panchayat should be duly replied and necessary action taken – State directed to effectively implement the provision of Section 100 of the Panchayat Raj Rules- Copy of the judgment directed to be sent to the Secretary (Panchayati Raj) for necessary action. (Para- 5 to 12)

For the Petitioner: Mr. Vir Bahadur Verma, Advocate as Amicus Curiae.

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr.M.A.Khan & Mr. Varun Chandel, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J. *(oral)*

By way of instant letter petition, received in the Office of Chief Justice of this Court on 10.10.2017, Pradhan, Gram Panchayat, Kheel, Development Block Karsog, District Mandi, Himachal Pradesh, highlighted the issue of great importance. Letter petitioner alleged that though constant efforts are being made by Central and State Governments to give more and more powers to Gram Panchayats to make them more effective and powerful, but on the other hand, resolutions being passed by Gram Panchayats are not being taken seriously by the concerned authorities, rather same are thrown in the dustbin. Letter petitioner further alleged that in normal circumstances, resolutions sent by the Gram Panchayats should be acknowledged/replied by the concerned departments within a reasonable period, but authorities do not deem it proper to reply the same and as such, Gram Panchayats remain unaware of decision, if any, taken upon the requests sent by them through resolutions for various development works in their respective area.

2. After having perused the averments contained in the letter petition, referred hereinabove, this Court while treating the same public interest litigation, directed the learned Additional Advocate General to have instructions in the matter.

3. Deputy Secretary (Panchayati Raj) to the Government of Himachal Pradesh, has submitted in his reply that as per provision of Section 9 of the Himachal Pradesh Panchayati Raj Act, 1994 read with Rules 24 to 31 to the Himachal Pradesh Panchayati Raj (General) Rules,1997, the Gram Panchayats shall hold its meetings at least once in a month in the Office of the Gram Panchayat. In the said meeting of the Gram Panchayat, the details of income and expenditure of the preceding month in respect of each item shall be placed before the Gram Panchayat besides taking up other agenda items for discussion as decided by the Gram Panchayat.

4. Deputy Secretary has further stated in his affidavit that meeting of Gram Sabha is also convened by the Gram Panchayat for discussing various development and welfare schemes of the Government to be implemented in the jurisdiction of the Gram Panchayats as per provisions of Section 5 of the Himachal Pradesh Panchayati Raj Act, 1994. Affidavit of Deputy Secretary further reveals that Gram Panchayat after having discussed various issues pertaining to various departmental activities relating to different departments of the State, passes resolution and sent the same to the concerned department for necessary action. Since, the Gram Panchayat is a constitutional body, it is incumbent upon the concerned department to reply the resolutions of Panchayats passed in relation to matter pertaining to their department.

5. It is quite apparent from the affidavit filed by the Deputy Secretary (Panchayati Raj) that there is mechanism in place, rather provided under Himachal Pradesh Panchayati Raj (General) Rules, which specifically provides that resolution of Panchayat passed in relation to matter pertaining to various department shall be duly replied and necessary action shall be taken upon the same.

6. Affidavit filed by the Deputy Secretary further reveals that since there is no mention with regard to resolution, if any, sent by the Gram Panchayat, Kheel to the different department, matter could not be got verified by the authority concerned. Since, it had come to the knowledge of the department that some of the representatives of different department as per Section 7(5) were not participating in the meeting of the Gram Sabhas, department had issued necessary directions to the Panchayats and DPOs as well as BDos for implementing the said provision of the Act.

7. Perusal of communication dated 2-3-2010 placed on record, suggests that officials from the departments of Agriculture, Veterinary, Primary Education, Forest, Irrigation, Public Health, Horticulture and Revenue, need to remain present in terms of Section 7(5) of Himachal Pradesh Panchayati Raj Rules, 1994 in the meeting of Gram sabhas.

8. Perusal of communication sent to this Court by Pradhan, Gram Panchayat, nowhere reveals specific instances, if any, where resolutions sent by it have been not dealt with and as such, there is/was no occasion for department of Panchayati Raj to respond to the allegations contained in the letter petition. It is ample clear from the documents placed on record by the respondent that there is already a provision in the Himachal Pradesh Panchayati Raj(General) Rules, 1997 as framed thereunder that Officers, as named above, shall remain present in the meeting of Gram Sabha, whereafter necessary action shall be taken on the resolution passed by the Gram Panchayats/Gram Sabhas, in accordance with law.

9. At this stage, it would be profitable to reproduce Section 100 of the Panchayat Raj Rules, as under:-

> **"100. Implementation of the resolution of the Panchayat Simiti:- (1) It shall be the duty of the Block Development Officer, assisted by the staff working under him, to faithfully implement and follow up the resolutions of the Panchayat Samiti.**

(2). **The responsibility for executing various schemes and works in accordance with the resolutions of the Panchayat Samiti and the instructions of the various departments shall be the responsibility of the Block Development Officer assisted by the staff working under him."**

10. Consequently, in view of above, we see no reason to keep the present petition alive and as such, the same is closed. Before parting, we hope and trust that authority concerned i.e. Secretary, (Panchayati Raj) to the Government of Himachal Pradesh, shall issue appropriate directions to the concerned Department for redressal of grievances as highlighted by the letter petitioner so that efforts/endeavour persistently being made by the Central and State Government to strengthen the Panchayati Raj institutions is achieved.

11. The efforts put in by Mr. Vir Bahadur Singh, learned Amicus Curiae, who, on the instructions of this Court, contacted letter petitioner and obtained necessary feedback.

12. Registry is directed to send a copy of this judgment to the Secretary (Panchayati Raj) to the Government of Himachal Pradesh, for necessary action as well as to the letter petitioner to enable him to take follow up action with the concerned authorities.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Gram Panchayat, Thunag ....Petitioner.

Versus

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

CWP No.2135 of 2016

Date of Decision: January 4, 2018

Constitution of India, 1950- Article 226- Petitioner Gram Panchayat, Thunag, District Mandi prayed for quashing the decision of establishing office of Sub-Divisional Magistrate-cum-Sub-Divisional Officer (Civil) at Janjehli instead of Tehsil Thunag and also for quashing the notification establishing the Sub-Tehsil at Chhatri- **Held-** that while issuing notification for establishment of offices in question the aspect of public interest has not taken care of as getting reflected from the record- Janjehli is not suitable place for establishing the office of Sub-Divisional Officer as it comprised only 14 Patwar Circles and during winter season it remains covered by snow making thereby things difficult from the view point of the administration, whereas, Thunag is geographically well connected- Further held- that public action has to be exercised in good faith- it should not be based on extraneous factors and arbitrariness- Petition allowed - notifications regarding creation of office of Sub-Divisional Officer at Janjehli, District Mandi and creation of new Sub Tehsil at Chhatri are quashed- petition disposed of. (Para- 7, 13 and 14)

For the Petitioner : Mr. Sanjeev Kuthiala, Advocate.

For the respondents : Mr. Ashok Sharma, Advocate General, with Mr. M.A. Khan, Mr. Anup Rattan, Mr. Varun Chandel, Additional Advocates General, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Gram Panchayat, Thunag, District Mandi, Himachal Pradesh, through its Pradhan and duly authorized representative, has filed the instant petition, inter alia, praying for the following reliefs:

> "i) To call for the record of the case pertaining to the decision taken with respect to the Advertisements (Annexures P-1 and P-6) and after seeing the same to quash and set aside the decision taken for establishing the office of Sub-Divisional Magistrate-cum-Sub-Divisional Officer (Civil) at Tehsil Thunag.
>
> ii) To direct the respondents to consider the representation of the various Panchayats and its locality (Annexure P-5/A to Annexure P-5/X) and the Resolution of the Zila Parishad (Annexure P-5/Y) as also the representation of the Vayapar Mandal (Annexure P-5/ZZ) and after giving personal hearing to take decision accordingly for the establishment of the office of the Sub-Divisional Magistrate-cum-Sub-Divisional Officer (Civil) at Janjehli instead of Tehsil Thuna.
>
> iii) to quash the notifications (Annexures P-9 and P-10), which have been issued by the respondents without recourse of procedure and without giving personal hearing to the affected general public and being contrary to the representations and the Resolutions of the various Gram Panchayats, Zila Parishads and Vyapar Mandal."

2. Annexures P-1 to P-6 are simply newspaper reports and notices. We need not elaborate the same, for they directly relate to the notifications (Annexure P-9 & P-10).

3. Annexures P-5/A to P-5/ZZ are representations and resolutions of various bodies, including Panchayati Raj Institutions.

4. Annexure P-9 is the Notification dated 27.6.2016, issued by the Chief Secretary to the Government of Himachal Pradesh, whereby a new Sub Division (Civil), known as "Janjehli" is created by re-organizing certain areas of Tehsil Thunag and Tehsil Bali Chowki. Annexure P-10, dated 21.4.2016, is the Notification, creating Sub-Tehsil at Chhatri. In effect, this Court is called upon to adjudicate the action of the State in issuing Annexures P-9 and P-10.

5. At this point in time, it be only observed that earlier attempt of the State, in taking the aforesaid action, was assailed before the Court, which petition being CWP No.1272 of 2016, titled as *Gram Panchayat Thunag v. State of H.P. & others,* was disposed of in the following terms, for at that point in time, the Court was assured that no notification stands issued, with regard to the opening of Office of Sub Divisional Officer (Civil) at Janjehli and that question of unilateral decision to open the office does not arise at all:

> "2. The petitioners have sought the following main reliefs on the grounds taken in the memo of the writ petition:
>
> "(i) To call for the record of the case pertaining to the decision taken with respect to the Advertisements (Annexures P Annexures P Annexures P-1 and P 1 and P 1 and P-7) and after seeing the same to quash and set aside the decision taken for establishing the office of SubDivisional Magistrate-cum-SubDivisional Officer (Civil) at Janjehli instead of Tehsil Thunag.

(ii) To direct the respondents to consider the representation of the various Panchayats and its locality (Annexure P Annexure P Annexure P-6/A to Annexure P 6/A to Annexure P 6/A to Annexure P-6/X) and the Resolution of the Zila Parishad (Annexure P Annexure P Annexure P-6/Y) as also the representation of the Vayapar Mandal (Annexure P Annexure P Annexure P-6/zz) and after giving personal hearing to take decision accordingly for the establishment of the office of the Sub-Divisional Magistrate-cum-SubDivisional Officer (Civil) at Tehsil Thunag instead of Janjehli."

3. Respondents No.1 to 3 have filed reply. It is apt to reproduce paras 3 & 6 of the reply herein:

"3. In reply to Para No. 3 of the civil writ petition it is submitted that while opening new Govt. Offices at any place all aspects are being kept in mind and no unilateral decision or proposals are being taken. However, it is submitted that no notification has been issued by the Govt. about the functioning of Sub Divisional Office (C) at Janjehli, so far.

4 & 5. .....

6. That the contents of Para No. 6 are not admitted. In this context it is submitted that no notification has been passed by the Himachal Pradesh Govt. so far regarding opening of new SDM cum SDO (C) office at Thunag or Janjehli. **So the question of unilateral decision to open this office does not arise at all**."

4. Keeping in view the reply filed by respondents No. 1 to 3, this writ petition does not survive. The same is disposed of accordingly alongwith pending applications, if any."(Emphasis supplied)

6. It is in this backdrop, we now proceed to examine the issue raised before us.

7. Certain facts are not in dispute. Tehsil Thunag comprises of 19 Patwar Circles, having population of approximately 30000 people. Janjehli is just at a distance of 14 kms from Thunag. Since the very beginning, residents of Tehsil Thunag had been resisting creation of Sub Division at Janjehli and opening of Sub Tehsil at Chhatri. In fact, all the Panchayats, falling within Tehsil Thunag, had been passing resolutions since the year 2016, asking the Government not to go ahead with the proposal, if any.

8. From the response-affidavit dated 26.10.2017 that of the Deputy Commissioner, Mandi, all these facts are abundantly clear.

9. From the petition, it is also evident, which fact is not disputed by the State, that at Thunag there are several offices and space is available for future expansion and development. Geographically, it is Thunag which is central and caters to the larger section of the people.

10. It be only observed that breaking up of Thunag as a Gram Panchayat and creating a separate Sub Division at Janjehli, has in fact aggravated the problem and agony of the residents of the area.

11. This Court is not oblivious of the fact that decision to create a Sub Division and place headquarters at a particular place is the sole prerogative of the State, but then such actions have to be based on sound principles of law. There has to be rationality and logic in the same. Also such decision ought to be based on some objective material.

12. One finds that not only the assurance meted out to this Court that no decision on unilateral basis shall be taken by the State, stands breached, but apart from the fact that principles of natural justice stand not complied with, inasmuch as views of the

local people were not even considered, to the contrary one finds the record to be conspicuously absent, explaining the public interest involved in taking such action.

13. What is that "public interest" remains shrouded with mystery. Record is not reflective of the same. It may be in the memory of the decision maker, but then, in law, one cannot trace it to the same, for it is the record which must speak and not the person. Resolutions of the Gram Panchayats have not been considered, muchless responded to. There is no application of mind and the decision, it appears has been taken in hot haste, only to achieve certain oblique ends, as alleged by the petitioner. Consciously, we are not dwelling on the political consideration being one of them. However, we are concerned that even otherwise the democratic Will and voice of the people stands ignored and not considered, apart from the fact that the decision is totally illogical and arbitrary.

14. Newly created Sub Division at Janjehli, with its headquarters at the same place, now comprises of 14 Patwar Circles of Tehsil Thunag. What is the justification for doing the same, and that too, when Janjehli is just at a distance of 14 kms from Thunag, remains undisclosed. Most of the population is towards Thunag. Geographically, Thunag is well connected. Even climatically, it is Thunag which is best suited, for during winters Janjehli, quite often, is covered by snow, making things difficult from the viewpoint of administration.

15. Public action has to be exercised in good faith. It cannot be based on extraneous factors and considerations. Arbitrariness cannot be allowed to prevail. It should not be dependent upon whims and caprice of an individual.

16. In view of the peculiar facts and circumstances, we are inclined to interfere in the present writ petition and, as such, quash Notification (Annexure P-9), dated 27.6.2017, regarding creation of Sub Division at Janjehli, District Mandi, Himachal Pradesh; and Notification (Annexure P-10) dated 21.4.2016, regarding creation of new Sub Tehsil at Chhatri, District Mandi, Himchal Pradesh, both issued by the Chief Secretary to the Government of Himachal Pradesh.

Present writ petition stands allowed. Pending application(s), if any, stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Anil Sood ....Petitioner.

Versus

Rajinder Kumar Sood & Another .....Respondents.

CMPMO No. 328 of 2017.
Decided on: 5th January, 2018

Code of Civil Procedure, 1908- Section 24- Transfer of the civil suit sought on the ground that the defendant is a practicing lawyer in Palampur and as such no advocate is coming forward to appear for the petitioner- Application dismissed by the Learned District Judge - While allowing the petition- The High Court **Held-** the possibility of the members of the bar not willing to appear against the respondent cannot be ruled out- Justice should not only be done, but look like to have been done- Consequently, petition allowed. (Para-3)

For the petitioner Mr. Ravinder Singh Jaswal, Advocate.

For the Respondents Mr. N.K. Sood, Senior Advocate with Mr. Hemant Kumar Sharma, Advocate for respondent No.1.
None for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Order under challenge Annexure P-5 has been passed by learned District Judge, Kangra at Dharamshala in an application filed under Section 24 of the Code of Civil Procedure in Civil Suit No. 282 of 2012, registered as CTA No.09-P/2016, for transfer of Civil Suit from the Court of Senior Civil Judge, Palampur to the Court of Senior Civil Judge, Dharamshala on the grounds *inter alia* that the respondent herein (plaintiff in the trial Court) is an Advocate by profession and practicing at Palampur and it is for this reason the lawyers practicing at Palampur are not coming forward to appear on behalf of the petitioner and proforma respondent, defendants in the trial Court. Learned trial Court has dismissed the application as in its opinion the same was filed with malafide intention.

2. The perusal of impugned order reveals that not only Civil Suit No. 282 of 2012 is pending disposal against the petitioner-defendant, but three more cases between the parties are also pending disposal in the Court of learned Senior Civil Judge, Palampur. Learned District Judge has noted in the impugned order that no application for transfer of those cases was filed. The intention of the petitioner-defendant is stated to be not bonafide as had it been so, the application for transfer of the remaining cases should have also been filed. The names of the Advocates, who appeared on behalf of the petitioner-defendant has also been noted in the impugned order.

3. On having gone through the record and also taking into consideration the rival submissions, this Court is not in agreement with the findings recorded by learned Court below while dismissing the application vide impugned order for the reason that when the respondent-plaintiff is a practicing lawyer at Palampur, the possibility of the members of Bar may not be willing to appear against him and defend the petitioner-defendant in the pending suit filed by their fellow Bar members cannot be ruled out. It is well settled that justice should not only be done but appears to have been done. Therefore, when the petitioner-defendant has apprehension of being not defended in the suit properly in view of the respondent-plaintiff is a member of Palampur Bar Association, the above said legal principle is likely to be violated in case the suit is not transferred from Palampur. As regards three remaining civil suits, admittedly, the defendants have filed applications qua transfer thereof also to Dharamshala. The said applications are pending disposal before learned District Judge Kangra at Dharamshala. Being so, the impugned order is not legally sustainable and the same is accordingly quashed. Consequently, this petition is allowed and ***Civil Suit No. 282 of 2012***, titled ***Rajinder Kumar Sood*** versus ***Vanita Sood and Another*** is ordered to be transferred from the Court of Senior Civil Judge, Palampur to the Court of Senior Civil Judge, Kangra at Dharamshala for disposal, in accordance with law. The parties through learned counsel representing them are directed to appear before the transferee Court on 19.2.2018. Learned Senior Civil Judge, Palampur to transfer the record of the case to the Court of learned Senior Civil Judge, Kangra at Dharamshala well before the date fixed. The petition is accordingly disposed of, so also the pending application(s), if any.

An authenticated copy of this judgment be sent to both Courts for compliance.

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

Bala Nand & others. .....Appellants/Plaintiffs.
Versus
Smt. Shakuntla Devi ....Respondent/Defendant.

RSA No. 236 of 2007
Reserved on : 27.12.2017
Decided on : 5th January, 2018

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for decree of possession- The late husband of the defendant had taken the suit land from the plaintiff in exchange and had agreed to give the plaintiff the land comprised in other khasra numbers- The late husband of the defendant had not handed over the possession of the land and as such plaintiff wants his land back- The defendant while contesting the suit had enter alia raised a plea that her husband had been in adverse possession of the suit land- The learned Trial Court had dismissed the suit, which was upheld by the learned 1st Appellate Court- On second appeal the High Court reversed the findings and **Held**- That the hostile animus possedendi has to be borne out from the written statement- defendant with a hostile animus, began possession vis-a-vis the suit land – It was also essential to submit from when and how the possession became hostile – Adverse possession was only thereupon imperatively reckonable- On facts held that the same was amiss in the present case- Moreover, in view of Ex.DW-4/A, a recital showing deed of conveyance qua the suit land- The defendant was estopped from raising a plea of adverse possession- Consequently, judgment of the courts below set aside and quashed qua the said findings. (Para-8 to 10)

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Section 53-A of the Transfer of Property Act- Doctrine of Part Performance- Defendant in alternative had sought the protection of Section 53-A of the Transfer of Property Act based on Ex.DW-1/A- **Held-** that the learned Trial Court had erred in not framing issue in respect of the alternate plea raised by the defendant vis-à-vis Section 53A resulting in prejudice to the parties- A specific issue in this behalf framed by the High Court - Consequently, matter remanded back to the learned Trial Court to seek evidence of both the parties on the aforesaid issue alone- the learned Trial Court directed to decide the same within five months from the date of the order. (Para-11 and 12)

Case referred:
Achal Reddi v. Ramakrishan Reddiar and others, AIR 1990 SC 553

For the Appellants: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishat, Advocate.
For the Respondent: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit, for, rendition of a decree for possession of the suit khasra number, was, dismissed by both the learned Courts below. Both the learned Courts below, accepted, the espousals of the defendant, of, hers becoming owner of the suit land by way of adverse possession. In sequel thereto, the plaintiff/appellant herein is driven to institute the instant appeal before this Court.

2. Briefly stated the facts of the case as set up by the plaintiffs are that Ram Rattan, the late husband of the defendant, had taken the suit land from the plaintiff and in

exchange had agreed to give the plaintiff(s), the land comprised in khasra Nos. 350, 360 and 363. But late Ram Rattan actually did not hand over the suit possession and always put off the matter on one pretext or the other. The defendant was lastly asked in the third week of March, 1999, to handover the possession of the land as per promise. But she also did not keep the promise. Now the plaintiff wants his own land back. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, it is averred that no such agreement of exchange of land was entered into between the parties. In fact the plaintiff had taken some money from her husband. The plaintiff and her husband had been in adverse possession of the land. The plaintiff is no longer its owner and is not entitled to get back possession. The defendant has raised apple orchard and also constructed a house on this land. The plaintiff has not come to the court with clean hands. The suit was also resisted on the ground of non joinder of parties, mis joinder of cause of action, improper valuation, estoppel etc.

4. The plaintiffs/appellants filed replication to the written statement of the defendant, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is owner of suit land, as alleged?OPP

2. If above issue is proved in affirmative, whether the plaintiff is entitled for the relief of possession?OPP.

3. Whether the suit is not maintainable, as alleged?OPD.

4. Whether the defendant is in adverse possession of the suit land, as alleged? OPD.

5. Whether the plaintiff has not come to the court with clean hand, if so, its effect?OPD.

6. Whether the suit is bad for non joinder of the necessary parties as well as mis-joinder of cause of action, as alleged?OPD.

7. Whether the plaintiff has no locus standi to file the present suit, as alleged?OPD.

8. Whether the plaintiff is estopped to file the suit by his act, conduct and deeds etc., as alleged?OPD.

9. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, if so, its effect?OPD.

10. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the plaintiffs/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein, they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 25.04.2008, this Court, admitted the appeal instituted by the plaintiffs/appellants herein, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the Courts below have erred and acted illegally in rendering a finding of adverse possession against the appellants when the admitted case of the respondent was that she was in permissive possession of the property by virtue of alleged agreement of sale exhibit DW1/A?

b) Whether the Courts below were justified in invoking the doctrine of part performance of the agreement under Section 53A of the Transfer of Property Act, 1882, when no such plea was raised by the respondent in the pleadings and if so, its effect on the judgments under appeal?

Substantial question of Law No.1.

8. The defendant's espousal, of hers, perfecting vis-a-vis the suit land, title by prescription (I) stands sparked, by elapse(s) of the statutory periods, of, time, since hers with an *animus possedendi,* holding, possession of the suit land, (ii) AND was embedded in contentions, borne, in her written statement, wherein she echoed (a) of, since, time(s) immemorial, without, any interference, hers with a hostile *animus possedendi,* holding possession vis-a-vis the suit land, against, the lawful entitlement(s) thereof, of true owners thereof. The casting, of, the aforesaid contentions in the written statement, by the defendant, are, per se nebulous, vague and sketchy, (iii) thereupon, the contentions, are, infirm for capitalising any inference, of, hence theirs embodying averments, apposite, for, sustaining her espousals, of hers, becoming owner by adverse possession vis-a-vis the suit land, especially when (a) she contrarily, was enjoined to make specific echoings therein qua the specific time, whereat, she with a hostile *animus possedendi,* hence commenced her possession vis-a-vis the suit khasra numbers, importantly also against the rights, title or interest, of, specific named true owner(s), (b) besides whereagainst whom she with an *animus possedendi,* held possession thereof; (c) AND of, her apposite contention(s) carrying ascriptions, with, precise delineations vis-a-vis, whereat, hers with an *animus possedendi,* hence commencing possession vis-a-vis the suit khasra numbers, AND since commencements thereof, imperatively more than 12 years, elapsing upto the institution of the suit, (d) even though, immemorialilty of time, since, hers purportedly commencing possession, with a hostile animus vis-a-vis the suit kahsra numbers, AND against the lawful entitlements of true owners thereof, does per se prima facie rear an inference, of, the defendant, hence, completing the statutorily prescribed period of time, upto the date of institution of the suit, thereupon, she may be entitled, to, obtain findings, of hers, perfecting title vis-a-vis the suit land, by way of adverse possession. (f) Nonetheless, reiteratedly the apt precise averments, of, hers, rather making ascriptions with specificity vis-a-vis the exact time, whereat, overt acts hence occurred, whereby, the possession of the true owners vis-a-vis the suit land, hence, stood dislodged, was, rather the apt apposite averment, wherefrom, rather the computation(s) of commencement(s) of or openings, of, period, whereat, she with a hostile animus, began possession vis-a-vis the suit land, was thereupon imperatively reckonable. However, the aforesaid precise time, whereat, the defendant, commenced her possession, with, an animus possedendi vis-a-vis the suit land, is grossly amiss nor there is any ascription, with specificity in timing qua, whereat, she performed any overt act, upon, the suit land, whereby she dislodged the true owners, of, their lawful possession(s) vis-a-vis the suit khasra numbers. Corollary whereof, is, of with visibly all the aforesaid reckonable para meters, for making the necessary computation(s) vis-a-vis the commencements of possession, with, a hostile animus by the defendant, hence remaining both unpleaded besides unproven, thereupon, an inference is garnered, of both the learned Courts below in accepting the aforesaid plea, hence, committing gross error(s).

9. Be that as it may, the defendant had tendered into evidence Ex.DW4/A. A closest reading thereof reveals (i) of, the defendant thereunder obtaining possession, of, the suit land. (ii) With the defendant tendering into evidence Ex.DW4/A, the counsel for the plaintiff contended, that with the last portion thereof, embodying recitals of its executants, owing to certain constraints, not, in simultaneity thereof, hence, executing a registered deed of conveyance, (iii) whereas, there occurring recitals therein, of, theirs contracting, to execute a registered deed, of conveyance in future, renders, the possession(s) taken thereunder, of the suit land,being construable, to be, a permissive possession of the suit khasra numbers, (iv) hence, disabling besides estopping the defendant to contend, of hers adversely possessing the suit land, against, the rights, title or interest of true owners thereof. The aforesaid espousal, is well founded AND is amenable to acceptance, thereupon, the affirmative findings recorded by both the learned

courts below, upon, the issue appertaining to acquisition(s) of title, by the defendant vis-a-vis the suit khasra numbers, imperatively, by adverse possession are quashed and set aside.

10. Even though, the learned counsel appearing, for the defendant, contends with vigour, that, with Ex. DW4/A being not registered, whereas, it being statutorily enjoined to be compulsorily registered, hence, it being unreadable in evidence for any purpose, conspicuously for drawing inference(s), of, thereunder the defendant acquiring permissive possession of the suit land. Nonetheless, the aforesaid contention(s) is wanting in vigour, for the reasons, (a) of, there being a clear display in the afore referred Ex.DW4/A, of the executants thereof, agreeing, in future to execute a registered deed of conveyance qua the land mentioned therein; (b) hence, when Ex.DW4/A, is amenable to a construction, of, it being an executory contract of sale inter se the executants thereof, hence, dehors, its being not registered, would render, it to be readable, emphatically also for leveraging, the contention of the appellants, of the defendant/respondent, holding, thereunder hence permissive possession, of the suit khasra number; (c) also the defendant/respondent being precluded to rear a plea of hers acquiring title by adverse possession vis-a-vis the suit land. The aforesaid view finds support, from, a judgment of the Hon'ble Apex Court reported in ***AIR 1990 SC 553*** rendered in a case titled as ***Achal Reddi v. Ramakrishan Reddiar and others***, the relevant paragraph No.8 whereof stands extracted hereinafter:-

> "8. There is no controversy that the plaintiff has to establish subsisting title by proving possession within 12 years prior to the suit when the plaintiff alleged dispossession while in possession of the suit property. The first appellate court as well as the second appellate court proceeded on the basis that the plaintiff is not entitled to succeed as such possession has not been proved. The concur- rent findings that the plaintiff had title inspite of the decree for specific performance obtained against him, when that decree had not been executed are not assailed by the appellant in the High Court. The appellant cannot, there- fore, urge before us on the basis of the findings in the earlier suit to which he was not a party that Ex. A. 1 sale deed is one without consideration and does not confer valid title on the plaintiff. The sole question that has been considered by the High Court is that of subsisting title. We have to consider whether the question of law as to the character of the possession Varada Reddi had between 10.7.1946 and 17.7.1947 is adverse or only permissive. In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession. The well-settled rule of law is that if person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regard- ed as adverse in law, even though he claims under another title having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got toto possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and in case in which, there is a mere executory agreement of trans- fer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse." (p.555)

Consequently, substantial question of law No.1 is answered in favour of the plaintiffs/appellants and against the defendant/respondent herein.

11. The defendant in her written statement, had apart from, raising the plea of hers acquiring title, of, the suit land by adverse possession, HAD also in the alternative, for resisting the suit of the plaintiff, also reared a contention, anvilled, upon, the statutory provisions engrafted in Section 53 of the Transfer of Property Act AND has claimed satiations thereof, especially, when Ex.DW1/A reveals, (i) of in simultaneity thereof, the entire sale consideration being liquidated by the vendee vis-a-vis the vendor, (ii) possession of the suit land also being in simultaneity , of execution thereof, being delivered by the vendee vis-a-vis the vendor , thereupon, hers being entitled to the benefits thereof. Apparently the bedrock of the aforesaid contention was anvilled Ex. DW1/A, exhibit whereof, stood during the course of her testification, tendered besides exhibited. However, the learned trial Court, despite, the aforesaid contention, being pointedly, reared by the defendant in her written statement, it omitted to fame any issue in respect thereof, whereas, it was both a material and an imperative issue, for, resting the respective contested entitlements, of the litigants concerned vis-a-vis the suit khasra numbers. The apt omission, of, striking of the aforesaid material issue, obviously also precluded the plaintiff, to adduce cogent evidence in rebuttal thereof. Even though, Ex.DW1/A stood adduced into evidence, hence with both the parties, being, aware of its apposite probative worth, thereupon, when both are not taken by surprise, thereupon, it may be, prima faice inferable, of any non striking, of any issue, appertaining thereto, not vitiating trial of the suit. Nonetheless, for want of its striking besides want of any rendition(s) thereon, it would be grossly insagacious, at this stage, to either accept any contention apposite thereto, reared before this court by the counsel for the defendant/respondent. Consequently, this Court hereinafter frames apposite issue No. 9-A, in respect thereto:-

> "9-A Whether the defendant is entitled to protection of Section 53-A of the Transfer of Property Act on anvil of Ex.DW1/A? OPD"

12. Consequently, this Court deems it fit to remand the matter to the learned trial Court, to, receive the respective evidence(s) of the parties at contest, upon, the aforesaid issue, whereafter, it is directed to render its findings, only, in respect thereof. The learned trial Court is directed to upon its receiving the instant suit on remand, from this Court, for rendering findings, upon, the aforesaid issue, to, within five months from today, hereafter render its findings thereon. In case any litigant is aggrieved therefrom, he/she is at liberty to, in accordance with law, to, assail it. The parties are directed to appear before the learned trial Court on 26th February, 2018. Records be sent back forthwith.

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

Smt. Basanti .....Petitioner

Versus

Dhian Singh and Ors. .....Respondents

Civil Revision No. 188 of 2017
Date of Decision: 5.1.2018.

Code of Civil Procedure, 1908- Section 115- Order 23 Rule 1 read with Section 151 C.P.C. - Plaintiff filed an application under the aforesaid provisions seeking permission to withdraw the suit- Same came to be rejected by the learned Trial Court- Hence, the revision petition- The High Court held- that it is true that plaintiff can, at any time, after the institution of the suit, abandon the suit or abandon any part of his claim but that is always subject to the satisfaction of the Court- the proceeding cannot be used to fill up the lacuna or defects occurring in the suit.

(Para- 7 to 9)

For the petitioner: Mr. Vikas Rathore, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral).*

Being aggrieved and dissatisfied with order dated 13.6.2017, passed by the learned Civil Judge (Sr. Division), Chamba, in CMA No. 239 of 2017, whereby application having been filed by the present petitioner (herein after referred to as "the plaintiff") under Order 23 Rule 1 read with Section 151 CPC, seeking therein permission to withdraw the suit, came to be rejected, plaintiff (petitioner) has approached this Court by way of instant revision petition.

2. Briefly stated facts necessary for the adjudication of the present case are that plaintiff filed suit for declaration, injunction and in alternative, for possession, in the Court of learned Civil Judge (Sr. Division), Chamba. It also emerge from the bare reading of the impugned order passed by the Civil Judge that both the parties have already led their evidence in support of their respective claims and matter is pending for final arguments. Before final pronouncement could be made by the learned court below, plaintiff filed an application under Order 23 Rule 1CPC, seeking therein permission to withdraw the suit having been filed by him. Allegedly, respondents (herein after referred to as the defendants No. 1 to 7) had filed partition proceedings before A.C. Ist Grade, Churah, District Chamba, against one Shri Thakus Dass, predecessor-in-interest of the plaintiff. During the pendency of the partition proceedings, aforesaid person namely Thakur Dass expired leaving behind plaintiff as his LR to succeed to the estate left by him.

3. Mr. Vikas Rathore, Advocate, representing the plaintiff (petitioner herein) contended that since LRs of deceased Thakur Dass were not brought on record by defendants No. 1 to 7 and as such, order of partition passed by the A.C. Ist Grade, Churah, is a nullity being passed against a dead person. Appeal(s) having been preferred by the plaintiff against the aforesaid order passed by the A.C. Ist Grade, Churah, in the Court of SDO (C), Churah and thereafter, before the Divisional Commissioner, came to be dismissed on the ground that no appeal, if any, could be filed by the plaintiff as he was not party to the partition proceedings. Learned counsel further contended that since factum with regard to the passing of partition order, was not in the knowledge of the plaintiff, he could not lay any challenge to the partition orders passed by the AC Ist Grade, Churah. Omission on the part of the defendants to bring the LRs of deceased Thakur Dass on record in the proceedings of partition, which ultimately came to be decided by the AC Ist Grade, has caused great prejudice to the plaintiff and in case, he is not allowed to withdraw his suit, great prejudice shall be caused to him as he would be debarred from laying challenge to the partition order passed by the AC Ist Grade, Churaha.

4. Since despite service, none has put in appearance on behalf of the defendants, this Court has no option but to decide the present case on the basis of material available on record.

5. I have heard the learned counsel for the plaintiff (petitioner) and carefully gone through the record.

6. After having carefully perused impugned order passed by the learned Civil Judge, there appears to be no illegality and infirmity in the same, rather same appears to be based upon the proper appreciation of provision contained under Order 23 Rule 1 CPC. Perusal of application filed under Order 23 Rule 1 CPC (Annexure-P1) clearly suggests that plaintiff being aggrieved and dis-satisfied with order of partition passed by AC Ist Grade, Churah, filed an appeal before SDO (C) Churah and as such, plaintiff cannot be allowed to state that factum with regard to the passing of order of partition against deceased Thakur Dass i.e. predecessor-in-interest of the plaintiff, was not in his knowledge. Rather, impugned order reveals that plaintiff himself moved an application under Order 1 Rule 10 alleging therein that LRs of deceased Thakur Dass were not brought on record in the partition proceedings before the AC Ist Grade, Churah, but same was dismissed on 16.11.2015. Though, it is an admitted case of the defendants that predecessor-in-interest of the plaintiff passed away during the pendency of the proceedings but it

also stands proved on record that after the death of Thakur Dass i.e. predecessor in interest of the plaintiff, plaintiff alongwith her mother, Smt. Dilu, appeared before AC Ist Grade, Churah and contested the partition proceedings. Learned court below has categorically recorded that perusal of order Ext.PE clearly suggests that Smt. Dillu, widow of Thakur Dass was present before the Assistant Collector, Ist Grade, Churah on various dates. It also emerges from the various orders passed by the Divisional Commissioner in the appeal having been preferred by the plaintiff and her grandmother i.e. widow of Thakur Dass that plaintiff as well as widow of Thakur Dass, appeared before the Divisional Commissioner and order dated 15.12.2005 passed by the AC Ist Grade, was well in their knowledge. It also emerges from the impugned order that in the suit at hand, plaintiff while deposing before the court below categorically admitted in her cross-examination that on 19.3.2011, she had filed written statement before AC Ist Grade, meaning thereby, LRs of deceased Thakur Dass were brought on record and they appeared and contested the partition proceedings.

7. True, it is that in terms of order 23 Rule 1 CPC, plaintiff can, at any time, after the institution of a suit, against all or any of the defendants abandon the suit or abandon a part of his claim but that is subject to satisfaction of the Court that a suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim.

8. In the case at hand, as has been discussed in detail above, factum qua passing of partition order by AC Ist Grade, Churah in partition proceedings preferred on behalf of defendants, was very much in the knowledge of the plaintiff, rather said proceedings were contested by the plaintiff and his grandmother i.e widow of Thakur Dass and as such, there appears to be no force in the argument of Mr. Vikas Rathore, learned counsel representing the plaintiff/petitioner that defendants concealed material fact with regard to the non-impleadment of LRs of Thakur Dass in the partition proceedings.

9. Moreover, as has been taken not above, suit is complete in all respects and ready for pronouncement of judgment and as such, learned court below rightly held that allowing of application at this stage, would amount to filling up of lacuna or defect occurred in the suit.

10. Consequently, in view of the above, this Court sees no reason to interfere in the order passed by the court below, which otherwise appears to be based upon proper appreciation of material available on record and accordingly, same is upheld. The revision petition is dismissed being devoid of any merit. However, it is made clear that observation made in the present case shall not have any bearing on the main case and shall remain confined to the disposal of the present petition only.

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

Raghubir Singh ....Appellant/Plaintiff.

Versus

Smt. Taro Devi& Anr. ....Respondents/defendants.

RSA No. 25 of 2007
Reserved on : 27.1.2017
Decided on : 5th January, 2018.

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for specific performance of contract, further seeking permanent prohibitory injunction- Dismissed by the learned Trial Court- Findings affirmed by the learned 1st Appellate Court – One biswa of land on 25.1.1992 was agreed to be sold by the defendant No.1 for a sale consideration of Rs.10,000/- to the plaintiff- The consideration thereof was already paid and possession delivered to the plaintiff-

Plaintiff had already constructed his residential house over this one biswa of land- On 25.8.2000 defendant No.1 had sold 2-12 bighas of the land to the defendant No.2 vide registered sale deed for a sale consideration of Rs.30,000/-, by ignoring the agreement to sell arrived between the plaintiff and defendant No.1 – In Regular Second Appeal **Held-** that the findings recorded by the courts below were gripped with grave infirmities as it was crystal clear from the evidence on record that the entire sale consideration had been paid by the plaintiff to defendant No.1, authorities issuing notices to defendant No.2 for raising unauthorized construction clearly showing non execution of the registered deed of conveyance – The plaintiff was entitled to the relief claimed by him- Further held- that the cause of action arose to the plaintiff in the year 2000 when the defendant No.1 sold the land to defendant No.2 and the suit was not barred by limitation- Consequently, the sale affected in the year 2000 not validated- However, while setting aside the judgments and decrees passed by the learned courts below defendant No.1 directed to execute a registered sale deed within three months in support of one biswa of land only, strictly, in consonance with Ex.PA on record- Appeal allowed accordingly. (Para- 9 and 10)

For the Appellants:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishat, Advocate.
For the Respondents:	Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a decree for declaration AND for specific performance of contract besides for permanent prohibitory injunction, stood, under concurrent pronouncements recorded thereon, by both the learned Courts below, hence dismissed.

2. Briefly stated the facts of the case are that defendant No.1 is recorded owner in possession of the suit land comprising khata-khatauni No.72/86 and khasra No.950/825, situated in Mohal Banikhet Jarel, Pargana Chuhan, Tehsil Dalhousie, District Chamba, H.P. On 25.1.1992, defendant No.1 agreed to sell the land measuring one biswa out of the suit land from the sum of Rs.10,000/- to plaintiff. The consideration amount was paid to defendant No.1 and the possession of one biswa of land was deliver to the plaintiff. Thereafter, the plaintiff constructed his residential house over this one biswa of land. On 25.8.2000, defendant No.1 sold whose khasra No.950/825, measuring 2-12 bighas in favour of defendant No.2 vide registered sale deed for consideration of Rs.30,000/- by ignoring the agreement to sell arrived between the plaintiff and defendant No.1. The plaintiff is in peaceful possession of the suit property as he has already constructed his residential house over one biswa of suit land. Defendant No.2 is trying to interfere in the peaceful possession of the plaintiff. Therefore, it has been prayed that this suit be decree for declaration to the effect that defendant No.1 contracted to sell the land to the plaintiff measuring one bsiwa out of khasra No.950/825, measuring 2-12 bighas for the consideration of Rs.10,000/- vide agreement to sell dated 25.1.1992. The sale deed No.117, dated 25.8.2000 executed by defendant No.1 in favour of defendant No.2 is wrong and illegal. It has also been prayed that this suit be decree for specific performance of contract entered into between the parties, i.e. plaintiff and defendant No.1 on 25.1.1992. It has been further prayed that a decree b rendered for permanent prohibitory injunction by restraining defendant No.2 from interfering in the house constructed by the plaintiff.

3. The defendants contested the suit of the plaintiff and have filed separate written statements. Defendant No.1 in his written statement has taken preliminary objections qua maintainability, limitation and cause of action. On merits, it has been submitted that the plaintiff alongwith defendant No.2 approached defendant No.1, for sale of one biswa of land for consideration of Rs.10,000/-. The plaintiff and defendant No.2 are the real brothers and at their instance agreement dated 25.1.1992 was written and the possession of the land was delivered to

defendant No.2 as the plaintiff was serving out of station at that time, who requested defendant No.1 to deliver the possession of the land to defendant No.2. The plaintiff never made any construction over the suit land nor he ever came to defendant No.1 after execution of the said agreement. It has been denied that defendant No.1 had sold 2-12 bighas land to defendant No.2 It has been submitted that only three biswas of land was sold to defendant No.2, which includes one biswa of land of the plaintiff.

4. Defendant No.2 in his written statement has taken preliminary objections qua maintainability, estoppel, cause of action and limitation. On merits, it has been denied that an agreement to sell was executed regarding the suit land, nor any amount was paid to defendant No.1 by the plaintiff. The plaintiff never constructed any residential house over the suit land. In fact defendant No.2, purchased three biswas of land from defendant No.1 for consideration of Rs.30,000/- and constructed the residential house over this land in the year 1995-96. Three biswas of land was purchased by the defendant No.2 from defendant No.1, in the year 1995, but the sale deed was executed on 25.8.2000 due to ban on registration and the house was constructed by defendant No.2 upon the suit land in the year 1995.

5. The plaintiff/appellant herein filed replication(s) to the written statement(s) of the defendants/respondents herein, wherein, he denied the contents of the written statements and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether plaintiff is entitled to relief of declaration as prayed for?OPP.

2. Whether plaintiff is entitled to relief of specific performance of contract dated 25.1.1992, as alleged? OPP.

3. Whether plaintiff is entitled to relief of permanent prohibitory injunction, as prayed for? OPP.

4. Whether suit in the present form is not maintainable as alleged? OPD.

5. Whether suit is barred by the period of limitation as alleged? OPD.

6. Whether the plaintiff has no cause of action to file the present suit against the defendants as alleged? OPD.

7. Whether plaintiff is in possession of one biswa of land out of khasra No.950/825, if so, its effect, as alleged? OPD.

8. Whether the plaintiff is estopped from filing the present suit, as alleged? OPD.

9. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant, before the learned First Appellate Court, the latter Court dismissed the appeal AND affirmed the findings recorded by the learned trial Court.

8. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein, he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 13.07.2007, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether both the Courts below have fallen in error by ignoring the written statement filed by defendant No.1 and the statement on oath made by the

General Attorney and wife of the original defendant No.1 Smt. Taro Devi (Now LR of the original defendant) which has resulted into palpable totally illegal and erroneous findings on issue Nos. 1 to 8 and if so its effect on the judgments?

2. Whether the judgment of the First Appellate Court being the last Court of facts is vitiated by not discussing or appreciating interpreting the evidence as required in view of the law laid own by the Supreme Court in 2000(5) SCC 653 as well as 2005 (12) SCC page 186?

Substantial questions of Law No.1 and 2

9. The agreement to sell, borne in Ex.PA was proven both by its scribe and by the GPA, of, defendant No.1. Both the aforesaid witnesses testified, of, the entire sale consideration, borne, in a sum of Rs.10,000/- being liquidated by the plaintiff vis-a-vis defendant No.1, in simultaneity with the execution of Ex.PA. Both also testified qua delivery of possession of the property, mentioned therein, comprising one biswa of land, occurring in immediate simultaneity vis-a-vis execution of Ex.PA. However, with, the plaintiff in his cross-examination, making, an admission, of, his not beseeching defendant No.1, for executing a registered deed of conveyance, in respect of the suit land, (i) whereas, it being enjoined in Ex.PA, qua its execution imperatively occurring within the year 1992, (ii) thereupon, the learned Courts below, drew conclusion(s), of, the equitable relief of specific performance of contract being not affordable vis-a-vis the plaintiff, especially when he hence was unready and unwilling to perform his part of the contract; (iii) time being the essence vis-a-vis execution of a registered deed of conveyance in respect of the suit land, (iv) thereupon the plaintiff being disentitled to seek discretionary besides equitable relief of specific performance of Ex.PA. Furthermore, obviously both the learned Courts below , recorded concurrent conclusion(s), of, the plaintiff's suit for specific performance of contract, falling out side the mandatorily enjoined period of limitation, thereupon, it warranting its dismissal.

10. Be that as it may, for the reasons, to be assigned hereinafter, the aforesaid inferences drawn by both the learned Courts below are gripped with grave infirmities, (a) with the GPA of defendant No.1, making disclosures in her testification, of, possession of the suit land being delivered to the plaintiff in simultaneity of execution of Ex.PA; (b) the entire sale consideration also being liquidated thereat by the plaintiff vis-a-vis defendant No.1; (c) with the work force, employed by the plaintiff, for construction of a house thereon, making graphic echoings, in their testifications, of, both the plaintiff and defendant No.2 defraying, the necessary wages to them, (d) thereupon, the mere factum, of, authorities concerned issuing notices upon defendant No.2, for his raising uanthorised construction, (e) with the house located purportedly, on, the suit khasra number, being entered in the Panchayat record, in the name of defendant No.2, (f) besides with an electricity meter being installed in the name of defendant No.2, hence would obviously lose respective vigour(s), (g) especially when the plaintiff unequivocally deposes, of his being employed at a place other than the place, whereat, the suit property is situated, hence precluding him to throughout stay in the suit property. (h) Absence(s) whereof, of the plaintiff being capitalized by defendant No.2, to in his absence,hence, take possession of the entire construction raised on the suit property, (i) errections, of, the inferences aforestated also blunt all disabling effect(s) vis-a-vis the plaintiff's suit, being, barred by limitation, given his not instituting it, within three years since the year 1992, within year whereof, a registered deed of conveyance was enjoined in Ex.PA, to be, hence, executed, (j) besides the disabling effect(s) vis-a-vis the plaintiff, sparked, by his admission(s) occurring his cross-examination, reflective, of his purported unreadiness, to perform his part of obligation, comprised, in his making echoings therein, of, within the yea 1992, his omitting to beseech defendant No.1, for executing a registered deed of conveyance in respect of the land, recited in Ex.PA, thereupon, also lose their vigour. Accentuated vigour to the aforesaid inference, is, galvanized by the factum of the counsel for the defendant, while, holding the plaintiff to cross-examination, purveying affirmative suggestion(s) vis-a-vis him, (k) of, the land measuring 1 biswa recited, in, Ex.PA, being included in the sale deed executed qua three biswas of land, sale deed whereof stood executed inter se defendant No.1 and defendant No.2, whereto, an affirmative response was purveyed by the plaintiff. The effect(s) thereof, is of, with the sale deed inter se defendant No.1 and defendant

No.2, being executed in the year 2000 and its including the land recited, in, EX.PA, "when is construed in coagulation" with the testifictions, of, the labourers/work force, deployed, by the plaintiff, to raise construction of a house upon the land in respect whereof, Ex.PA, was executed, (l) testifications whereof unfold of both the plaitniff and defendant No.2, defraying, the apposite wages to them, for the relevant construction, (m) besides bearing in the mind, the factum, of, this Court dispelling the vigour of (n) notice(s) being issued by the Town and Country Planning vis-a-vis defendant No.2, for, his raising unauthorised construction upon the suit land; (o) its also blunting, the effect, of, the apposite house being entered in the Panchayat record, in, the name of defendant No.2 AND (p) besides, of, the electricity meter being installed in the name of defendant No.2, (q) besides bearing in mind, the evident fact of the plaintiff, given, his preoccupation(s) with his employment, in a place other than the place, whereat, the suit property is located, hence, being precluded to remain physically present at the relevant site. (r) Absence(s) whereof, stood capitalized by defendant No.2, to, take exclusive possession of the construction, raised, on even the land mentioned in Ex.PA. Necessarily, hence, when a part of the land mentioned in Ex.PA, is, included in the sale deed executed inter se defendant No.1 and defendant No.2, whereupon, the plaintiff, is, concomitantly, disempowered to, upon apposite occasions, hence, espouse of his being lawfully entitled, to the benefit(s), of, Section 53-A of the Transfer of Property Act, enshrining the principle(s) of part performance, (s) principles whereof are evidently espousable by the plaintiff, given, the entire sale consideration being evidently liquidated by him to defendant No.1, in simultaneity to the proven execution of Ex.PA AND possession of the suit land being also delivered to him in simultaneity thereof, (t) whereas, when for all the reasons aforesaid, he was, despite, his evidently defraying along with defendant No.2, wages, to the work force/labourers, for completing construction thereon, hence thwarted, to, take possession thereof, rather hence defendant No.2 taking exclusive possession of the construction raised thereon. Corollaries whereof, are, of with the plaintiff, throughout, since 1992, upto the execution, of an apposite sale deed in the year 2000 inter se defendant No.1 and defendant No.2, was under, a bonafide belief of his holding possession, upon, the suit land AND, when despite, non execution, of an apposite registered deed of conveyance, he for all the reasons aforestated, stood empowered, to, resist, the suit, if any, instituted by defendant No.1, for, possession AND for permanent prohibitory injunction, WHEREAS, the latter registered deed, of conveyance, of, 2000, rather frustrating all the aforesaid tenable endeavoures, of, the plaintiff. Obviously, thereupon, sanctity is to be meted to him. Moreover, when he has in his plaint, averred, of the causes of action arising in his favour, upon, execution of sale deed inter se defendant No.1 and 2 in the year 2000, sale deed whereof included therein, the land mentioned in Ex.PA, thereupon, in the interest of justice and fair play, it is deemed fit and appropriate, to, hence conclude, that, the cause of action, when, evidently arose vis-a-vis the plaintiff in the year 2000, hence, for all aforestated reasons, the plaintiff's suit being, not outside the period of limitation, dehors admission(s) occurring in the cross-examination of the plaintiff, qua his not beseeching, defendant No.1, within the year 1992, for executing a registered deed of conveyance.

11. Be that as it may, since there is no proven evidence, in respect of the sale deed, executed, inter se defendant No.1 and 2, in the year 2000, being a sequel of undue influence or coercion, thereupon, it is not befitting to invalidate it. The total land extantly owned and possessed by defendant No.1, is, comprised in an area of more than 1 bigha, thereupon, when hence, a small tract of, one biswas can therefrom, be, made subject matter, of, a registered deed of conveyance, to be executed inter se the plaintiff and defendant No.1, hence, defendant No.1 is directed to, within three months, from today, execute a registered deed of conveyance, with, the plaintiff, only with respect, to, one biswas of land, descriptions whereof is given in Ex.PA. Even though, both the learned courts below, make echoings, in their respective renditions of khasra numbers of land measuring, one biswa, being not ascribed therein, nonetheless, when the last portion of Ex.PA, carries reference(s), for, identifying the area of one biswas, thereupon defendant No.1 is directed to execute the registered deed of conveyance in favour the plaintiff, emphatically in consonance therewith.

12. The above discussion, unfolds, the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court being not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration. Both the substantial questions of law are answered in favour of the appellant and against the respondents.

13. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. In sequel, the plaintiff's suit is decreed and defendant No.1 is directed, to, within three months from today executed registered deed of conveyance qua the suit land measuring 1 biswa, strictly, in consonance with Ex. PA. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Sakshi Sharma .....Petitioner.
Versus
State of H.P. & others ....Respondents.

Criminal Revision No. 133 of 2015.
Reserved on : 21.12.2017.
Date of Decision: 5th January, 2018.

Code of Criminal Procedure, 1973- Section 397- Section 319 of Cr.P.C.- Public prosecutor had preferred an application under Section 319 Cr.P.C seeking to array one Nanak Chand and his employees as co-accused- Application came to be dismissed by the Learned Sessions Judge- **High Court Held-** that if during the course of trial, offence appears to have been committed, such persons could be tried together with the accused already facing trial as per the provision of Section 319 Cr.P.C.- The contention of the respondents that a de novo trial be instituted against the newly arrayed respondents as it will jeopardize the right of speedy trial of the other accused negated- Further Held- that the acceptance of the request for de novo trial would further infringe the provision of Section 223 of the Cr.P.C. (Para-3 to 5)

Case referred:
Babubhai Bhimabhai Bokhiria and another versus State of Gujarat and others, (2013)9 SCC 500

For the Petitioner: Ms. Ambika Kotwal, Advocate.
For Respondent No.1: Mr. Vivek Singh Attri, Addl. A. G. Advocate.
For Respondents No.2 to 5: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For Respondent No.6. Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein seeks quashing, of, the orders pronounced by the learned Sessions Judge Forest Shimla on 30.04.2015, whereby, he dismissed the application moved before him, by the learned Public Prosecutor concerned, application whereof, is cast under the provisions of Section 319 of the Cr.P.C., containing therein a relief for arraying, of, one Nanak

Chand Jindani, owner of Vatika Hotel, Shimla and Raju and Veeru, working in Vatika Hotel, Shimla, and his servants, as co-accused along with other accused, in respect whereof charge was framed by the learned trial Court concerned. Since, the learned Sessions Judge concerned, declined relief to the Public Prosecutor concerned, hence, being aggrieved, therefrom, the petitioner/complainant, has through instant petition, hence, concerted to beget reversal of the impugned orders pronounced, by the learned Sessions Judge concerned.

2. The victim one Rajesh Sharma, while stepping into the witness box, (i) had, in consonance with his previous statement recorded in writing, hence, testified vis-a-vis one Nanak Chand Jindani, the owner of Vatika Hotel, belabouring him along with his servants, (ii) in sequel whereof, he testified, of his receiving injuries on his eyes. However, the learned Sessions Judge concerned, had not meted credence thereto, per se, for, merely specious and scanty reason, of, the name of the aforesaid not specifically occurring in the testification rendered by the victim, named, one Rajesh Sharma, (iii) whereas, the victim Rajesh Sharma in consonance with his previous statement recorded in writing, has, rather with graphic categoricality, echoed in his testification, an incriminatory role vis-a-vis one Nanak Chand Jindani and his servants. In aftermath, reiteratedly besides reinforcingly, the inapt irreverence meted thereto, by the learned Sessions Judge concerned, is grossly improper. Even if, the aforesaid, during, the course of his rendering, his testification, reneged from his previous recorded statement in writing, yet upon his being cross-examined by the learned Public Prosecutor concerned, upon an apposite permission being accorded to him by the learned trial Judge concerned, (iv) he conceded, of his making a previous statement comprised in Ex.PW21/F, (v) even thereafter, upon, his cross-examination, conducted, by the learned defence counsel, yet in course thereof, no apposite suggestions were put to him, for belying his testification(s), occurring in his examination-in-chief, of his, being belaboured on 22.01.2008, by one Nanak Chand Jindani and his servants, (v) contrarily, during the course of his cross-examination, there occurs an affirmative response, to an apposite suggestion, of, his being belaboured on 22.01.2008, by one Nanak Chand and his servants, (vi) wherefrom, it is apt to conclude, of, the defence conceding, to the inculpatory role(s) ascribed by PW-24, especially vis-a-vis one Nanak Chand Jindani and his servants. Aggravated vigour, to the inference is galvanized, by the factum, of the learned defence counsel while holding PW-24 to cross-examination, his meteing affirmative suggestion(s) to him qua ASI Tej Ram, effecting a compromise inter se him and Nanak Chand Jindani. The further severe effect thereof is of hence the defence acquiescing, to the factum, of, PW-24 in his examination-in chief rendering a truthful version qua the inculpatory role ascribed therein vis-a-vis one Nanak Chand Jindani and his servants. Consequently, it was inapt for the learned Sessions Judge concerned, to decline relief as prayed for, in application cast under the provisions of Section 319 of the Cr.P.C.

3. Even though, the name of one Nanak Chand, is not borne in the FIR embodied in Ex.PW18/B, yet effect thereof is waned by (a) it being lodged by the petitioner, the wife of the victim Rajesh Sharma; (b) the defence, for the reasons aforestated, acquiescing qua the incriminatory role of one Nanak Chand, in the relevant occurrence. Moreover, the mandate of Section 319 of the Cr.P.C., provisions whereof stand extracted hereinafter:-

> "**319. Power to proceed against other persons appearing to be guilty of offence.**(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

(i) purvey statutory leverage to the trial Court concerned, to upon incriminatory/inculpatory evidence, making its upsurgings, vis-a-vis certain person(s) not initially joined as accused, (ii) upsurging(s) whereof, occur, especially during the course of trial of the accused, who are initially charged for the offences, encapsulated in the report, furnished, under the provisions, of, Section 173 of the Cr.P.C., by the Investigating Officer concerned, (iii) to hence qua those person(s), who is/are not initially charge sheeted, to thereupon proceed to array him/them, as co-accused along with the accused, who stand already charged, as accused. The mandate besides ingredients of sub section (1) of Section 319 of the Cr.P.C., for all the reasons aforestated, stand(s) satiated vis-a-vis Nanak Chand Jindani and his servants, (iv) thereupon, it is permissible for this Court, to, after quashing the impugned order, hence order, for theirs being arrayed as co-accused along with those accused, who already stand charge sheeted, by the learned Sessions Judge concerned.

4. The learned counsel appearing for respondents No.2 to 5 has placed reliance, upon, a judgment of the Hon'ble Apex Court, reported in ***(2013)9 SCC 500,*** rendered in a case titled as ***Babubhai Bhimabhai Bokhiria and another versus State of Gujarat and others***, relevant paragraphs No. 13, 14, 18 and 19 whereof, are extracted hereinafter:

"13. In the light of the above two decision rendered by the co-ordinate Benches of this Court, we have no hesitation in holding that even if the addition of the petitioner Babubhai Bhimabhai Bokhira is held to be justified by the Constitution Bench of this Court the mere fact that the trial of the remaining accused has already concluded, would not prevent the prosecution of the petitioner for the offences for which he has been summoned by the trial court.

14. There is another angle from which the matter can and must be examined. The prosecution has already examined as many as 134 witnesses at the trial. In terms of the ratio of the direction of this Court in Shashkant Singh case,[(2002) 5 SCC 738] with the addition of the petitioner as accused all those witnesses shall have to be recalled for a fresh examination. If that be so, the trial would go on or a few more years having regard to the number of witnesses that have to be examined. This would in turn mean that the right of the accused to a speedy trial, that they have laboured to complete within six years or so, will be in serious jeopardy on account of the entire process being resumed de novo. Such a result is manifestly unjust and unfair and would be perilously close to being in violation of the fundamental rights guaranteed to the accused persons who cannot be subjected to the tyranny of a legal process, that goes on endlessly for no fault of theirs.

18. It is, in the light of the settled legal position, no longer possible to question the legitimacy of the right to speedy trial as a part of the right to life under Article 21 of the Constitution. The essence of Article 21 of the Constitution lies not only in ensuring that no citizen is deprived of his life or personal liberty to except according to procedure established by law, but also that such procedure ensures both fairness and an expeditious conclusion of the trial. It is in that backdrop not possible to countenance a situation where addition of Babubhai Bhimabhai Bokhiria as an accused to the case at hand would lead to an indefinite suspension of the trial and eventual recall of 134 witnesses already examined against the applicant who has been in jail for over six years now. There is, therefore, no reason for a blanket stay against the progress of the trial before the courts below qua other accused persons.

19. In the totality of the above circumstances, therefore, we are inclined to modify our order dated 17.12.2008 by which further proceedings before the trial court were brought to a halt. We make it clear that while the stay of the trial against Babubhai

> Bhimabhai Bokhiria the petitioner in SLP No.9184 of 2008 shall continue qua the said petitioner, the trial court shall be free to proceed with the trial qua the other accused persons. Criminal Miscellaneous Petitions Nos. 20502 of 2008 and 24292 of 2011 are allowed in part and to the above extent."
>
> (pp.....506, 507 & 508)

(i) AND, therefrom, he contends with vigour, that, with alike therewith, the apposite trial against respondents No. 2 to 5, standing progressed upto the stage of arguments, (ii) thereupon, upon, adding, of, one Nanak Chand as accused along with accused, in respect whereof trial has progressed upto the stage of arguments, (iii) would rather entail consequence(s) of the entire set, of, prosecution witness(es) being ordered to be re-summoned, for their re-testifying, (iv) with a further ill consequence(s) of the right, of, speedy trial of respondent No.2, being severely jeopardised, (v) hence, he contends that, rather in consonance with the verdict recorded by the Hon'ble Apex Court in Babubhai's case (supra), this Court, order, the learned Sessions Judge, to pronounce its judgment vis-a-vis the accused, in respect whereof, the apposite trial stand(s) already concluded, upto, the stage of arguments, whereas, it permit holding, of, fresh de novo trial only vis-a-vis one Nanak Chand Jindani. However, the aforesaid contention, is not acceptable to this Court, (vi) significantly when the succor which he intends, to draw from the verdict, of the Hon'ble Apex Court rendered in Babubai's case (supra), rather holding a factual matrix,hence, bearing a gross contradistinctivity vis-a-vis the prevalent herewith factual matrix, for the reason (a) in the verdict pronounced by the Hon'ble Apex Court, it had proceeded, to, vacate the orders pronounced earlier, whereby, it had stalled the further progress, of trial vis-a-vis the accused, in respect whereof trial, had progressed upto the stage of arguments AND had yet ordered that the staying of trial vis-a-vis the petitioners therein, yet remaining in operation; (b) the effect thereof being, of, affirmative orders pronounced by the High Court concerned, upon, an application borne under Section 319 of the Cr.P.C., hence, remaining finally unadjudicated; (c) hence, merely for ensuring speedy trial, of the accused, in respect whereof, trial had progressed upto the stage of the arguments, it had vacated vis-a-vis only them, the order(s), hence, halting the further progress of the trial vis-a-vis them, (d), whereas, hereat, this Court has, not earlier vacated, the orders rendered, for, stalling the further progress of the trial vis-a-vis those accused, other than, one Nanak Chand Jindani; (e) contrarily this Court has, upon, the complainant's petition, hence proceeded, to make a final adjudication, upon, the legality of the impugned orders; (f) whereas, reiteratedly the Hon'ble Apex Court, in its verdict (supra), had not rendered any final adjudication, upon, the onslaught cast, by the petitioner(s) therein vis-a-vis the affirmative impugned orders pronounced, upon, an application, cast under the provisions of Section 319 of the Cr.P.C., (g) rendering hence the espousal of the learned counsel, appearing for respondents No.2 to 5, to be not acceptable. Conspicuously, the mandate of sub clause(b) to sub section (4) of Section 319 of the Cr.P.C., would prima facie, be also infringed, in case the espousal of the counsel for the respondents No.2 is accepted, (h) especially with a specific mandate being borne therein, of a person, who is not initially arrayed as an accused, is, upon, upsurgings, of, incriminatory/inculpatory evidence vis-a-vis him, especially during course of trial, of, initially charge sheeted accused, hence, visited the statutory ill consequence(s) of his being also enjoined to be charged sheeted along with the already arrayed accused,(i) besides upon an order, for his being arrayed as an accused, enjoining the Court concerned, to regress the trial upto the stage, whereat, cogonizance is taken upon offences vis-a-vis hitherto earlier charge sheeted accused, (j) apparently, hence, a denovo trial is contemplated and mandated, by clause (b) of sub section (4) to Section 319 of the Cr.P.C., upon, rendition(s), of, affirmative order(s), especially, within the domain of sub section (1) of Section 319 of the Cr.P.C.

5. Moreover, the mandate of Section 223 of the Cr.P.C, provisions whereof extracted hereinafter:-

> "**223. What persons may be charged jointly. The following persons may be charged and tried together, namely**:-
>
> (a) persons accused of the same offence committed in the course same transaction;

(b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860). or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:"

would also be rendered infringed, if the espousal of the learned counsel, appearing for respondents No.2 to 5 is accepted, (I) conspicuously, upon, adding(s) of one Nanak Chand Jindani along with his servants, as co-accused alongwith earlier herewith charge sheeted accused, vis-a-vis the offences alleged against them, (ii) ARE, also necessarily enjoined to be joined therewith as accused, (iii) with a concomitant ensuing sequel, of, trial against all statutorily proceedings simultaneously besides concurrently.

6. Be that as it may, for ensuring deference being meted to the principle of speedy trial, this Court deems it fit to order, (i) that the learned trial Court concerned shall, only, ensure the re-summoning besides re-recording, of, the testifications, of, only those prosecution witnesses concerned, who, in their respectively rendered testifications, make, echoings vis-a-vis the incriminatory role, of, one Nanak Chand Jindani and his servants.

7. For the foregoing reasons, the instant petition is allowed and the order impugned hereat, is quashed and set aside. The learned trial Court is directed to array Nanak Chand Jindani, the owner of Vatika Hotel and his servants, namely, Raju and Veeru, as accused in Case No. 32-S/7 of 2013. The learned trial Court is also directed, to, within four months from today, conclude trial of the aforesaid case. The parties are directed to appear before the learned trial Court on 12th January, 2018. All pending applications also stand disposed of. However, it is made clear that the observations made hereinabove shall not be construed as any expression on the merit(s) of the case. Records be sent back forthwith.

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

Shri Sandeep Kapila .....Petitioner/plaintiff.

Versus

State Bank of India & another .....Respondents/defendants.

CMPMO No. 377 of 2017.
Reserved on : 19.12.2017.
Date of Decision: 5th January, 2018.

Code of Civil Procedure, 1908- Order 39 Rule 1 and 2 readwith Section 151 CPC- The petitioner seeking ad-interim mandatory injunction against the defendants, for theirs, unlocking the suit premises- The learned Trial Court allowed the plaintiff's application, which on appeal was reversed by the Learned 1st Appellate Court- The Hon'ble High Court while reversing the order passed by the Learned 1st Appellate Court **Held-** that the relief of interlocutory mandatory injunction are generally granted to preserve and restore the last non-contested status, immediately preceding the controversy- On facts, the misdoings of locking the suit premises by the defendant held to be untenable, moreso as the property in question was contradistinct from the one owned by Sukh Ram, against whom proceedings under the "SARFAESI" Act were initiated by the defendant- Consequently, orders passed by the learned Trial Court upheld. (Para-3 to 5)

Cases referred:
Dorab Cawasji Warden versus Coomi Sorab Warden and others, (1990)2 SCC 117
Mohd. Mehtab Khan & others v. Khushunma Ibrahim & others, AIR 2013 SC 1099

For the Petitioner: Mr. Sudhir Thakur and Mr. Anirudh Sharma, Advocate.
For the Respondents: Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's instituted a suit against the defendants for permanent prohibitory injunction and for mandatory injunction, as also, for recovery of mesne profits @ Rs.20,000/- per month w.e.f. August, 2014 to 31.07.2015 and future mesne profits @ Rs.20,000/- per month, from 1.8.2015, after, filing of suit till the locks are unlocked and mucleman are removed from suit property.

2. The plaintiff's suit was resisted by the defendant by instituting written statement thereto. However, during the pendency of the suit, the plaintiff instituted an application, cast under the provisions of Order 39, Rules 1 and 2 of the CPC read with Section 151 of the CPC, wherein, he reared a claim for ad interim mandatory injunction being pronounced against the defendants, for theirs, unlocking the suit premises. The Learned trial Court allowed the plaintiff's application. Being aggrieved therefrom, the defendants instituted an appeal, before, the learned Additional District Judge-II, Solan, the latter accepted the defendants' appeal and reversed the findings recorded by the learned trial Court, upon the plaintiff's application, cast under the provisions of Order 39, Rules 1 and 2 of the CPC. Now the plaintiff being aggrieved therefrom, has instituted the instant petition, whereby, he concerts to beget reversal(s) of the order passed by the learned Appellate Court.

3. Suit land bearing khasra number 2297/2070/1574, measuring 00-01-28 sq. meters, is situated in Mauza Ser, Tehsil and District Solan, H.P., AND is, averred to be purchased by the plaintiff, from, Syndicate Bank, in an auction held under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI" Act). It is averred of a certificate of sale being issued, on 4.8.2014, vis-a-vis the plaintiff. Obviously, since then upto the institution of suit, on 3.8.2015, a period of more than six months has elapsed, vis-a-vis the plaintiff, in his, pursuance, to, the certificate of sale issued vis-a-vis him by Syndicate bank, hence holding possession of the suit land. The principles, for guaging the validity(ies), of granting a relief of ad interim mandatory injunction, are, borne in paragraph No.16, of, a judgment rendered by the Hon'ble Apex Court in a case titled as ***Dorab Cawasji Warden versus Coomi Sorab Warden and others, (1990)2 SCC 117,*** paragraph whereof reads as under:

> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief. "
>
> ....(p.126-127)

The aforesaid relief, has been therein expostulated, to be an equitable relief, meant only for (i) preserving or restoring the status quo, existing on the last non contested status, (ii) immediately, preceding the eruption, of, controversy(ies) AND for compelling undoing(s) of illegal acts and (iii) besides , for, ensuring restoration of, that, which was wrongfully taken from the party complaining. The aforesaid principles STAND further reiterated, by the Hon'ble Apex Court, in a case titled as ***Mohd. Mehtab Khan & others v. Khushunma Ibrahim & others, AIR 2013 SC 1099,*** the relevant paragraph No.12 whereof reads as under:-

> "12. A proceeding under Section 6 of the Specific Relief Act, 1963 is intended to be a summary proceeding the object of which is to afford an immediate remedy to an aggrieved party to reclaim possession of which he may have been unjustly denied by an illegal act of dispossession. Questions of title or better rights of possession does not arise for adjudication in a suit under Section 6 where the only issue required to be decided is as to whether the plaintiff was in possession at any time six months prior to the date of filing of the suit. The legislative concern underlying Section 6 of the SR Act is to provide a quick remedy in cases of illegal dispossession so as to discourage litigants from seeking remedies outside the arena of law. The same is evident from the provisions of Section 6(3) which bars the remedy of an appeal or even a review against a decree passed in such a suit."
>
> (p1103-1104)

4. The learned counsel appearing for the respondents has, however, contended with much vigour, that with initiation of proceedings under the "SARFAESI" Act, by the defendants/respondents herein against one Sukh Ram, besides also vis-a-vis the suit khasra number, thereupon, with a special statutory mechanism being contemplated therein, for its availment by the plaintiff, (i) thereupon, the plaintiff's suit warranting, dismissal, (ii) rather than the inapt relief, of ad interim mandatory injunction being pronounced vis-a-vis him. In making the aforesaid submission, he, has relied, upon, a judgment pronounced by the Hon'ble Division Bench, of, this Court in **CWP No.618 of 2016** in a case titled as **M/s Cecil Instant Power Company** versus **Punjab National Bank and others**.

5. This court would proceed to revere the rendition recorded by the Hon'ble Division Bench of this Court, in CWP No. 618 of 2016, only upon, an evident display emanating, from, the material on record, (i) qua apart from one Sukh Ram, against whom proceedings under the "SARFAESI" Act, stand evidently launched by the defendants, (ii) theirs standing also launched against the plaintiff/petitioner herein. However, no such material exists on record, (iii) contrarily, the suit khasra number bears a specific khasra No. 2297/2070/1574, measuring 00-01-28 sq. meter, whereas the khasra numbers appertaining, to Sukh Ram, against whom proceedings, under the "SARFAESI" Act, are launched, bear, contradistinct therefrom, khasra number

2031/1574, measuring 00-01-17 sq. meter. Consequently, with the suit property, owned, by the plaintiffs being located in a khasra number, contradistinct, vis-a-vis the khasra number owned by Sukh Ram, against whom, proceedings are launched, under, the "SARFAESI" Act, (iv) thereupon, it was apt, for the learned trial Court, upon, evident satiation, of, the principles propounded by the Hon'ble Apex Court in *Dorab Cawasji Warden's case (supra),* for validating relief(s), of, ad interim mandatory injunction, (v) *comprised* in six months prior to the institution of the suit, the plaintiff evidently holding possession, of the suit property, arising from, his on 4.8.2014 being issued a sale certificate, in pursuance to his purchasing the suit khasra number, in an auction conducted by the Syndicate bank. (v) The aforesaid status of the suit property immediately existing, prior, to the institution of the suit, also constituted the undisputed and uncontested status thereof, preeminently six months prior to the institution of the suit. (vi) Thereupon, with affordability of relief of ad interim mandatory injunction being rested, on, the principle of, imperativeness for preserving and restoring the status quo of the last non-contested status of the suit property, (vii) thereupon, hence, unless, the untenable misdoings, of, locking of the suit premises, is ordered be undone, through, affording, of, relief of ad interim mandatory injunction, obviously, there would, not, occur preservation(s) and restoration(s) of status quo of the last non contested status, of, the aforesaid suit khasra number(s). Contrarily, the learned Appellate Court, has prima facie, erroneously dwelt, upon, the factum of the integrity, of, khasra No. 2031/1574, in respect whereof against one Sukh Ram proceedings under the "SARFAESI" Act, were launched, "with" the suit khasra number, whereas, as borne out from the revenue record(s) existing hereat, rather making display, of khasra number(s) in respect whereof, proceedings, against Sukh Ram, under, the "SARFAESI" Act, were initiated, bearing no linkage, with the suit khasra number, owned by the plaintiff, (viii) thereupon, also the further reason assigned, by the learned Appellate Court, that, unless there occurs partition, of the purported undivided assets owned respectively, by one Sukh Ram and by the plaintiff, it would not be befitting, to affirm the order recorded by the learned trial Court, also hence prima facie suffers from an infirmity. In sequel, the order of the learned First Appellate Court, suffers, from a gross mis-appreciation, of, the material on record, hence, warrants interference by this Court. More so, when the balance of convenience lies in favour of the plaintiff also when in the event of refusal of the ad interim mandatory injunction, it will put the plaintiff/applicant to a loss which, cannot, be compensated in terms of money.

6. For the foregoing reasons, the instant petition is allowed and the impugned order recorded by the learned Additional District Judge-II, Solan in Civil Misc. Appeal No. 3ADJ-II/14 of 2017 is set aside, whereas, the order rendered by the learned Civil Judge(Junior Division), Court No.2, Solan, in CMA No. 172/6 of 2015 is maintained and affirmed. However, it is made clear that the the observations made hereinabove shall not be construed as any expression on the merit(s) of the case. No order as to costs. The parties are directed to appear before the learned trial Court on 16.01.2018. All pending applications also stand disposed of . Records be sent back forthwith.

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

Dole Raj Thakur ...Appellant.

Versus

Pankaj Prashar ...Respondent.

Cr. Appeal No. 505 of 2017
Decided on: 06.01.2018

Code of Criminal Procedure, 1973- Criminal Appeal- Section 138 of Negotiable Instruments Act- Case dismissed for non-prosecution as the complainant failed to put up appearance on the

date fixed- High Court in appeal **Held-** that Section 256 Cr.P.C. provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper – Magistrate can also dispense with the attendance of the complainant and proceed for the day in case he is represented by a pleader- Further Held- that when the Court notices that the complainant is absent on a particular day, the Court must consider whether the personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date. (Para- 6 to 16)

Code of Criminal Procedure, 1973- Criminal Appeal- Section 138 of Negotiable Instruments Act- Section 397 Cr.P.C- Held- that there is difference between filing of second revision after adjudication of the first revision on merits and filing of a successive revision after withdrawing the first revision. (Para-17 to 21)

Cases referred:

Vinay Kumar versus State of U.P. & Anr., 2007 Cri.L.J. 3161
N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another, 2008 (2) Latest HLJ 1249
Associated Cement Co. Ltd. versus Keshvanand, (1998) 1 Supreme Court Cases 687
Mohd. Azeem versus A. Venkatesh and another, (2002) 7 Supreme Court Cases 726
S. Anand versus Vasumathi Chandrasekar, (2008) 4 Supreme Court Cases 67
Boby versus Vineet Kumar, Latest HLJ 2009 (HP) 723

For the appellant: Mr. Maan Singh, Advocate.
For the respondent: Mr. Ashok K. Tyagi, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

This appeal has been preferred against impugned order, dated 27th June, 2017, passed by learned Judicial Magistrate 1st Class, Manali (hereinafter referred to as "Magistrate") in Criminal Case No. 13-I/2012/35-III/2012, whereby the complaint filed by appellant-Dole Raj Thakur against respondent-Pankaj Prashar under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "NI Act"), came to be dismissed in default for non-presence and non-prosecution, when the case was listed for arguments.

2. It is apt to reproduce the impugned order herein:

"27.06.2017 Present: None for complainant.
Sh. Bhanu Pratap, ld. Adv. for accused.
On separate application, accused exempted through counsel for today only.
2. Be awaited. Be called after respite.

Sd/-
Judicial Magistrate 1st Class
Manali Distt. Kullu (H.P.)

Taken up again after respite
Present: None for complainant.
Sh. Bhanu Pratap, ld. Adv. for accused.

3. Be called after lunch.

Sd/-

Judicial Magistrate 1st Class
Manali Distt. Kullu (H.P.)

Taken up again after lunch
Present: None for complainant.
Sh. Bhanu Pratap, ld. Adv. for accused.

4. Be called after respite.

Sd/-
Judicial Magistrate 1st Class
Manali Distt. Kullu (H.P.)

Taken up again after respite
Present: None for complainant.
Sh. Bhanu Pratap, ld. Adv. for accused.

5. Case called repeatedly after intervals during the whole day. None has appeared on behalf of the complainant. It is 3:30 pm already and the cause list of the day stands exhausted. In the entirety of the facts and circumstances of the case, to my mind, without presence of the complainant this case cannot be proceeded further at the stage and presence of the complainant is indispensable and the complainant has not been appearing. Hence, the instant complaint is hereby dismissed in default for non-presence and non-prosecution. File after due completion be consigned to the records.
Announced.

Sd/-
Judicial Magistrate 1st Class
Manali Distt. Kullu (H.P.)"

3. In view of Section 143 of the NI Act, offence under Section 138 of the NI Act is to be tried summarily and accordingly, procedure for summons case provided in Chapter XX of the Code of Criminal Procedure (hereinafter referred to as "CrPC") is applicable during the trial initiated on filing a complaint under Section 138 of the NI Act. In this Chapter, Section 256 CrPC deals with a situation of non-appearance of death of complainant.

4. In the judgment passed by Allahabad High Court in case titled as **Vinay Kumar versus State of U.P. & Anr.,** reported in **2007 Cri.L.J. 3161,** and another judgment passed by co-ordinate Bench of this Court in case titled as **N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another,** reported in **2008 (2) Latest HLJ 1249,** Section 256 CrPC has been held to be applicable in a complaint filed under Section 138 of the NI Act.

5. I deem it proper to reproduce Section 256 CrPC herein:

*"**256. Non-appearance or death of complainant.** - (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that

the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

6. Section 256 CrPC provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper. Proviso to this Section also empowers the Magistrate to dispense with the complainant from his personal attendance if it is found not necessary and to proceed with the case. Also, when the complainant is represented by a pleader or by the officer conducting the prosecution, the Magistrate may proceed with the case in absence of the complainant.

7. When the Magistrate, in a summons case, dismisses the complaint and acquits the accused due to absence of complainant on the date of hearing, it becomes final and it cannot be restored in view of Section 362 CrPC, which reads as under:

*"**362. Court not to alter judgment.** - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."*

8. Keeping in view the effect of dismissal of complaint under Section 138 of the NI Act, the apex Court in case titled as **Associated Cement Co. Ltd. versus Keshvanand,** reported in **(1998) 1 Supreme Court Cases 687,** after discussing the object and scope of Section 256 CrPC, has held that, though, the Section affords protection to an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean that if the complainant is absent, the Court has duty to acquit the accused in invitum. It has further been held in the said judgment that the discretion under Section 256 CrPC must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

9. Similarly, the apex Court in case titled as **Mohd. Azeem versus A. Venkatesh and another,** reported in **(2002) 7 Supreme Court Cases 726,** has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

10. Also in case titled as **S. Anand versus Vasumathi Chandrasekar,** reported in **(2008) 4 Supreme Court Cases 67,** wherein the complaint under Section 138 of the NI Act was dismissed by the trial Court exercising the power under Section 256 CrPC on failure of the complainant or her power of attorney or the lawyer appointed by her to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence, the apex Court has considered as to whether provisions of Section 256 CrPC, providing for disposal of a complaint in default, could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined and it has been held that in such a situation, particularly, when the accused had been examined under Section 313 CrPC, the Court was required to pass a judgment on merit in the matter.

11. This Court in **N.K. Sharma's case (supra)** also**,** relying upon in **Associated Cement Co. Ltd.'s case (supra),** has held that when the Court notices that complainant is absent on a particular day, the Court must consider whether the personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason and if the situation does not justify the case being adjourned, then only Court is free to dismiss the complaint and acquit the accused, but if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged under Section 256 CrPC.

12. This Court in another case titled as **Boby versus Vineet Kumar,** reported in **Latest HLJ 2009 (HP) 723,** has reiterated ratio of law laid down in **N.K. Sharma' case (supra),** again relying upon in **Associated Cement Co. Ltd.'s case (supra).**

13. Coordinate Bench of this Court in **Criminal Appeal No. 367 of 2015,** titled as **Vinod Kumar Verma versus Ranjeet Singh Rathore,** decided on 6th May, 2016 and **Criminal Appeal No. 559 of 2017,** titled as **Harpal Singh versus Lajwanti,** decided on 13th October, 2017, has held that dismissal of the complaint in default for non-appearance of the complainant on the date fixed without affording him even a single opportunity is unjustified.

14. Keeping in view the effect of dismissal in default, the Magistrate is supposed to exercise his discretion with care and caution clearly mentioning in the order that there was no reason for him to think it proper to adjourn the hearing of the case to some other day.

15. In present case, the case was at advance stage of hearing, was fixed for addressing arguments and the complainant was duly represented by the counsel, but his counsel has also failed to put in appearance before the Magistrate for which complainant may not be held liable directly, rather, absence of the complainant, as he has engaged a counsel to represent him, may be considered as justified under the bona fide belief that the counsel may attend his complaint in his absence, particularly, on a date of hearing, in which no role on the part of the complainant was to be performed as the arguments were to be addressed by the counsel engaged by him.

16. In view of the ratio of law laid down by the apex Court and other judgments of the High Courts, including this Court, I am of the opinion that the learned Magistrate was not justified in dismissing the complaint in default for single absence of the complainant coupled with failure of his counsel to attend the date. From the stage of complaint, it is evident that presence of complainant, on that day, was unnecessary as the case was at final stage. The Magistrate instead of dismissing the complaint in default should have adjudicated upon the complaint on merit and for that purpose, he might have adjourned the case for a future date.

17. It is argued by learned counsel for the respondent that during pendency of the complaint, an application under Section 311 CrPC was preferred by the respondent for leading additional evidence, which was rejected by the trial Court/Magistrate, the said rejection order was assailed by the respondent by filing revision petition under Section 397 CrPC before the learned Sessions Judge and subsequent to dismissal of the complaint, the said revision was also dismissed as withdrawn.

18. Further, it is argued that on revival of complaint after setting aside its dismissal in default, the respondent will suffer irreparable loss because his revision, against the rejection of application under Section 311 CrPC, will not be revived as there is no provision of restoration of revision petition once decided finally and also keeping in view Section 362 CrPC, learned Sessions Judge has no power to revive the said revision petition. It is also contended that in view of dismissal of revision petition preferred before the learned Sessions Judge, the respondent, in terms of sub-section (3) of Section 397 CrPC, will not be permitted to file second revision.

19. In my opinion, there is a difference between filing of second revision after adjudication of first revision on merit and filing of successive revision after withdrawing the first revision. Bar under section 397 (3) CrPC shall become operative only if the first revision petition under this Section has been filed and adjudicated upon merit either by the High Court or by the Sessions Judge.

20. In a case, like present one, where revision petition was dismissed as withdrawn on account of dismissal of the main complaint, the order passed wherein was basis for filing the first revision petition, cannot be treated as a bar to prefer successive revision petition after revival of the original complaint.

21. In any case, in the facts and circumstances of present case, respondent would also have an option to invoke the provisions of Section 482 CrPC to secure the ends of justice.

Even if, it is considered that respondent is not entitled to file another revision petition under Section 397 CrPC, then also, withdrawing of revision petition by respondent after dismissal of complaint cannot be considered a valid basis for rejecting the present appeal.

22. In the impugned order, there is no finding of the Magistrate that the complainant was not pursuing the complaint honestly and diligently. There is no reference of previous history, if any, with regard to conduct of the complainant causing unnecessary delay on account of adjournments sought by him or for want of his presence. There is only reference of his absence on the date since morning till post-lunch session. Therefore, acquittal of the accused without adjudicating the case on merits, due to non-appearance of the complainant on the date of arguments, who was sincerely pursuing his remedy, is improper. In normal circumstance, no complainant will be disinterested in pursuing his complaint without any reason, particularly, when it is at final stage of trial involving stake of ₹ 8 lakhs. It was a fit case for the Magistrate to exercise his discretion to adjourn the case for a subsequent date.

23. Further, it is also contended on behalf of appellant that absence of counsel before the Magistrate was for noting down wrong date in his diary by vice counsel appeared on previous date.

24. In view of above facts, circumstances and discussion, I am of the view that there is merit in the appeal and it deserves to be allowed. Accordingly, appeal is allowed and impugned order, dated 27th June, 2017, passed by learned Judicial Magistrate 1st Class, Manali in Criminal Case No. 13-I/2012/35-III/2012 is set aside and complaint before learned Judicial Magistrate 1st Class, Manali, District Kullu, is ordered to be registered to its original number and directed to be decided in accordance with law.

25. Respondent is at liberty to avail the remedy available to him against the rejection of his application under Section 311 CrPC in accordance with law, if so advised.

26. Parties are directed to appear before the Magistrate on **23rd February, 2018.**

27. Appeal is allowed in above terms alongwith all pending applications, if any.

****

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

M/s Victory Oil Gram Udyog Association ...Petitioner

Versus

The Managing Director and another ...Respondents

Arb. Case No. 74 of 2017
Decided on: January 9, 2018

Arbitration & Conciliation Act, 1996- Section 11- Respondents floated an open tender for the supply of mustard oil- Purchase order was awarded to the petitioner – dispute arose about the payments of the consideration amount of the commodity – Petitioner invoked relevant clauses of the tender document and purchase order requesting the respondent to appoint an arbitrator- Secretary (Food, Civil Supplies and Consumer Affairs) was nominated as an Arbitrator as per agreement between the parties- appointment was objected to on the ground that the appointee Arbitrator is exercising direct control over day to day affairs of the respondent corporation- **Held-** that in view of the amended Section 12(5) of the Act, Arbitrator should be an independent and impartial person and to ensure the same, it is permissible to travel beyond the agreement between the parties- Appointment of the Arbitrator quashed and new Arbitrator appointed- Petition disposed of. (Para-13 to 15)

Case referred:
Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

For the Petitioner : Mr. Atul Jhingan, Advocate.
For the Respondents : Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge.

By way of instant petition filed under Section 11 (4) of the Arbitration & Conciliation Act, 1996, prayer has been made on behalf of the petitioner for appointment of an arbitrator, in terms of Clause 14 as contained in the tender document, (Annexure P-1) and Clause 13 of the purchase orders dated 7.2.2015, 10.3.2015 and 10.4.2015, (Annexures P-2 to P-4, respectively.)

2. Averments contained in the petition suggest that respondents floated an open tender for the supply of mustard oil and petitioner being the lowest bidder came to be awarded purchase order for supply of mustard oil. Since petitioner was lowest bidder, respondent No. 1 issued various orders for supply of mustard oil to be supplied at various destinations/godowns.

3. It also emerges from the averments contained in the petition and documents annexed therewith that the petitioner supplied certain quantities of mustard oil pursuant to purchase orders placed by the respondents, but for one reason or the other, respondent-Corporation withheld some amount payable to the petitioner. Since, respondents failed to release the amounts due to the petitioner despite several requests, petitioner invoked Clause 14 of the tender document, (Annexure P-1) as well as Clause 13 of purchase orders, (annexure P-2 to P-4), requesting the respondent-Corporation to appoint an impartial arbitrator.

4. Mr. Atul Jhingan, learned counsel representing the petitioner, while referring to the aforesaid Clauses contained in tender document and purchase orders, fairly contended that though a reference was made by the petitioner to the named arbitrator i.e. Secretary (Food, Civil Supplies and Consumer Affairs) to the Government of Himachal Pradesh, but petitioner has serious objections to his being appointed as an arbitrator to adjudicate the dispute inter se parties. While inviting attention of this Court to the amended provisions of Section 12(5) of Arbitration and Conciliation (Amendment) Act, 2015, learned counsel contended that despite there being prior agreement, if any, between the parties, no person, whose relationship with the parties or counsel or subject matter of dispute falls within categories as specified in the Seventh Schedule, shall be appointed as an arbitrator. Amended Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 provides as under:

> "(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
>
> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

5. Mr. Atul Jhingan, learned counsel representing the petitioner further contended that in the case at hand, person as named in the agreement arrived inter se parties i.e. Secretary (Food, Civil Supplies and Consumer Affairs) can not be appointed as an arbitrator in terms of specific bar contained in Clauses 9 to 14 of Seventh Schedule as specified in Section 12 (5) of the amended Section 12 of the Arbitration and Conciliation (Amendment) Act, 2015. He specifically invited attention of this Court to Clauses No. 9 to 14 of the Seventh Schedule of the Act *ibid*, which are reproduced as under:

"9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case."

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

6. Mr. Jhingan, further contended that Secretary (Food, Civil Supplies and Consumer Affairs) to the Government of Himachal Pradesh is ex-officio Director of the respondent-Corporation and he has direct control over the respondent-Corporation. Mr. Jhingan further contended that although a notice was received by petitioner from the above named arbitrator i.e. Secretary (Food, Civil Supplies and Consumer Affairs) to the Government of Himachal Pradesh, but, petitioner at the time of causing his appearance before him on 17.5.2017, expressed his unwillingness to subject himself to his arbitration, as a consequence of which, dispute has arisen between the parties and this Court needs to appoint an independent and impartial arbitrator to adjudicate upon the dispute inter se parties.

7. Mr. Arvind Sharma, learned counsel representing the respondents, while inviting attention of this Court to the reply filed on behalf of his clients, contended that present petition deserves to be dismissed because same has been filed merely on presumptions. Mr. Sharma, further contended that petitioner himself requested the respondents for appointment of an arbitrator and accordingly, Secretary (Food, Civil Supplies and Consumer Affairs) to the Government of Himachal Pradesh was appointed as an arbitrator. Mr. Sharma, further contended that as per agreed terms inter se parties, i.e. Clause 14 of the terms and conditions of the tender document, only Secretary (Food, Civil Supplies and Consumer Affairs) can be appointed as an arbitrator, as such, there is no illegality or infirmity in the action of the respondents in appointing aforesaid person as an arbitrator to adjudicate the dispute inter se parties. Mr. Sharma, further contended that since petitioner by making itself present before learned arbitrator, pursuant to notice issued by him, has subjected itself to the jurisdiction of the arbitrator appointed in terms of agreement arrived inter se parties as such, objections, if any at this stage, as raised by it placing reliance upon amended Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 are not tenable and present petition deserves to be dismissed.

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

9. In the case at hand, as has been discussed herein above, though petitioner had made a reference to the named arbitrator i.e. Secretary (Food, Civil Supplies and Consumer Affairs) in terms of agreement/purchase order, but since above named arbitrator exercises direct control over the respondent-Corporation, he can not be appointed as an arbitrator despite there being specific agreement arrived inter se parties. It would be appropriate to reproduce amended Section 12 (5) of the Act herein below:

"12 Grounds of challenge

(1) x x x x

(2) x x x x

(3) x x x x

(4) x x x x

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

10. After having carefully perused amendment made in Section 12 reproduced supra, this court finds considerable force in the argument of learned counsel for the petitioner that the Secretary (Food, Civil Supplies and Consumer Affairs) could not be appointed as an Arbitrator for the reason that he exercises direct control over day-to-day affairs/working of the respondent-corporation.

11. Having carefully perused the aforesaid provision of law, this Court is persuaded to agree with the contention of learned counsel for the petitioner that Secretary (Food, Civil Supplies and Consumer Affairs), can not be appointed as an Arbitrator in the instant case and some independent person, who has no direct or indirect control over the affairs of the respondent-Corporation ought to have been appointed as an Arbitrator to adjudicate the dispute inter-se parties.

12. Hon'ble Apex Court in **Volestalpine Schienen GMBH** v. **Delhi Metro Rail Corporation Ltd**., (2017) 4 SCC 665, has held as under:-

"14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:

8. (i) for sub-section (1), the following Sub-section shall be substituted, namely

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;

(ii) after Sub-section (4), the following Subsection shall be inserted, namely—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them,

waive the applicability of this Sub-section by an express agreement in writing. (emphasis supplied)

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

> NEUTRALITY of ARBITRATORS
>
> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. 54. In the Act, the test for neutrality is set out in Section 12(3) which provides
>
> > 12(3) An arbitrator may be challenged only if—
> >
> > (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."
>
> 55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not

whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State,

> the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.
>
> 58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.
>
> 59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).
>
> 60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of

neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

13. In the aforesaid judgment, it has been categorically held by the Hon'ble Apex Court that main purpose for amending the provision was to provide for neutrality of arbitrators. Hon'ble Apex Court has further held that in order to achieve the neutrality, as referred above, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or counsel or subject matter of dispute falls under any of the categories specified in the schedule, he shall be ineligible to be appointed as an arbitrator.

14. In the case at hand, respondent has nowhere disputed the claim of the petitioner that Secretary (Food, Civil Supplies and Consumer Affairs) has direct control over the day-to-day affairs of the respondent-Corporation as such, in view of amended provisions of law, i.e. amended Section 12(5) of the Act *ibid*, he can not be appointed as an arbitrator, as such, his appointment deserves to be quashed and set aside.

15. Consequently, in view of detailed discussion made herein above and law laid down by Hon'ble Apex Court, notice dated 15.7.2017, annexure R-6 issued by the named arbitrator i.e. Secretary (Food, Civil Supplies and Consumer Affairs) is quashed and set aside and with the consent of the learned counsel representing the parties, **Shri Suneet Goel, Advocate, HP High Court, Shimla**, is appointed as an arbitrator to adjudicate the dispute inter se parties. His consent/declaration under Section 11(8) of the Arbitration & Conciliation Act has been obtained. He has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. Thereafter, petitioner is directed to file claim petition within a period of three weeks. Reply be filed by the respondents within a further period of three weeks. Pleadings, including rejoinder and counter-claims shall also be completed by the parties within a period of eight weeks after entering into reference by the Arbitrator. It shall be open to the Arbitrator to determine his own procedure with the consent of the parties. It shall also be open to the Arbitrator to fix his fee. Award shall be made strictly as per the provisions of Arbitration & Conciliation Act, within six months. Needless to add that the Arbitrator shall pass a speaking order.

16. A copy of this order shall be made available to the Arbitrator, named above, by the Registry of this Court, within a period of two weeks, enabling him to take steps for commencement of the arbitration proceedings.

17. The petition is disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE, SANDEEP SHARMA, J.

Court on its own motion ...Petitioner

Versus

State of Himachal Pradesh & others ...Respondents

CWPIL No. 10 of 2017
Date of Decision : January 10 , 2018

Constitution of India, 1950- Article 226- Letter petitioner informed the Court about the illegal mining in District Mandi and inaction on the part of authorities in this behalf- **Held**- that grievance of letter petitioner stands addressed from the steps taken by respondent State during the pendency of the petition- Court, however, directed that State to adhere to the calendar of carrying out surveys and inspection of site- further directed that Government should consider taking action against erring government officials along with wrong doers for checking illicit mining and also consider on revising mining policy, 2013 within 6 months from the disposal of the petition- petition disposed of. (Para-9)

For the petitioner : Ms. Shalini Thakur, Advocate, as Amicus Curiae.
For the respondent : Mr. Ashok Sharma, Advocate General with Mr. M.A. Khan and Mr. Varun Chandel, Addl. A.Gs. and Mr. J. K. Verma, Dy.A.G. for respondents/State.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

On the basis of letter petition with regard to illegal mining of minerals being carried out in District Mandi, this Court, taking *suo motu* cognizance, issued notice. Letter petitioner Sh. Harish Chander s/o Sh. Gopal Singh, R/o Village Manyana Kehanwal, P.O. Tilli, Tehsil Sadar, Distt. Mandi, H.P., alleged that in village Manyana Kehanwal, Tehsil Sadar, Distt. Mandi, illegal mining of minerals is being carried out and despite the matter having brought to the notice of the concerned officials, including the Deputy Commissioner and the D.F.O., unabatedly the mining is being carried out without any checking.

2. The Additional Superintendent of Police, Mandi, vide his affidavit dated 25.5.2017, admitted the factum of illegal mining being carried out within the territorial jurisdiction of Tehsil Sadar, Distt. Mandi, H.P. and F.I.Rs. having been registered with regard thereto. However, what shocked the Court was the extent of illegal mining inasmuch as in 417 cases, offenders were challaned and a sum of Rs.8,97,800/- was recovered as fine only from one police station. This prompted the Court to pass the following order on 10.7.2017:

> "From the affidavit filed by Additional Superintendent of Police, Mandi, it is evident that in District Mandi lone, 407 cases of illegal mining were detected and the defaulters challaned, from whom, a total sum of Rs.8,97,800/- recovered. Learned Amicus Curiae invites our attention to the effect that within the district, 21 mining leases have been granted and that too after getting environmental clearances. She further drew our attention to the fact that the total quantity recovered as a result of illegal mining is more than 70 MT. It is in this back drop that we do not find the explanation so furnished by the Additional Superintendent of Police as also the Deputy Commissioner to have taken adequate steps for checking illicit mining to be satisfactory or worthy of inspiring in confidence.

2. Mr. Anup Rattan, learned Additional Advocate General invites our attention to the Himachal Pradesh Mining Policy, 2013, so notified on 24th of August, 2013. Perusal thereof indicates existence of complete mechanism for taking adequate steps for checking the menace of illicit mining. Also there is a mechanism for conducting survey of river beds and other places including rivulets and rivers having mineral deposits. The committee is required to carry out survey and after obtaining permission from the authorities so established under various statutes dealing with environmental and forest laws, identify sites for auction. Now there is nothing on record to show as to whether prior to the issuance of 21 mining leases, any such survey was carried out or permission obtained from the statutory authorities. Also whether there is any policy, for district Mandi for putting such minerals alongside rivulets and rivers for auction or not is not clear. Also we find that there is complete mechanism provided for illegal mining. Specific attention can be drawn to clause 10, which reads as under:-

> "10. Steps to check illegal mining.
>
> *10.1. Illegal mining leads to unscientific & haphazard mining, therefore, emphasis has to be given to check the menace of illegal mining. It has been noticed that illegal mining mostly takes place on Govt. lands largely belonging to Revenue & Forest Department. Henceforth there is a need for action by the custodian Departments of such land from where this material is sourced. It would be the responsibility of such Department/custodian of such land to promptly initiate action to prevent illegal mining for which they have adequately been empowered under relevant act/statutes.*
>
> *10.2. It shall be incumbent on the concerned Department whose public property is damaged or caused to be damaged by illegal mining to file First Information Report (FIR) with Police for damaging public property besides filing case of illegal extraction in the competent court of law.*
>
> *10.3. in case any working stone crusher registered as such on enquiry is found to be involved violating any of the conditions prescribed at the time of approval/registration of such unit may be imposed a penalty/fine to be prescribed under the rules. Subsequent violation if any would be dealt with severely and attract penal provisions stringent action which may include disconnection of electricity or de-registration of unit and cancellation of lease/working permit etc. Similar provision shall be made for the stone crushing unit being run of DG Sets.*
>
> *10.4 The finished product i.e. grit, sand, etc. shall also be transported with color coded M-Form/transit pass issued by the concerned Mining Office.*
>
> *10.5 In order to check the misuse of "M" Form the system for its issue shall be reviewed and modernized by adopting Bar Coding and to make to more scientific, transparent and accountable.*
>
> *10.6 the unauthorized mineral material seized during checking/raids shall be put to auction within a period not exceeding one month by the Committee comprising of the following:-*
>
> | | |
> |---|---|
> | *1-Sub Divisional Magistrate* | *Chairman* |
> | *2-Deputy Superintendent of Police* | *Member* |
> | *3-Assistant Conservator of Forest/Range Officer* | *Member* |

This Committee shall follow the prescribed procedure and the Chairman can co-opt any other member for this purpose.

10.7 To encourage public participation and create public awareness about the ill effect of illegal mining on the environmental & Ecology frequent interaction with the Public representatives and opinion makers at local level shall be actively encouraged.

10.8 the mineral concession holder will fix sign board at the conspicuous prominent place near concession area depicting all relevant details of mining lease like area, period of permission, purpose of lease etc. for the information of general public. People including mining lessee will be encouraged to report cases of any illegal mining to concerned Mining Officer and other authorized Officers for taking appropriate action as per Law.

10.9 To review the complaints relating to illegal mining a dedicated toll free number shall be installed/activated in the office of State Geologist.

10.10 Regular review of illegal mining activities and action taken to stop them shall also form part of agenda of meeting taken by the Deputy Commissioner on quarterly basis and report to this effect shall be submitted to the Director of Industries/Government regularly.

10.11 Periodic interaction between the lease holder and Department will be organized to redress the problems/issues of the mining industry.

10.12 A comprehensive review of the manpower needs of the Department will be undertaken to ensure that adequately trained manpower at all levels is provided for scientific exploration of minerals in the State & to check the menace of illegal mining effectively.

<u>Note:</u>- These policy guidelines are to be read with the statutory provisions in the relevant Acts and Rules, directions from the Hon'ble Courts from time to time and may be amended/changed by the competent authority."

3. On record, there is nothing to establish that such preventive steps were ever taken by the respondents.

4. As such, we direct the Deputy Commissioner, Mandi, to file his personal affidavit disclosing: (a) whether such Committees stand established or not; (b) as to whether any survey stands conducted by the Committees or not; (c) as to whether any sanctions, based upon surveys, have been obtained from the statutory authorities or not; (d) as to whether the Government has taken a decision to the effect that minerals deposits alongside the river beds, rivulets can be put to auction. If so then why the same have not been put to auction; (e) if the minerals can not be put to auction then what steps stand taken for checking illegal mining; (f) as to what action stands taken against the erring officer(s)/official(s), who allowed the unscientific and illegal mining in more than 407 cases. Such affidavit be filed within two weeks.

5. It shall be open to the learned Amicus Curiae to fully interact with the Deputy Commissioner and the Members of the Committee and give suggestions of involving civil society in helping/checking this menace of illicit mining. We issue such directions taking into consideration Section 10.7 of the Policy whereby the State is obliged to encourage public participation and create awareness of ill effect of illegal mining.

List on 25th of July, 2017"

3. The Conservator of Forests, Mandi Forest Circle, Mandi, H.P., vide affidavit dated 23.6.2017, had also informed the Court about the illegal mining being carried out in Gram Panchayat Tilli, District Mandi, H.P.

4. Further, Deputy Commissioner, Mandi, filed his affidavit dated 30.6.2017, disclosing names of all the offenders and the quantity of material so recovered. We need not deal with the same elaborately, save and except, note that the quantity recovered was huge.

5. Considering the fact that the sites of deposit of minerals were neither surveyed nor identified, much less, put to auction in accordance with law, this Court directed the State Geologist to have the needful done at the earliest. On 28.7.2017, we recorded our satisfaction that areas falling in Mandi district were surveyed.

6. On 6.12.2017 we further passed the following order:

> "S/Sh.Madan Chauhan, Deputy Commissioner, Mandi, Atul Kumar, Assistant Geologist and Rajeev Kalia, Mining Officer, Mandi, are present in Court.
>
> Deputy Commissioner, Mandi, seeks permission to withdraw the affidavit dated 29.09.2017. Registry is directed to return the same. Let fresh affidavit, in its place, be filed within a period of one week.
>
> On 28.09.2017, we had noticed the efforts put in by the Deputy Commissioner, Mandi, in identifying the areas, which could have been put to auction subject to the recommendation of the State Geologist.
>
> Subsequently, on 15.09.2017, we pass the following order:
>
> > "Learned Amicus points out that affidavit of Deputy Commissioner is conspicuously silent with regard to direction (f) contained in para-4 of order dated 10.7.2017 passed by this Court.
> >
> > Let an affidavit, stating action taken against erring officials, be positively filed within one week. Also, whether action qua all the sites so identified, for which permission is sought from the State Geologist, has been taken or not? if not, then what is the status of the file, and, if permissions already stand accorded, then, within how much time, action shall take place. In any event, we direct State Geologist, Himachal Pradesh and Secretary (Industries) to have the matter first examined and thereafter file their personal affidavits stating the position with regard to files pertaining to District Mandi. Affidavits be filed within one week. Officer need not remain present, unless so directed.
> >
> > List on 11.10.2017.
> >
> > Copy dasti."
>
> We notice that at least thirty sites were identified, which could have been put to auction for extraction of minor minerals. This was in District Mandi, alone. Regretfully, out of these sites, only three sites could be auctioned for the reason that the matter was pending consideration with the Secretary concerned. In his affidavit dated 25.10.2017, Additional Chief Secretary (Industries) to the Government of Himachal Pradesh, has not indicated the reasons for not taking decision with regard to such sites. Perhaps inaction on the part of the authorities concerned has resulted into loss of revenue. This State of affairs is only with regard to District Mandi. We are not sure that what is the position with regard to whole of the State of Himachal Pradesh.
>
> As such, let Additional Chief Secretary (Industries) to the Government of Himachal Pradesh, file his personal affidavit stating the reasons for delay in not dealing with the cases recommended by the Deputy Commissioners/ State Geologist for extraction of minor minerals, not only with regard to District Mandi, but entire State. Such information be furnished in a tabulated form, District

wise, indicating the date on which the case was forwarded by the Deputy Commissioner; the State Geologist and received in the office of the Additional Chief Secretary (Industries) to the Government of Himachal Pradesh. Reasons for delay be furnished in a separate column.

Also as to whether there is any mechanism, in place, for dealing with such cases in a timely manner or not, be also stated in his affidavit.

We may only observe that decision to put the site of deposit of minor minerals to auction is the sole prerogative of the State. The extraction of material has to be on scientific basis. But then, such decision has to be based on sound and settled principle of law and the cases have to be dealt with, with speed and expedition. This we say so for the reason that timely extraction of minor minerals before the onset of monsoon, would only help replenish the sites with the same, rather than, allowing them to go waste and inundate the lower line areas. Ordinarily and prudently, such decisions necessarily have to be taken before the monsoons.

It is in this backdrop, we express our concern of lack of insensitivity exhibited by the competent authorities at the highest level.

Additional Chief Secretary (Industries) to the Government of H.P. and State Geologist, remain present in Court on the next date of hearing. S/Sh.Atul Kumar, Assistant Geologist and Rajeev Kalia, Mining Officer, Mandi, need not remain present in Court, unless so directed.

List on 13.12.2017.

Copy dasti."

7. Pursuant thereto, the Addl. Chief Secretary (Industries) to the Government of Himachal Pradesh as also the Conservator of Forest, Mandi have now filed their affidavits dated 25.10.2017; 11.12.2017 and 1.12.2017, stating that not only the sites of deposit of minerals stand surveyed but also calendar stands prescribed for carrying out the auction of the minerals so deposited along the banks of rivers/rivulets as also the quarries. Affidavit dated 9.1.2018 that of Sh. Rajneesh Sharma, State Geologist, Himachal Pradesh, Shimla reads as under:

"2. That it is submitted that broadly the water flowing through the river perform three types of geological actions i.e. erosion, transportation and deposition. Flowing water erodes mineral/material from the catchment area as well as from the banks of a river channel and transport the eroded material to a new location for further deposition. The quantum of erosion, transportation and deposition of mineral (Sand, Stone & Bajri) varies from stream to stream depending upon numbers of factors such as catchment of the area, lithology, discharge, river profile and geomorphology of the river course. The annual deposition of mineral i.e. Sand, Stone & Bagri mostly takes place during the rainy season and depends upon the intensity of rainfall & types of rocks in the catchment area. However, in case, there is unprecedented rain during rainy season along a particular river basin, it may lead to flash floods; landslides etc. which may further cause over accumulation of sediment load in a particular stretch of a river/stream.

3. It is submitted that generally, the rainy season starts in the State of Himachal Pradesh from the month of July and terminates up to September month of a particular year. As such soon after the termination of the said monsoon period, there may be possibility for development of new mineral bearing sites generated due to aforesaid circumstances i.e. flash floods; landslides etc. As such, all Mining Officers are being directed to identify such new developed mineral bearing sites, immediately after the rainy season in a particular year is over i.e. upto the 30th November of every year and accordingly, directions are

being issued to Mining Officers of the Districts to complete the whole process of procurement of revenue record, demarcation & joint inspection of such new developed sites up to the 31st December of every year so that after scrutiny of the proposal and completion of whole process approval of the Government could be obtained for publication of Tender-cum-Auction notice within a period of 30 days upto the 31st January of every year."

8. Affidavit dated 11.12.2017 that of Sh. Tarun Kapoor, Addl. Chief Secretary (Industries) to the Government of Himachal Pradesh, Shimla, reads as under:

"2. That the District wise information of cases of tender cum auction forwarded by the Deputy Commissioners/ State Geologist H.P. for approval of the Government in a tabulated form is as under:-

Sr. No.	Name of the District	Date on which the proposal was forwarded by the Mining Officer from the District	Date on which the Director of Industries forwarded the case to the Government after scrutiny	Date on which approval conveyed by the Government	Remarks/Reasons for delay
1.	Mandi	05.09.2017 (Second Phase)	29.09.2017	07.10.2017	Approval already conveyed. Pending for publication of auction notice at Directorate level due to Modal Code of Conduct. Letter issued to Mining Officer for fixation of date.
2.	Kangra	05.07.2017 (Second Phase)	05.09.2017	29.09.2017	Approval already conveyed. Pending for publication of auction notice at Directorate level due to Modal Code of conduct. Letter issued to Mining Officer for fixation of date.
3.	Bilaspur	26.08.2017	26.09.2017	07.10.2017	Approval already conveyed.

					Pending for publication of auction notice at Directorate level due to Modal Code of conduct. Letter issued to Mining Officer for fixation of date.

The Detail of the quarries already auctioned:-

Sr.No.	Name of District	Numbers of quarries auctioned	Date of Auction
1	Hamirpur	14	21.04.2016
2.	Sirmour	21	06.07.2015 & 07.07.2015 & 23.11.2016
3	Una	6	20.08.2017
4	Mandi (1st Phase)	3	02.08.2017
5	Kangra (1st Phase)	13	25.04.2016

It is submitted that the approval in all the cases received from Deputy Commissioners through the Directorate of Industries Himachal Pradesh has been conveyed by the Government on the dates shown in the table and there is no delay at the part of the Government in any manner. However, the matter for the publication of notice for Tender-cum-Auction is pending at the Directorate level due to Modal Code of conduct which is in operation till 20.12.2017.

3. That it is also submitted that apart from the above, the Department has already auctioned 14 numbers of quarries in District Hamirpur, 13 quarries in Districti Kangra (in first phase), 21 quarries in District Sirmour, 06 quarries in District Una and 03 quarries in Mandi (in first phase) H.P. to meet out the demand of raw material in the aforesaid Districts. In rest of the Districts, the proposals for the auction of quarries is under process at various stages at the District level. In case, any proposal is received from these remaining Districts by the Government, the same shall be put to auction expeditiously after completing all codal formalities.

4. That the preparation of survey documents is the pre requisite for grant of mineral concession by way of auction and the same is prepared and approved by the District Environment Assessment Authority (DEIAA) as per notification dated 15.01.2016 issued by the Ministry of Environment, Forest and Climate Change (MoEF & CC) Government of India. Thereafter the suitable mineral bearing sites are identified by the concerned Mining Officer at the District keeping in view the general geography of the region, location of public utility points, hydroelectric projects, reservoir, cremation sheds, schools, public paths, gharats etc. located along the respective identified sites in the Districts. Accordingly, the demarcation of the site proposed for auction conducted after collecting the revenue record from the concerned authorities, the date for joint inspection of the site proposed for auction is fixed by the concerned Sub-Divisional Officer, keeping in mind the availability of all the Committee members. After the

conduction of the Joint Inspection and suggestions/recommendations of the Committee members, removal of objections if any, the joint inspection report is prepared by the concerned Mining officer which is then sent to the Government for obtaining approval of the Government and further fixation of the date of Tender-cum-Auction.

It also important to mention here that as per Himachal Pradesh Minor Minerals (Concession) and Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2015, it has been prescribed under Rule 25 that notice of auction or tender shall be notified by the Director in the Himachal Pradesh Government Gazette by publishing the auction notice atleast 30 days before the date of auction or tender. A copy of the auction or tender notice shall be sent to the local authority having jurisdiction over the area, where the mine is situated for giving wide publicity."

9. In view of the intervening developments we are persuaded by Sh. Anup Rattan, learned Addl. Advocate General to close the present proceedings which we do so with the following directions:

(i) The calendar set up by the Government for carrying out surveys; inspecting the sites; and putting the same to auction, strictly in accordance with law, shall be adhered to by the State.

(ii) An endeavour shall be made to have the surveys carried out periodically and wherever advisable and feasible, such of those sites which are replenished or have fresh deposits, be put to auction/grant of lease/license, in accordance with law. This would only ensure that rather than allowing the deposit of minerals to be washed away downstream with the flow of water, same can be extracted and the sites replenished afresh. The purpose is not only to generate revenue but to ensure no inundation of rivers down stream takes place, causing severe damage to property and human life.

(iii) The Himachal Pradesh Minor Minerals (Concession) & Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2015, shall be adhered to in letter and spirit and the State Geologist shall ensure that no extraction of minerals takes place in violation thereof and the directions issued by Hon'ble the Apex Court as also this Court, in its several pronouncements, from time to time.

(iv) The Government may consider making provisions for checking illicit mining to be more stringent. Not only action shall be taken against private persons engaged in such illegal mining but strict action shall also be taken against the Government Officials who, at the first instance, allow such mining to take place.

(v) The state has formulated a policy termed as Himachal Pradesh Mining Policy, 2013, so notified on 24th of August, 2013. Considering the overall development which has taken place in the last five years within the State of Himachal Pradesh, perhaps this Policy needs to be revised which the State must positively do within six months. The Chief Secretary to the Government of Himachal Pradesh shall ensure compliance of the order and file his personal affidavit of compliance.

10. We clarify that issues, other than the one we have noticed remain untouched and shall be dealt with in other appropriate proceedings.

11. Before parting, we wish to place on record our appreciation qua the efforts put in by Ms. Shalini Thakur, learned Amicus Curiae, who, on the instructions of this court, contacted the letter petitioner and obtained necessary feedback.

12. Registry is directed to send a copy of this judgment to the Deputy Commissioner, Mandi, H.P. and State Geologist, Himachal Pradesh, for necessary action as well as to the letter petitioner to enable them to take follow up action with the concerned authorities.

With the aforesaid observations, present petitions stand dispose of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Court on its own motion ....Petitioner.

Versus

The Deputy Commissioner, Shimla And another ...Respondents.

CWPIL No.152 of 2017
Date of Decision: January 10, 2018

Constitution of India, 1950- Article 226- Letter petitioner informed the Court that there is no appropriate shelter for the horses at the Ridge Shimla during the rains effecting adversely the horses - **Held-** that animals have also fundamental rights of life and same does not mean mere survival or existence or instrumental value for human beings, but also some intrinsic worth, honour and dignity - pony ride is an intrinsic part of heritage of the Shimla town- Authorities (Deputy Commissioner, Shimla and Commissioner, Municipal Corporation, Shimla) to ensure that owners and stakeholders do not cause any cruelty to horses- Petition stands disposed of (Para- 15, 18 and 20)

Cases referred:

Animal Welfare Board of India v. A. Nagaraja & othes, (2014) 7 SCC 547
State of Gujarat v. Mirzapur Moti Kureshi Kassa Jamat, (2005) 8 SCC 534
T.N. Godavarman Thirumulpad v. Union of India & othes, (2012) 3 SCC 277
Centre for Environmental Law, World Wide Fund-India v. Union of India & others, (2013) 8 SCC 234

For the Petitioner	:	Mr. Ankush Dass, Senior Advocate, as Amicus Curiae, with Mr. Devan Khanna, Advocate.
For the respondents	:	Mr. Ashok Sharma, Advocate General, with Mr. M.A. Khan, Mr. Varun Chandel, Additional Advocates General, and Mr. J.K. Verma, Deputy Advocate General, for respondent No.1-State. Mr. Hamdender Chandel, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

As to whether domesticated horses, licenced to be used for the purpose of joy rides to children on the Ridge (Shimla), have a right to shelter during rain and snow, is the core issue, which arises for consideration in the present petition.

2. By way of the instant letter petition, addressed by Ms Nidhi Bhalla, Hill View Lodge, Bharari, Shimla (Mobile No.98160 17917), plight of the horses, stationed on the Ridge (Shimla), was brought to the notice of this Court.

3. The Deputy Commissioner, Shimla, vide communication dated 10.11.2017, reproduced hereinbelow, requested the Commissioner, Municipal Corporation, Shimla, to have the mater examined and take appropriate action:

> "Please refer to the abovementioned subject and to request you that the above case was listed before the Hon'ble High court on 1.-11-2017 and the Hon'ble High court has directed to file the reply to the petition with in a period of two weeks' time.
>
> In this context, it is requested that the Hon'ble High Court has taken the cognizance on the representation presented by Nidhi Bhalla, Resident of Hill view Lodge Bharari Shimla. The petitioner has submitted that there is no appropriate shelter for the horses at the Ridge Shimla during the rains as such they needs to be protected and preserved otherwise the way the horses and owners are being treated, Shimla people may see the pride of ridge as vanishing. You are, therefore, requested to look into the matter personally and take the appropriate steps to redress the grievances as mentioned in the above case. Further you are also requestedto send the status report to this office within weeks time so that the Hon'ble high court could be apprised accordingly.
>
> Being a High Court matter treat it as most urgent."

4. Both Mr. Ankush Dass, learned Senior Advocate and Mr. Devan Khanna, Advocate, on our request, took up the matter with the authorities and appreciably, have found out a solution to the problem. Initially, learned Amicus were of the view that perhaps a temporary structure, totally gelling with the environment, can be raised on the Ridge for giving shelter to the ponies.

5. On a thoughtful consideration, considering the heritage status of the Ridge, the place where the horses are licenced to give joy rides, prudently, we did not find favour with such suggestion, for one does not know that with the passage of time, the authority may take a decision to build a permanent structure, thus destroying the heritage value and character of the place.

6. Thankfully to the learned Amicus, the Municipal Corporation, Shimla, has identified a place, immediately below the Ridge, towards the northern side, i.e. hill towards the Local Bus Stand, where the ponies can be tethered during rain and snow. Both Mr. Dass, Senior Advocate, and Mr. Deven Khanna have visited the site.

7. The Commissioner, Municipal Corporation, Shimla, states that necessary action for clearing and cleaning the passage; removing the encroachments, if any; and making the place, so identified, to be fully useable, shall be taken up at the earliest and the place made available for use, definitely on or before 28.2.2018.

8. Well with this, we find the grievance to have been redressed. But, before we close the present proceedings, we intend to say a little more.

9. Shimla is a heritage town. The Ridge is part of its heritage, so also pony rides for children on the Ridge, intrinsically is part of the very same heritage.

10. At present, as we are informed, there are 17 persons to whom licences, termed as "Horse Licence" stand issued by the Superintendent Estate, Municipal Corporation, Shimla. These horse owners run the ponies on an identified/earmarked route. At present, ponies are tethered in the open, on the Ridge itself. To the credit of the Municipal Corporation, one must record that place for drinking water for the horses is provided for.

11. The problem arises when it rains or snows. Whereas the owners run for shelter, they leave their horses, covered with a plastic sheet, tethered to the pole, in the open, unattended, to only suffer the vagaries of the weather.

12. In our considered view, concept of inalienable rights, within the framework of Rule of Law, applies as much to animal life as it would to humans. The vagaries and harshness of the weather, at times, is cruel in nature. Neither the horse owners nor the authorities issuing the licences can adopt an attitude of indifference to this suffering, causing immense cruelty.

13. Article 51-A of the Constitution of India mandates it to be a duty of every citizen to not only preserve the rich heritage of a composite culture, but also show compassion to all living creatures. To similar effect is the duty cast upon the State. One has to exhibit compassion for all living creatures.

14. The Apex Court in *Animal Welfare Board of India v. A. Nagaraja & othes,* (2014) 7 SCC 547, highlighting the importance and significance of the provisions of the Prevention of Cruelty to Animals Act, 1960, and that the expression "well-being of the animals", under Section 3 of the said Act, would mean state of being comfortable, healthy and happy. The Court reiterated the principle laid down in *State of Gujarat v. Mirzapur Moti Kureshi Kassa Jamat*, (2005) 8 SCC 534, with regard to the duty of citizens to show compassion for living creatures. What is "humanism" under the Constitution, stands explained in the following terms:

> "68. Article 51A(h) says that it shall be the duty of every citizen to develop the scientific temper, humanism and the spirit of inquiry and reform. Particular emphasis has been made to the expression "humanism" which has a number of meanings, but increasingly designates as an inclusive sensibility for our species. Humanism also means, understand benevolence, compassion, mercy etc. Citizens should, therefore, develop a spirit of compassion and humanism which is reflected in the Preamble of PCA Act as well as in Sections 3 and 11 of the Act. To look after the welfare and well- being of the animals and the duty to prevent the infliction of pain or suffering on animals highlights the principles of humanism in Article 51A(h). Both Articles 51A(g) and (h) have to be read into the PCA Act, especially into Section 3 and Section 11 of the PCA Act and be applied and enforced."

In the very same report, meaning of expression "right to life", under Article 21 of the Constitution, was held to be applicable to all forms of life, including animal life (Para-72).

15. We are totally in agreement with the learned Amicus that Article 21 covers under its umbrella every species and all forms of life in the environment. "Life", in the context of animals, does not mean mere survival or existence or instrumental value for human beings, but also some intrinsic worth, honour and dignity.

16. In fact, in its earlier decisions, while dealing with the issue of man-animal conflict, the Apex Court in *T.N. Godavarman Thirumulpad v. Union of India & othes,* (2012) 3 SCC 277, held as under:

> "17. Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. Manyof our principles like sustainable development, polluter-pays principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature centred where humans are part of nature and non-human has intrinsic value. In other words, human interest do not take automatic precedence and humans have obligations to nonhumans independently of human interest. Ecocentrism is therefore life-centred, nature-centred where nature include both human and non-humans. National Wildlife Action Plan 2002-2012 and centrally sponsored scheme (Integrated Development of Wildlife Habitats) is centred on the principle of ecocentrism."

17. The view stands reiterated in *Centre for Environmental Law, World Wide Fund-India v. Union of India & others,* (2013) 8 SCC 234.

18. In our considered view, during rain and snow, the horses, which are domesticated, cannot be allowed to be kept in the open, for it causes cruelty to them. Such an act is against public morale and order. Animals do have emotion, though they may not have the language of humans, but animal-lovers do understand their such emotions, expressed in various forms, including sound, body language and behaviour. In our considered view, animals do have a fundamental right under the Indian Constitution.

19. In the instant case, there is no conflict of interest between animals and humans. On the contrary, man needs to attend to the animals. Their sufferings need to be lessened and life ameliorated.

20. As already observed, pony ride being an intrinsic part of heritage of the town, the authorities are duty bound to ensure that the owners and the stakeholders do not cause any cruelty to the horses. The issue needs to be addressed and all sensitized about the same.

21. Before parting, we place on record our appreciation for the efforts put in by Mr. Ankush Dass, learned Senior Advocate and Mr. Deven Khanna, learned Amicus Curiae, who, on the instructions of this Court, contacted the letter petitioner and obtained necessary feedback.

22. Registry is directed to send a copy of this judgment to the Deputy Commissioner, Shimla, District Shimla, Himachal Pradesh, and the Commissioner, Municipal Corporation, Shimla, for necessary action, as also to the letter petitioner to enable her to take follow up action with the concerned authorities.

In view of the aforesaid, present letter petition is closed, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Pritam Singh .....Petitioner.

Versus

State of H.P and others .....Respondents

CMPMO No. 582 of 2017
Decided on: 10.01.2018

Code of Civil Procedure, 1908- Order 1 Rule 10- Application filed by the petitioner to be impleaded as defendant in the main suit before the learned 1st Appellate Court- Application dismissed and hence the present petition- High Court while dismissing the petition **Held-** That in case the documents on the basis of which impleadment is sought seemingly are not genuine and the said fact has been duly considered by the Lower Court, application for impleadment need not be allowed- On facts, further Held- that application for impleadment had only been filed during the pendency of the appeal and that too without any explanation as to what prevented the petitioner from filing the same during the pendency of the suit in the trial Court- Consequently, CMPMO dismissed. (Para-5 and 6)

For the petitioner: Ms. Rubeena Bhatt, Advocate vice Ms. Salochna Rana, Advocate.

For the respondents: Mr. Pramod Thakur, Addl. A.G for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Notice. Mr. Pramod Thakur, learned Additional Advocate General appears and accepts service of notice on behalf of respondent No.1. No notice need be issued to respondents No. 2 to 10.

2. In the pre-lunch session, original counsel representing the petitioner was present. After hearing this matter for some time, on her request, the matter was passed over enabling her to seek instructions. Ms. Rubeena Bhatt, Advocate submits that being in personal difficulty, right now she is not present. Also that, instructions in the matter could not be obtained.

3. It is seen that on the last date also, this matter was adjourned on the request made by learned counsel representing the petitioner. The instructions, if required, should have been obtained for today.

4. On the other hand, the record amply demonstrates that the petitioner is none-else but the applicant in an application under Order 1 Rule 10 CPC, which he has filed in lower appellate Court for his impleadment as defendant in the main suit. The said application has been dismissed vide order, Annexure P-1, under challenge in this petition.

5. The land in dispute is 05-54-52 hectares bearing Khasra No. 269. The Jamabandi to this effect has already been placed on record of the main suit. The petitioner claims his possession over a portion thereof i.e. 2-90-00 hectares. In support of his claim, he has produced the record i.e. a complaint made against him to Tehsildar, Indora by one Jarnail Singh on 16.09.2015 that he has encroached upon the suit land and that his possession is 50 years old. The report from the Patwari that the suit land to the extent of 2-90-00 hectares is in possession of the petitioner and in the year 2016-17, wheat crop was found to be sown thereon was also obtained. Learned trial Judge has considered the material so produced by the petitioner in support of his claim vis-à-vis the documents produced by the respondents-plaintiffs 2 to 10 and defendant-State in the trial Court. As a matter of fact, as per Jamabandi, entire suit land was recorded in possession of respondents-plaintiffs in the capacity of non-occupancy tenant, however, during the settlement operation, such entries were deleted and it is for this reason, they filed the suit for seeking declaration, which was decreed. As per revenue record, the respondents-plaintiffs and their predecessors-in-interest are/were entered in possession of the suit land right from very beginning. The petitioner was never recorded in possession of the suit land or any portion thereof. On the basis of application made by aforesaid Jarnail Singh against the petitioner to Tehsildar, Indora and the report of Patwari for the reasons already recorded, it is difficult to believe that he is in possession of a portion thereof.

6. Interestingly enough, when the same Patwari who has issued the Khasra Girdawari placed on record by learned Dy. D.A, in which there is no mention of wheat crop sown in the suit land, how the same Patwari could have given another report to the petitioner, mentioning therein that the wheat crop was sown by him over that portion of the suit land, which is in his possession. The application made by aforesaid Jarnail Singh and report submitted by Patwari relied upon by the petitioners seems to be not genuine documents, hence rightly not considered by learned lower appellate Court. The application for impleadment has been filed during the pendency of the appeal without any explanation as to what prevented the petitioner from filing the same during the pendency of the suit in the trial Court. The petitioner, as such, is not a necessary party in the suit. Learned lower appellate Court, therefore, has not committed any illegality or irregularity while dismissing the application.

7. Having said so, there is no merit in this petition and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

An authenticated copy of this judgment be sent to learned lower appellate Court for records.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Inder Sharma ...Petitioner.

Versus

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

CWP No.1200 of 2017
Date of Decision: January 11, 2018

Constitution of India, 1950- Article 226- Petitioner sought writ of prohibition to the respondent authorities against acquiring land for the purpose of construction of Subji Mandi and against its construction at Chindi and also sought direction for full utilization of existing Subzi Mandi at Karsog- **Held-** that large number of Deodar & Kail trees need to be felled for construction of the Subzi Mandi at Chindi affecting adversely the environment – The sufficient land is available for the construction of Subzi Mandi at Chaar-kufri/Parga Gali- Further directed that respondent board shall not set up Subzi Mandi at Chindi, rather, identify alternate land during the financial year itself and also temporary Subzi Mandi being run at Chindi shall not be functional any further- It is further directed that Subzi Mandi at Karsog be completed at the earliest – petition disposed of. (Para-11)

For the Petitioner : Mr. Devender Sharma, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General, Mr. M.A. Khan, Mr. Varun Chandel, Additional Advocates General, and Mr. J.K. Vema, Deputy Advocate General, for the State.
Mr. Sanjay Ranta, Advocate, for respondents No.5 & 6.
Ms Vidushi Sharma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

By way of the present writ petition, so filed in public interest, the petitioner, a practicing Advocate of this Court and otherwise resident of Karsog, District Mandi, the place with which we are concerned, has, inter alia, prayed for the following reliefs:

> "(i) Issue a writ of prohibition to the respondent authorities directing them not to construct a Subzi Mandi at Chindi. And further prohibit the respondent authorities from acquiring land for constructing a Subzi Mandi at Chindi.
>
> (ii) Issue a writ of mandamus directing to the respondent authorities to fully utilize the existing Subsi Mandi at Karsog."

2. The grievance made out by the petitioner stands best appreciated by us in our interim order dated 1.9.2017, which we reproduce as under:

> "CMP No. 7263 of 2017
>
> Notice. Response by the appearing parties be positively filed within a period of two weeks. Rejoinder, if any, within a period of one week thereafter.
>
> CWP No.1200 of 2017

The Secretary, Agricultural Produce Market Committee, Mandi, District Mandi, H.P., is impleaded as party respondent No.6. Mr. Sanjay Ranta, learned counsel, has also entered appearance on behalf of newly added respondent. Registry is directed to carry out necessary corrections in the Memo of parties.

2. We appoint Mr, Ashok Sharma, Sr. Advocate, as Amicus Curiae to assist this Court. Paper book stands supplied to the learned Amicus Curiae.

3. In the present petition, petitioner highlights arbitrary and illegal action of the State in establishing a Subzi Mandi at Chindi. Allegedly such action is without application of mind and deliberation.

4. From the response, so filed by the Himachal Pradesh State Agricultural Marketing Board, it is apparent that by virtue of provisions of the Himachal Pradesh Agricultural & Horticulture Produce Marketing (Development and Regulation) Act, 2005 (hereinafter referred to as the Act), Agricultural Produce Market Committee, Mandi, has established a temporary Subzi Mandi, at Chindi (Karsog). This was pursuant to resolution No.20, passed in a meeting held on 10.04.2015 and subsequent notification issued in the month of July, 2015. This Mandi is temporary in nature. In fact, it is a temporary market sub-yard (Mandi).

5. It also stands revealed that by incurring an expenditure of Rs.76.40 lacs, a proper Subzi Mandi was established at Karsog. However, since it being in close proximity to the Court/Administrative Complex and opening of this Mandi would have resulted into congestion in the area, as such, a decision was taken to ensure free and unobstructed access to the Mandi by constructing an alternative link road from Bhandarnu side. Also decision was taken to raise the boundary wall so as to ensure that no obstruction is caused in the smooth functioning of the Court/Judicial Complex. This was so done pursuant to directions issued by this Court in CWPIL No.6 of 2012, titled as *Court on its own motion vs. HP Marketing Board & others*. It stands explained that till date, proposal has not yet been implemented.

6. In the response, it also stands explained that a decision was taken to set up a Subzi Mandi at *Chindi* and as such, pursuant to joint inspection, so carried out by the stakeholders i.e. Sub Divisional Officer (C), Divisional Forest Officer, Karsog, District Mandi and Secretary, Agriculture Produce Market Committee, Mandi, District Mandi, H.P., site of 4-16-0 bighas was identified at Chindi, where a temporary market was established w.e.f. 08.07.2015.

7. One thing is clear that at Karsog, already there is a Mandi, which stands established and at Chindi no structure of whatsoever nature stands erected**,** save and except that makeshift arrangement is in operation and the Mandi is being operated, so to say, from tents.

8. Significantly out of 4-16-0 bighas, where Mandi is to be established, 1-6-16 bigha of land at Chindi is classified as demarcated & protected forest land. No doubt, clearance from the Ministry of Environment, Forest & Climate Change, Regional Office, Dehradun, stands received. But then there is nothing on record to establish that any officer from Chandigarh/Delhi, office of the Ministry of Environment ever visited the spot for ascertaining the factual position. For had it been so, perhaps decision would have been to the contrary.

9. *Prima facie* this Court is of the considered view that decision to establish the Mandi at Chindi is absolutely illogical, irrational and arbitrary. The trees to be felled for construction of the Mandi are mostly of Deodar & Kail species. Out of 127 trees, for which sanction stands accorded, maximum volume is of Deodar species, which is slow growing and a fast diminishing. Report of the Divisional

Forest Officer, Karsog, with respect to the number of trees and the volume is reproduced as under:-

"Cost of Trees					
Sr.No.	Name of	No of trees	Volume	Rate	Amount
1.	Deodar	41	46,172	55904	2581199
	Sappling	15	0.84	55904	46959
2.	Kail	8	1.68	40126	67412
	Sappling	4	0.32	40126	12840
3.	Chil	48	3.96	21117	83623
	Sappling	11	0.55	21117	11614
	Total	127	53.522		2803649
			Vat 13.75%		385502
		G. Total			3189151"

10. The Committee of local officers who inspected the site and made recommendation, in its joint inspection report (Page-38), does not state: (a) that it had accounted for the sentiments of the people of the Tehsil; (b) it had considered setting up of a Mandi at Chindi from the point of convenience of all the growers of the Tehsil; (c) any other place more suitable and convenient was not available; (d) whether this place was ideally best suited, considering the fact that there is a historical temple; a famous and huge hotel established by the Public Sector undertaking (HPTDC); and a Government school in close proximity. Even the iconic Chindi Government Rest House is in close proximity.

11. Learned Amicus Curiae, points out that the school, temple, hotel and the Rest House are all situate on the very same road, in close proximity of less than 200 meters.

12. *Prima facie*, it appears that with the establishment of the Mandi at Chindi, whole area has been facing immense traffic problem. Mandi sought to be established is on the State Highway.

13. In Particular, it would cause nuisance to the general public, more so, children, tourists and the devotees.

14. Why no budgetary provision has been made for making the Mandi at Karsog operational, remains unexplained. One cannot forget that for the last two years, no action was taken for establishing the Mandi at Chindi, on permanent basis. Forest clearance came to be received only in May, 2017. Why nothing was done to have the market established at Karsog and why action was not taken to make the said market operational, has not been explained.

15. Judicial notice can be taken of the fact that Karsog is a Tehsil with its headquarters at Karsog. Geographically it is in the heart of the entire Tehsil. It has colleges & Government offices. In all, major educational institutions, hospitals and administrative authorities are also at Karsog. Karsog is in fact convenient from every angle and Chindi is at a distance of 18 kms from Karsog.

16. Be that as it may, if the Government wants to establish another Mandi, then as is pointed out by the learned Amicus Curiae, a full fledged Mandi can be set up at a place known as Chaar-kufri, which is at a short distance away from Chindi, where not only land in abundance is available, but even if trees are

required to be felled, they are not of the species of Deodar and Kail, but of Chil, which is a fast growing species having far less commercial value than other trees.

17. Under these circumstances, we issue following directions:-

(i) No trees shall be felled, pursuant to the sanction accorded by the Ministry of Environment, Forest & Climate Change, Regional Office, Dehradun, under the provisions of the Forest Conservation Act, 1980, as communicated by the Divisional Forest Officer, Karsog Forest Division, to the Secretary, Agricultural Produce Market Committee, Mandi, vide communication dated 27.06.2017;

(ii) A Committee comprising of the Secretary, Agricultural Produce Market Committee, Mandi, Sub Divisional Magistrate & Divisional Forest Officer, shall ensure that no structure of whatsoever nature is allowed to be raised over land comprising in Khata/Khatauni No.37/64 min, Khasra No.321/1, area admeasuring 4-16-0 bigha, in Muhal DPF Bakhras/385, & Khata/Khatauni No.1/1 min, Khasra o.7/2/, 7/4/Kita 2, area admeasuring 3-19-10 bigha for gair mumkin Subzi Mandi and area admeasuring 1-4-16 bigha for gair mumkin road in Muhal DPF Chindi/482, Tehsil Karsog, District Mandi, H.P.;

(iii) Also with effect from the next financial year, no Mandi shall be allowed to operate at Chindi. Some alternate arrangement must be carried out by the respondents.

(iv) A Committee comprising of the Secretary, Agricultural Produce Market Committee, Mandi Sub Divisional Magistrate & Divisional Forest Officer, shall forthwith have the site at Chaar-Kufri or any other convenient place found suitable and fit for establishing the Mandi, around Chindi inspected and submit its report within a period of three weeks.

(v) Needless to add, Committee shall consider convenience of all the stakeholders, and *inter alia*, parameters have to be: (a) free access and egress; (b) possibility of future expansion; (c) unobstructed and free flow of traffic on the State

Highway/main roads; and (d) convenience of growers etc.

18. Despite opportunities afforded, response has not been filed by the State. Needful be positively done within a period of three weeks.

List on 22.09.2017."

3. The Managing Director of the Agriculture Produce Marketing Committee, Shimla (respondent No.5) has filed his affidavit, admitting (a) temporary market having been started at Chindi, w.e.f. 8.7.2015, (b) there being a proper Sub Market yard at Karsog.

4. It appears that the Board wants to set up the Market at Chindi, but then such decision, in our considered view, is not based on objective assessment of the attending facts and circumstances. The decision, as we have already observed, is based more on account of political considerations and factors, rather than public interest. If there is already a Subzi Mandi at Karsog and huge money stands spent in developing the same, then where is the question of construction of another Subzi Mandi at Chindi and that too without completing the earlier Mandi at Karsog.

5. Be that as it may, how many Subzi Mandis should be established is for the Marketing Board to consider and decide, but then it has to be based on the criteria which is objective and promotes public interest and not the other way around.

6. The Subzi Mandi at Karsog is best located and must be completed at the earliest.

7. The Board is under a statutory obligation, under Section 39 of the Himachal Pradesh Agriculture & Horticulture Produce Marketing (Development and Regulation) Act, 2005 (hereinafter referred to as the Act) to ensure that a proper market yard/sub-market is established within the market area. Whether whole of territory of Karsog Tehsil of Mandi District can be declared to be a market area is an issue which we leave it open to be considered and decided in an appropriate proceeding. But then, power to be exercised, moreso under sub-section (3) of Section 39 of the Act, including Section 19 thereof, has to be based on cogent material and objective assessment.

8. Learned Advocate General points out that pursuant to the directions issued by this Court, the Committee has now submitted its report and the matter can be put to rest, with the Government taking an appropriate decision of not setting up the Subzi Mandi at Chindi, but at a third place. This would be in addition to the Subzi Mandi already in existence at Karsog.

9. Our attention is invited to the report of the Committee, comprising of Sub Divisional Magistrate, Karsog; Divisional Forest Officer, Karsog; and Secretary, Agriculture Produce Market Committee, Mandi, District Mandi, Himachal Pradesh. Relevant portion whereof is reproduced as under:

> "2. That in compliance with the directions of this Hon'ble court, the committee comprising of Secretary, Agriculture Produce Market Committee Mandi, Sub-Divisional Magistrate and Divisional Forest Officer Karsog visited/inspected the site/location at Chaar Kufri and around Chindi area for establishment of permanent/full fledged Subzi Mandi on 14.09.2017.
>
> 3. That the land (at Chaar Kufri) comprised in Khasra No.19/2 measuring 10-04-06 bighas situated at Muhal DPF Kufri Pangna, Tehsil Karsog has been identified for the construction of Mandi is found suitable and fit, but the same place is known as Chaar Kufri Mela (fair) ground and there is celebration of a traditional fair (Mela) of Maa Bhagwati Chindi and other local Devtas every year in the month of July and the people of surrounding areas are opposing any permanent construction activities on this land. Further, the same place is already selected for eco-tourism where tents will be established as a camping site for the convenience of tourists.
>
> 4. That another land comprised in Khasra No.1/1 area measuring 10-01-06 bighas situated at Muhal DPF Kufri Pangna, Tehsil Karsog and land comprised in Khasra No.19/1 area measuring 10-01-12 bighas situated in same Muhal has also been indentified for the establishment of Subzi Mandi at Chindi but it falls in between the Hotel Mamleshwar and Rest House Chindi which cannot be recommended for establishment of Subzi Mandi because of the school, temple, hotel and Rest house are situated in close proximity of less than 200 meters and it will cause nuisance to the general public, children, tourists and devotees.
>
> 5. That further the committee visited another site at Parga Gali which is about 10-11 Km. away from Chikndi towards Shimla. The land comprised in Khasra No.1/1 area measuring 10-08-00 bighas situated in Muhal Shil Badyar/106, Tehsil Karsog District Mandi, H.P. is identified and found suitable and fit for the construction/establishment of Subzi Mandi. This site is in open space and is having lesser number of trees of chil species (Maximum). The above place is very convenient to the stakeholders and full fills the parameters as defined by this Hon'ble court. Also there is scope for future expansion of Subzi Mandi."

10. Evidently, the Committee is of the view that the most convenient place is at "Parga Gali". Well, it is not for this Court to dwell upon the same, save and except, as stands rightly pointed out by the learned Advocate General, that the most convenient place, in fact is "Chaar Kufri". The advantage of Chaar Kufri is such that it caters to all the areas producing

horticulture/agriculture produce. Also, otherwise there is land in abundance, which is available and can be utilized for construction of a Subzi Mandi at Chaar Kufri. Interest of the local deity can also be protected with the place earmarked for such purpose. Not only that Chaar Kufri is a focal point and traffic from Shimla, Mandi and Rampur converges at this place. There is also scope for future expansion of not only roads but other infrastructural facilities.

11. It is in this backdrop, we dispose of the present petition, in the following terms:

(a) The respondent-Board shall not set up any Mandi at Chindi, at the place where it was run on temporary basis. This is the most unsuitable place, for not only it would result in environment degradation, but otherwise also disturb the ambiance of the area, causing disturbances to the tourists, pilgrims and the school children. Further, it would lead to congestion of the road and obstruction of free flow of traffic.

(b) Subzi Mandi at a place alternate to Chindi be established, preferably at Chaar Kufri/Parga Gali, for which the Government shall take a decision at the earliest.

(c) Process of identification of the land and commencement of work shall positively be completed within this financial year.

(d) In any event, Subzi Mandi, temporary in nature, at Chindi, shall not be allowed to function any further.

(e) The Subzi Mandi at Karsog be completed at the earliest.

(f) Affidavit of compliance be filed within a period of three months.

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

Only for the purpose of filing compliance affidavit, the matter be listed before the Additional Registrar (Judicial) of this Court, on 27.4.2018.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Archana Thakur .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 1992 of 2017
Reserved on: 05.12.2017
Date of Decision: 12.01.2018

Constitution of India, 1950- Article 226- Civil Writ Petition- Petitioner seeking admission to M.Sc. Physics as her name was reflected at serial No.2 of the waiting list and since the seats belonging to SC and ST categories were lying vacant, petitioner sought admission to the aforesaid vacant seats, based on her eligibility, as per the merit secured by her in the entrance examination- **Held-** that in case of admission to academic institutions left over seats cannot be "carried forward", and the vacant seats, remains unfilled for the entire duration of the course, seats reserved for SC and ST candidates which remain unfilled can be allowed to be filled from amongst open category candidates, in case eligible candidates are available, on the strength of the merit so secured by them in the entrance examination- Further Held- that vacant seats belonging to reserve category cannot be allowed to remain unfilled- petition disposed of in the aforesaid term. (Para-6 to 13)

Cases referred:
Charles K. Skaria and others Vs. Dr. C. Mathew and others, (1980) 2 Supreme Court Cases 752
Medical Council of India Vs. Madhu Singh and others, (2002) 7 Supreme Court Cases 258
Neelu Arora (Ms.) and another Vs. Union of India and others, (2003) 3 Supreme Court Cases 366

For the petitioner:	Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with M/s. Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General for respondents No. 1 and 3. Mr. J.L. Bhardwaj, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

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

"(i) That a writ in the nature of mandamus may very kindly be issued and the respondents may very kindly be directed to grant admission to the petitioner in M.Sc. Physics Course in Gobind Balabh Panth Memorial Government College, Rampur Bushahr, H.P. in the interest of law and justice.

(ii) Any other relief as may be deemed just and proper keeping in view the facts and circumstances of the case may also be granted in favour of the petitioner."

2. Case of the petitioner was that respondent No. 2 had invited applications from eligible candidates for admission to various courses for the academic Session 2017-2018, which includes M.Sc. Physics course. According to the petitioner, she being eligible, applied for the said course and roll number allotted to her to appear in the entrance examination was 16062. The entrance examination was held on 07.07.2017. She secured 30 marks in the same, which is evident from Annexure P-4. It was further the case of the petitioner that on the strength of marks so obtained by her, she was not able to make it in the merit list. Further as per the petitioner, respondent No. 3-College, which had earlier issued a Prospectus for admission of courses available with it for the Session 2017-18, was also later on permitted to admit candidates in MA and M.Sc. classes, including an intake of 20 students in M.Sc. Physics, by respondent No. 2. Applications in this regard were invited and the petitioner submitted her application well before the last date, i.e., 29.07.2017. Counselling took place on 1st and 2nd August and in furtherance of the same, 13 candidates were admitted as per communication Annexure P-6, dated 03.08.2017, on the strength of entrance examination, which stood conducted by respondent No. 2-University. Name of petitioner found mentioned at Sr. No. 2 in the waiting list (Annexure P-8). It was further the case of the petitioner that out of three candidates, who had applied for admission against the seats reserved for SC category, two were able to gain admission on the strength of their merit against open category seats. No candidate belonging to ST category had applied for the course. This resulted in seats reserved for SC and ST categories remaining unfilled. Grievance of the petitioner was that despite the fact that candidates like the petitioner, who were in the waiting list as per Annexure P-8 were available, respondents rather than offering vacant seats on merit to general category candidates, were not making any efforts to fill the same. It was in this background that the present petition was filed.

3. During the pendency of the petition, on 12.09.2017, this Court passed the following order:

"Let response be filed positively within two weeks. Rejoinder thereto, if any, within one week thereafter.

In the meanwhile, we direct that the seat(s) which are lying unfilled, be offered to the next meritorious candidate(s) and be filled up positively within two days from the open category candidates.

List on 10th of October, 2017, as prayed for."

4. We are informed that on the strength of order, dated 12.09.2017, the petitioner stands admitted to the course in issue.

5. Reply(s) to the writ petition stands filed by the respondents.

6. The moot issue involved in this writ petition is as to whether in the admission process, which is initiated by respondent No. 2, in case sufficient number of candidates belonging to SC and ST categories are not available and the seats are lying vacant, whether these seats can be filled up from amongst the candidates of general category, who otherwise are eligible for admission, as per the merit secured by them in the entrance examination or the seats should be allowed to remain unfilled?

7. Before proceedings any further, we would like to clarify that herein it is not a case of appointment. The case is of admission to a particular course and in each academic Session, fresh admissions are made to the 1st Year or the 1st Semester of the course, as the case may be, meaning thereby that left over seats are not "carried forward". Any seat, which remains vacant, remains unfilled for the entire duration of that particular course. In this background, in a given situation, where seats reserved for SC and ST candidates remain unfilled, in our considered view, it is both in the interest of institution as well as the students that the said seats should not be allowed to go unfilled and they should be filled from amongst open category candidates, in case eligible candidates are available, who can be given admission against the vacant seats, on the strength of merit so secured by them in the entrance examination. In case this is done, the same will not at all affect the interests of SC and ST categories, for whom the seats were otherwise reserved, because this exercise shall be undertaken by the institution only if after exhausting the list of eligible SC and SC candidates, yet seats remain vacant. On the other hand, by offering the seats to eligible candidates from open category, this will not only facilitate more candidates to gain education in the course in issue, it will also result in optimum utilization of the resources, because it is obvious that the institution in issue has the infrastructure to impart education to number of students, it is permitted to admit.

8. It is common knowledge that seats available in various academic courses in colleges and universities are far below the number of applicants. This obviously means that sears are at a premium and all efforts should be made to ensure that as far as possible, the seats are not wasted. It is relevant to refer to the judgment of Hon'ble Supreme Court in ***Charles K. Skaria and others*** Vs. ***Dr. C. Mathew and othe***rs, (1980) 2 Supreme Court Cases 752, in which Hon'ble Supreme Court has observed that welfare-oriented judicial process must be constructive in its objective, must be geared to order as its goal and must pave the way for resultant contentment.

9. It is not a disputed factual position that vacant seats belonging to reserve category even in courses like MBBS, are not allowed to remain unfilled. A seat which is reserved for Scheduled Caste category, is firstly offered to a candidate belonging to Scheduled Tribe category if it is not filled up by a Scheduled Caste candidate and if the seat even after being offered to Scheduled Tribe candidate remains unfilled, same is thereafter offered on merit to open category candidate. This factual position could not be disputed even by the State during the course of arguments.

10. At this stage, it is relevant to refer to a judgment of Hon'ble Supreme Court in ***Medical Council of India*** Vs. ***Madhu Singh and others***, (2002) 7 Supreme Court Cases 258, in which case, Hon'ble Supreme Court was dealing with admissions to Medical College, has deprecated the practice of directing mid-session admissions. Though, in the aforementioned case, the Hon'ble Supreme Court was dealing with the admission to Medical Colleges, however, in our

considered view, necessity of timely admissions and avoiding mid term admissions is required in other educational streams also.

11. In ***Neelu Arora (Ms.) and another*** Vs. ***Union of India and others,*** (2003) 3 Supreme Court Cases 366, a three Judge Bench of Hon'ble Supreme Court has held that if seats are unfilled, the same cannot be a ground for making mid-session admissions and there cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year. Hon'ble Supreme Court was dealing with admissions to MBBS/BDS courses. It is relevant to take note of the fact that above adjudications have been made by the Hon'ble Supreme Court because a time frame has been put in place as to how admissions are made in MBBS/BDS courses and further in order to achieve the said time schedule, when the counseling is to be conducted.

12. Therefore, the process of identifying such vacant seats which remains unfilled after exhausting the list of reserve category candidates should be filled before the commencement of academic year so that there is no eventuality of mid-academic admissions, which stands deprecated by the Hon'ble Supreme Court.

13. Accordingly, we dispose of this petition with the direction to respondents No. 1 and 2 that for academic Sessions necessary instructions be imparted to the effect that vacant reserved seats meant for SC and ST categories in educational institutes including Schools, Colleges and Universities, which remain unfilled after exhausting the list of available and eligible SC and ST candidates, should be thereafter offered and filled from amongst eligible candidates from open category on the basis of merit. We clarify that in case any cut off limit has been fixed, then only those candidates of open category should be admitted against the vacant seats, who have gained marks at par with the cut off limit.

Petition stands disposed of, so also miscellaneous applications, if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own motion …Petitioner.

Versus

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

CWPIL No. 18 of 2017
Date of Decision: January 12, 2018

Constitution of India, 1950- Article 226- Letter petitioner informed about the various lapses in filling up promotional posts of the officers of the Forest Department- Most of the Officers and officials serving in the offices than in the field- mal-handling of the resources by the Forest Department resulting in increase of burden on the state exchequer- it is directed that Forest Development society be constituted and ensure maximum participation of the civil society including the Panchayati Raj Institutions – Promotions and postings be done strictly as per rules governing the service condition of the Forest Guards- Forest Guards be equipped with necessary weapons and Senior Forest Officers be provided with vehicles- State is further directed to consider the proposal to adequately equip the field forest staff with all gazettes and infrastructure – Government is also directed to adhere to the transfer policy- Accordingly petition stands disposed of. (Para-12 and 13)

For the Petitioner: Ms.Vandana Mishra, Advocate as Amicus Curiae.

For the Respondents: Mr. Ashok Sharma, Advocate General, with M/s M.A. Khan, Varun Chandel, Additional Advocate Generals and J.K. Verma Deputy Advocate General, for respondents No.1 to 4.
Mr.Rajesh Sharma, ASGI, for respondent No.5.

The following judgment of the Court was delivered:

Sanjay Karol, Aciting Chief Justice

On the basis of letter petition, addressed to this Court, taking *suo motu* cognizance, petition was registered, in which notices were issued.

2. Ms.Vandana Mishra, Advocate, was requested to assist the Court as Amicus Curiae.

3. Devi Singh Chandel, resident of House No.244, Ward No.2, PO Hamirpur, Himachal Pradesh, in his letter petition, alleged lawlessness in the Forest Department of the Government of Himachal Pradesh, resulting into wastage of public money. Also various lapses were committed in promoting and posting of the officers at places other than the field. All this has resulted into drain on the exchequer and overstaffing in the offices rather than in the fields.

4. On 25.07.2017, posing following questions, we directed the Principal Chief Conservator of Forests, Himachal Pradesh, to file his personal affidavit:-

a. What are the total sanctioned posts of Guards, Block Officer, Deputy Ranger, Range Officer, Assistant Conservator of Forests, Divisional Forest Officer, Conservator and Principal Chief Conservator of Forests in the State of Himachal Pradesh?

b. How many of such posts are lying vacant?

c. How many persons holding a particular post are performing the job pertaining to some other post?

d. At the ground level (District), how many posts are lying vacant and what steps have been taken/are being taken for filling them up.

e. How many field officials are deputed to perform office duties?

5. He has filed his affidavit stating that due to the shortage of forest guards and their promotion to the post of Deputy Rangers, Forest Beats were left unattended. Also the forest guards were promoted to the post of Deputy Rangers on "in-situ" basis by way of interim arrangement.

6. The exact position qua the sanctioned strength and the number of vacancies with respect to different cadres was clarified by the Pr.CCF, H.P., vide affidavit dated 28.07.2017, in the following terms:-

i) Forest Guard

(a)	Sanctioned strength	2581
	Number of beats	2041[beats/50[Check-Posts]
(b)	Number of vacant beats	90
(c)	Number of Forest Guards performing the job pertaining to some other post	41 [looking after work of vacant Blocks]
(d)	Number of posts lying vacant	68
(e)	Number of Forest Guards, deputed to perform office duties	112 [including Forest Guards working as Range Assistants]

ii) Deputy Rangers:-

(a)	Sanctioned strength	801
	Number of Blocks	572[Blocks]
(b)	Number of vacant Blocks	41 [Blocks]
(c)	Number of eputy Ranger performing the job pertaining to some other post	10
(d)	Number of posts lying vacant	68
(e)	Number of Deputy Rangers, deputed to perform office duties	45

iii) Range Forest Officers:-

(a)	Sanctioned strength	296
	Number of Ranges	195
(b)	Number of vacant Ranges	10
(c)	Number of Range Forest Officer performing the job pertaining to some other post	None
(d)	Number of posts lying vacant	109
(e)	Number of Range Officers, deputed to perform office duties	02

iv) Assistant Conservator of Forests (ACF)

a	Sanctioned post	53	ACFs in Cadre division 22/ non cadre division 12 and functional post 19
b	Number of posts	19 (in HPFS cadre)	

v) Divisional Forest Officers (DFO)

The Cadre post of DFO are managed by officers of rank of DCF (IFS) and non cadre posts are managed by HPFS officers.

(a) Deputy Conservator of Forests (IFS Cadre Post)

a	Sanctioned strength	29 (in cadre)	In addition, there are also 6 DCFs post on Central deputation (6)/State Deputation (3) as per IFS Cadre rules and (1) on the job training.
b	Number of vacant posts	18	Against 18 posts of DCFs, HPFs officers have been posted as Divisional Forest Officers.

c	Number of DCFs performing the job pertaining to some other posts	05	DCFs posted in non Cadre Division/post (5)

(b) Divisional Forest Officers (HPFS)

a	Sanctioned post (non cadre divisions)	17	In addition, there are also 6 DCFs post on Central deputation (6)/State Deputation (3) as per IFS Cadre rules and (1) on the job training.
b	Number of vacant posts	01	One post is managed by DCF
c	Number of DFOs working against other post	18	In addition to 16 non cadre post, HPFS officers also manage the 18 posts of DCF (cadre division)
d	DFO (in functional divisions)	31	2 IFS officers are working in functional post of HPFS.

(vi) Conservator of Forests

a	Sanctioned strength	18 (in cadre)	In addition, CFs working against Central deputation (2)/State deputation (4)/Leave(1)/Training Reserve & Other posts under the IFS Cadre rules.
b	Number of vacant posts	04	No Territorial or Wild Life Circle is vacant. The vacant posts pertain to functional Circles.
c	Number of CFs performing the job pertaining to some other posts	03	These CFs working against the post of CCFs

(vii) Chief Conservator of Forests

a	Sanctioned strength	14 (in cadre)	In addition, there are 13 CCFs working against Central deputation (5)/State deputation (6)/Leave/Training Reserve & other posts as per IFS Cadre rules.
b	Number of vacant posts	02	Both vacant posts of CCFs are being managed by additional charge

c	Number of CCFs performing the job pertaining to some other posts	07	The CCFs working against the post of APCCFs(1) The CCFs working in against the post

(viii) Addl. Pr. Chief Conservator of Forests

a	Sanctioned strength	07 (in cadre)	In addition, 9 APCCFs are working against Central deputation (5)/State deputation (4)/Reserve, as per IFS Cadre rules.
b	Number of vacant posts	06	The work of these posting is being looked after by PCCFs.
c	Number of APCCFs performing the job pertaining to some other posts	01	One APCCF is working against the post of CCFs.

(ix) Pr. Chief Conservator of Forests

a	Sanctioned strength	08 (6 posts of PCCFs created temporarily with the approval of Cabinet).	In addition, 5 PCCFs working against Central deputation (3)/State deputation (2)/Reserve as per IFS Cadre rules.
b	Number of vacant posts	03	The process for filling up the post of PCCF (HoFF) has been initiated and this post is likely to be filled u shortly.

7. Further Court was informed that process for filling up the vacant posts is in progress.

8. Vide affidavit dated 11.09.2017, Additional Chief Secretary (Forests), further informed the Government to have taken decision in the following terms:-

> "4. ... ... It is submitted that it has been decided by the Govt. that in future promotions will be effective only against the higher post and no *in situ* joining be accepted and the deponent has issued instruction in this behalf vide letter No. FFE-A-(B)16-7/2016 dated 23.06.2017 to the Principal Chief Conservator of Forest (HoFF) and Principal Chief Conservator of Forest (Wildlife)-cum-Chief Wildlife Warden, H.P. for compliance. It is, further submitted that as far as the issue of in situ promotion of 129 Forest Guards is concerned, report from the Pr. CCF (HoFF) HP would be sought and ensure that the instructions issued vide order dated 23.6.2017 by the Deponent are complied with letter and spirit by the Department."

9. Significantly, in the very same affidavit, State through the Additional Chief Secretary (Forests) informed that process for filling up the posts, more specifically that of forest guards and their placements is under way and necessary action for deployment shall be taken at the earliest.

10. Prior to the filing of the said affidavit, learned Amicus invited our attention to the fact that the State Government framed Rules known as Rules Regulating the Grant-in-Aid Scheme, 2002 (hereinafter referred to as the Rules), but however there was reduction in the number of Joint Forest Management Committees constituted thereunder and that funds to the tune of Rs. 4 Crores (approximately) remained unutilized on account of lack of matching grant to the extent of 10% to be borne by the State Government.

11. Consequently on 23.10.2017, this Court directed the Sate to file affidavit explaining the same. In the affidavit dated 11.09.2017, the Additional Chief Secretary (Forest) to the Government of H.P., admitted the position with regard to the reduction of committees and non utilization of the funds/grant issued by the Central Government.

12. On 29.09.2017, Additional Chief Secretary (Forests) to the Government of H.P., filed his personal affidavit further explaining the position with regard to the committees in the following terms:-

> "As per guidelines of Government of India, the State Forest Development Agency (SFDA), HP has been registered under HP Societies Registration Act, 2006 on 4th February, 2010. Village level Joint Forest Management Committees have also been registered under this scheme and presently 963 Joint Forest Management Committees are functional. During the year 2014-15 budget under NAP amounting to Rs.72.53 lac was allocated to the State Forest Development Agency (SFDA) and further made available to the JFMCs through division level FDAs. No funding has however been received from Government of India to the State for the years 2015-16 & 2016-17. During these years the unspent amount pertaining to previous years was utilized by various JFMCs. During the financial year 2017-18, an Annual Plan of Operation amounting to Rs. 404.47 lac has been approved by the Government of India. Out of this amount Rs.364.02 lac is Centre Share (90%) and remaining 10% share i.e. Rs. 40.45 lac will be borne by the State Government. The funds on receipt will be allocated to the FDAs to be spent by JFMCs as per their Annual Work Programmes as soon as the installment is transferred into the account of SFDA. The funds are utilized strictly as per operational guidelines of the scheme. Detailed account of Grant-in-aid received and expenditure incurred is being maintained properly and audited by the accredited CA."

13. Having perused the affidavits and the material so placed on record by the learned counsel, we are of the considered view that the present petition can be disposed of in the following terms:-

> i. State shall take all steps for not only filling up all posts lying vacant, but also depute the officers in the field. 2041 beats and 50 Check-posts cannot be left unmanned and as such first priority must be given to fill up the posts of Forest Guards, Deputy Rangers, Range Forest Officers and Assistant Conservators of Forest. This shall be positively done within a period of four months, for we notice that the process of filling up the posts is under way;
>
> ii. The Forest development Societies under the Rules referred supra be constituted, so as to ensure maximum participation of the civil society and the institutions at the grass root level particularly the villagers and the functionaries dealing with the Panchayati Raj Institutions;
>
> iii. No "in-situ" promotion shall be made, as undertaken by the Government, vide affidavit dated 11.09.2017, relevant portion whereof is extracted here-in-earlier. Since the Government has taken a decision, we are not elaborating on the legality with regard to such promotions made thus far, clarifying that it shall be open for the Government to reconsider/revise its decision and take action for

restoring status qua ante. Also the issue can be adjudicated in an appropriate *lis* before an appropriate Forum;

iv. Noticeably 66% of the State geographically area falls under forest cover. Field staff is devoid of any infrastructure. A forest guard has none to support himself or his bonafide actions in the field. He is helpless. The Department does not supply him a weapon. Also the Range Forest Officer does not have a vehicle for himself. Why so, remains unexplored and unexplained. Even an ATM is guarded by a CCTV camera and a guard with a gun. In Himachal Pradesh most of the forest wealth is in the shape of trees of different species fetching high value. Cases of illicit felling are on the increase. One tree of Deodar specie alone can fetch more than Rs.10-15 lac. Now forest wealth, which is vulnerable, cannot be allowed to be looted and plundered or remain unprotected by fully unequipped staff. It is in this backdrop, the Government must consider supplying a weapon and a vehicle at an adequate level of hierarchy of an officer;

v. The Government's decision of disbanding forest check posts on the various roads, has not achieved the desired results; at least it acted as a deterrent with the transportation of illicit forest produce by the forest mafia. With doing away of these forest check posts, all have got a free hand; timber after illicit felling is freely transported from one forest range to another and one forest division to another; in fact, saw mills are not being checked on periodical basis and all this has resulted into illicit felling of trees, for personal consumption of persons raising building/houses in urban areas. The real brunt of the problem is being faced by the field staff, as the learned Amicus rightly points out maximum number of felling illicit forest trees, has taken place in District Chamba, a distant place and not easily accessible by roads; it is in this backdrop, State must consider adequately equipping the field staff with all gazettes and infrastructure;

vi. The Government must adhere to the Transfer Policy and not post the staff in their home Districts save and except in accordance with law.

14. In view of the above, we see no reason to keep alive the present petition and as such the same is closed. Before parting, we wish to place on record appreciation qua the efforts put in by Ms. Vandana Mishra, Amicus Curiae, who, on the instructions of this Court, contacted letter petitioner and obtained necessary feedback.

15. Also learned Amicus Curiae undertake to communicate the outcome of the present petition to the letter petitioners.

With the aforesaid observations, present petition stands disposed of.

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

State of Himachal Pradesh ...Appellant.

Versus

Kehar Chand ...Respondent.

Cr. Appeal No. 234 of 2008
Reserved on: 27.12.2017
Decided on: 12.01.2018

Code of Criminal Procedure, 1973- Appeal under Section 378 Cr.P.C.- Sections 354, 325 and 341 of IPC- The respondent/accused convicted by the learned Trial Court and acquitted by the Learned Sessions Court- On appeal while reversing the judgment of the learned 1st Appellate

Court High Court **Held-** that identification by the complainant and her husband, even though declared hostile was sufficient and unequivocal and proves the presence of the accused on the spot and his involvement in the offence- Further Held**-** that non-association of the independent witnesses was also not fatal to the prosecution as the occurrence had taken place at 8:00 AM and none could have been available in the market place, moreso, as there is no evidence or suggestion in cross-examination that at the time of incident, large number of people were present at the spot- Consequently, conviction and sentence passed by the learned Trial Court upheld, however, benefit of probation extended to the accused. (Para- 24 and 25)

For the appellant: Mr. Pankaj Negi, Deputy Advocate General.
For the respondent: Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Instant appeal has been preferred by State against the acquittal of respondent-Kehar Chand vide judgment, dated 15th February, 2008 passed by the learned Sessions Judge, Shimla in Criminal Appeal No. 25-S/10 of 2007, whereby the conviction and sentence imposed upon respondent-Kehar Chand vide judgment, dated 14th March, 2007 passed by Judicial Magistrate 1st Class, Court No. 3, Shimla in Criminal Case No. 82/2 of 2001, convicting and sentencing respondent-Kehar Chand for commission of offence under Sections 354, 325 and 341 of the Indian Penal Code (hereinafter referred to as "IPC"), has been reversed.

2. Prosecution case, in brief, is that on 10th August, 2001, at about 8.00 a.m., respondent-Kehar Chand assaulted and used criminal force to PW-1 Sheetal Devi, wife of complainant PW-2 Suraj Kumar with intention to outrage her modesty and on objection raised by PW-2 Suraj Kumar, caused grievous hurt to him with fist blow.

3. As per prosecution story, PW-1 Sheetal Devi and PW-2 Suraj Kumar had a night stay on 9th August, 2001 in New Sidharth Hotel, Ram Bazar, Shimla and checked out on 10th August, 2001 at about 8.00 a.m. When they were leaving the hotel, respondent-Kehar Chand pulled the shirt of PW-1 Sheetal Devi from back side which was objected by PW-1 Sheetal Devi and PW-2 Suraj Kumar, whereupon respondent hit PW-2 Suraj Kumar with fist blow on his nose causing injury and bleeding in his nostrils and also pushed PW-1 Sheetal Devi. PW-1 and PW-2 approached Police Station Sadar at 8.20 a.m. whereafter, in pursuance to FIR recorded, PW-2 Suraj Kumar was medically examined at IGMC Shimla at 8.50 a.m. by PW-5 Dr. R.P. Chauhan and on his advice, PW-3 Dr. Usha Sharma, Radiologist, got the x-ray of nose of PW-2 Suraj Kumar conducted in her supervision, which discovered fracture in nasal bone of PW-2 Suraj Kumar. Thereafter, investigation was completed by receiving MLC Ex. PW-5/B and opinion of Doctors, preparing the spot map Ex. PW-7/A, recording statements of witnesses and taking into possession extract of register Ex. PW-4/A and check-in slip Ex. PW-7/B vide seizure memo Ex. PW-2/B. On completion of investigation, finding *prima facie* complicity of respondent-Kehar Chand in commission of offence, challan was presented in the Court by PW-8 SHO Jagdish Sharma.

4. Prosecution has examined nine witnesses to prove its case. After recording statement under Section 313 of the Code of Criminal Procedure (for short "CrPC"), respondent had chosen not to lead any evidence in his defence. On conclusion of trial, respondent was held guilty for commission of offence under Sections 354, 325 and 341 IPC. In appeal preferred by respondent-Kehar Chand, learned Sessions Judge has acquitted him. Hence, present appeal by the State.

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

6. PW-1 Sheetal Devi and PW-2 Suraj Kumar, in their deposition in Court, have corroborated their version with regard to the incident reported to the police in FIR Ex. PW-2/A by

reiterating that after checking out, when the couple was coming out of the hotel and PW-1 Sheetal Devi (wife) was following her husband PW-2 Suraj Kumar, respondent-Kehar Chand pulled her shirt from behind, which was objected by the couple, whereupon respondent-Kehar Chand physically assaulted PW-1 Sheetal Devi and PW-2 Suraj Kumar in a manner which, besides causing injury to PW-2 Suraj Kumar, amounted to outraging the modesty of PW-1 Sheetal Devi and she was also pushed from her chest by respondent-Kehar Chand.

7. PW-1 Sheetal Devi in her statement fairly stated that she was not able to identify respondent-Kehar Chand in the Court at the time of her deposition as the incident had taken place about four years ago. She also stated that in case accused was shown to her in the Court, perhaps, she might be identifying him. Thereafter, she was declared hostile on this point whereafter, on cross-examining by learned Assistant Public Prosecutor, she stated that the accused present in Court shown to her was perhaps the same Manager but she was not sure.

8. PW-2 Suraj Kumar was also declared hostile for resiling from his statement to the extent of the act of respondent pushing PW-1 Sheetal Devi from chest and he was cross-examined by learned Assistant Public Prosecutor, wherein he admitted that accused present in Court had pushed his wife from her chest. In his statement, he had identified respondent-Kehar Chand as the person who had assaulted him and his wife.

9. The incident had taken place on 10th August, 2001 and the statements of PW-1 and PW-2 in the Court were recorded on 2nd November, 2006. The capability and capacity of reception, attention and narration always differ from person to person and it is but natural to have some discrepancies in the statements recorded in the Court after about five years of the incident. The statements of PW-1 Sheetal Devi and PW-2 Suraj Kumar, in its totality, are indicating that these witnesses were not tutored one but had deposed in natural manner in the Court. Whatever they remembered they deposed and what they did not remember was not deposed. There is no parrot like narration on their part so as to ensure the conviction of respondent at the instance of prosecution. Their statements in the Court are natural statement.

10. PW-1 Sheetal Devi had expressed her hesitation to identify respondent with surety for gap of four years, however, PW-2 Suraj Kumar had identified the respondent in clear terms by stating that it was respondent who had assaulted him and his wife. Further, PW-4 Gurcharan Kukreja, owner of the hotel, also identified respondent as the person serving in the hotel on the day of incident. He also proved staying of couple in his hotel by proving photocopy of the relevant page of Entry Register Ex. PW-4/A and Entry Form of hotel Ex. PW-7/B. In his cross-examination, a specific question was put to PW-4 Gurcharan Kukreja, which was admitted by him, that respondent-Kehar Chand was waiter in his hotel, which corroborated that respondent was an employee of the hotel at relevant point of time.

11. By putting a positive suggestion to PW-2 Suraj Kumar in his cross-examination that it was correct when the couple was coming out of the hotel, PW-1 Sheetal Devi was following PW-2 Suraj Kumar, presence of couple at the relevant time was admitted. Further, it is case of the prosecution that wife (PW-1) was following her husband (PW-2) when her shirt was pulled by respondent-Kehar Chand, which stood duly corroborated by the suggestion put to PW-2 Suraj Kumar by respondent-Kehar Chand himself.

12. PW-1 and PW-2 were strangers in the city who had come to attend ailing mother of PW-2 admitted in the hospital. They were not having any enmity or proximity with respondent and there was no reason for them to implicate the respondent in a false case as they had no scores to settle with him for any reason. Neither any such suggestion was put to them nor any evidence to this effect was brought on record. The defence under Section 313 CrPC was denial simpliciter.

13. As per extract of Entry Register Ex. PW-4/A, the couple had checked out from the hotel at about 8.15 a.m., FIR Ex. PW-2/A was lodged at 8.20 a.m. stating therein that incident had taken place at 8.00 a.m. PW-2 Suraj Kumar was medically examined immediately thereafter and as per MLC Ex. PW-5/A, he was examined at 8.50 a.m. These timings indicate that

immediately after the incident, the couple while leaving the hotel for hospital, had visited the police station and after lodging the FIR, PW-2 Suraj Kumar was medically examined at 8.50 a.m., i.e. within one hour of the incident. As per medical examination, injuries caused to him were corroborated by the medical evidence. There is no delay in the action of the victims and the police, rather there is promptness. Had there been no incident, there was no occasion for the couple to suffer the harassment of visiting the police station, getting PW-2 Suraj Kumar medically examined and to engage themselves in the police investigation, particularly, when mother of PW-2 Suraj Kumar was admitted in the hospital and moreover, they were not even residents of the same town having any grudge against respondent.

14. Plea of respondent that statements of PW-1 and PW-2 cannot be relied upon for conviction of respondent for the reason that both of them were declared hostile is not tenable. It is settled law that testimony of a witness, which has been declared hostile, is not to be discarded only on the ground that the said witness has been declared hostile, but the same can be considered in favour of either of the parties on finding corroboration by other evidence on record with any reliable portion thereof.

15. In present case, PW-1 was declared hostile on her failure to identify the accused with certainty but the said failure stands duly explained in her statement wherein she clarified that for long gap between the incident and her deposition in the Court, she was unable to identify the respondent with certainty. Rest of her statement finds due corroboration with other evidence on record and inspires confidence.

16. PW-2 was declared hostile when he failed to depose the sequence of incident, but thereafter, he had duly corroborated the prosecution story in consonance with his earlier statement on material particulars. He also identified the respondent and his testimony, as a whole, is duly corroborated by the other evidence available on record and is sufficient to rely upon to convict the respondent.

17. Contention of respondent, that pushing a female by touching her chest during scuffle may not amount to outraging the modesty of a woman in all cases and it may have happened in natural manner without any intention to outrage the modesty of PW-1 Sheetal Devi, may be acceptable and such an act in isolation may not be construed as commission of offence under Section 354 IPC, but, in present case, it is not only this act of respondent which has invited to charge him under Section 354 IPC, but the initiation of the incident started from pulling the shirt of PW-1 Sheetal Devi, which definitely, as has happened in present case, amounts to commission of offence under Section 354 IPC.

18. For determining as to whether respondent has committed an offence under Section 354 IPC, it would be relevant to have a glance at Section 354 IPC, which reads as under:

> ***"354. Assault or criminal force to woman with intent to outrage her modesty.*** *- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."*

19. Section 354 IPC provides punishment for assault or use of criminal to a woman with intent to outrage her modesty. Criminal force and assault have been defined in Sections 349, 350 and 351 IPC, which read as under:

> *"**349. Force.** - A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.*

First. - By his own bodily power.

Secondly. - By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly. - By inducing any animal to move, to change its motion, or to cease to move.

***350. Criminal force.** - Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.*

***351. Assault.** - Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.*

Explanation. - Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault."

20. PW-1 Sheetal Devi, in her statement, has deposed that respondent-Kehar Chand had pulled up her shirt, which was objected by her whereupon her husband had also objected the same. PW-2 Suraj Kumar has duly corroborated this statement and the FIR Ex. PW-2/A was also recorded by stating the same version immediately after the incident.

21. As per Section 350 IPC, intentional use of force to any person without that person's consent, intending by the use of such force to cause or knowing it to be likely that by the use of such force, he will cause not only injury but, even only fear or annoyance to the said person, is said to be use of criminal force to that other. Every prudent person understands that pulling up shirt of a woman is definitely an act, which will likely to cause annoyance to the woman.

22. As per Section 349 IPC, a person is said to use force to another by causing motion, changing motion or cessation of motion. Section 351 IPC provides that any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he, who makes that gesture or preparation, is amount to use criminal force to that person will be said to be committing an assault. Causing annoyance to a person amount to use of criminal force. In present case, by pulling up the shirt of PW-1 Sheetal Devi, respondent-Kehar Chand has used criminal force to her and has definitely committed an assault to outrage her modesty. Therefore, he is liable to be convicted under Section 354 IPC.

23. It has come in evidence that respondent had stopped the couple outside the hotel and assaulted PW-2 Suraj Kumar as well as PW-1 Sheetal Devi. The complainant couple was proceeding to the hospital and respondent, by his act, had caused obstruction in their movement, which has resulted restraining the couple from free movement, which amounts to wrongful restrain resulting into commission of offence under Section 341 IPC.

24. Commission of offence by respondent under Section 325 IPC stands proved in statements of PW-1 Sheetal Devi and PW-2 Suraj Kumar, which finds corroboration in FIR Ex. PW-2/A, medical evidence, i.e. MLC Ex. PW-5/B and testimony of PW-3 Dr. Usha Sharma and PW-5 Dr. R.P. Chauhan.

25. Learned Sessions Judge has reversed the findings of the trial Court on the ground that the respondent was not duly identified on record and no independent witnesses were associated during investigation. As discussed above, though, PW-1 Sheetal Devi had expressed her hesitation to identify the respondent, but PW-2 Suraj Kumar identified the respondent, in

unequivocal terms, as the same person, who had assaulted the couple. Further, it was the respondent who was on duty on the day of incident as has also been corroborated by statement of PW-4 Gurcharan Kukreja and the positive suggestion put to PW-2 Suraj Kumar also indicates that presence of respondent-Kehar Chand on the spot and his involvement in commission of offence. Therefore, respondent stands duly identified as offender and the findings of learned Sessions Judge on this count are contrary to the record.

26. Learned Sessions Judge has referred the admission of the witnesses in cross-examination that there were many shops on both sides near the hotel and large number of people remained present in the market, but he has failed to take note of the fact that the incident had taken place at about 8.00 a.m. and usually, the market opens at about 9.00 a.m. At 8.00 a.m., shopkeepers cannot be supposed to be present in front of or in their shops in the market. So far as other passers-by present on the spot are concerned, they cannot be supposed to remain present there as the markets are having floating visitors, who normally are not available or identifiable even after a few seconds of the incident, what to say of the minutes. There is no convincing evidence or even suggestion in cross-examination to prove or to suggest that at the time of incident, large number of persons were present on spot. There is general suggestion that large number of people remain present in the market which cannot, at any stretch of imagination, be proof of presence and availability of independent witnesses on spot. Therefore, keeping in view the timing of incident, possibility of availability of independent witnesses moving in the market was least in the present case. PW-1 and PW-2 are natural witnesses of the spot. Therefore, learned Sessions Judge has committed an error in acquitting the respondent on this count also.

27. Scrutiny of evidence on record reveals that the trial Court had appreciated the evidence completely and correctly. There was no perversity in the findings of the trial Court and, thus, the respondent is held guilty for commission of offence under Sections 325, 341 and 354 IPC. Accordingly, impugned judgment, dated 15th February, 2008 passed by learned Sessions Judge Shimla in Criminal Appeal No. 25-S/10 of 2007 is set aside and judgment, dated 14th March, 2007 passed by Judicial Magistrate 1st Class, Court No. 3, Shimla in Criminal Case No. 82/2 of 2001, convicting respondent-Kehar Chand under Sections 325, 341 and 354 IPC is affirmed.

28. Before directing respondent-convict to serve substantive sentence imposed upon him, it would be in the interest of justice to consider plea of learned counsel for the respondent, who has also argued in alternative that in case respondent is found guilty for commission of offence, then also, keeping in view the facts and circumstances of the case and also that the respondent has suffered trauma of facing criminal trial for seventeen years, that too, including trauma of being convict after suffering judgment of conviction by the trial Court, it is a fit case for extending benefit of Probation of Offenders Act to the respondent as he was a first offender and is not involved in any other case thereafter.

29. Considering the submissions made by the learned counsel for the respondent and the fact that the incident had taken place in the year 2001, the respondent was convicted in the year 2007 and has faced the criminal proceedings for seventeen years and further that at the time of incident, he was a young boy of 22 years, instead of awarding substantive sentence, benefit of Probation of Offenders Act may be extended to respondent. But, prior to that, it would be appropriate to call for report of the Probation Officer. The respondent is permanent resident of Village Mashog, Tehsil Karsog, District Mandi. Therefore, Probation Officer, Karsog is directed to submit his report under Probation of Offenders Act on or before 9th March, 2018.

30. List on **16th March, 2018,** on which date the respondent-convict shall remain present in the Court.

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

Jumman and Ors. .....Petitioners
Versus
State of Himachal Pradesh and Anr . .....Respondents

Cr.MMO No. 3 of 2018
Decided on 16.1.2018

Code of Criminal Procedure, 1973- Section 482 Cr.P.C.- Sections 451, 323, 341, 382, 147, 149, 504 and 506 IPC- Quashing of FIR in pursuance to a compromise between the parties- **Held-** that since the parties had resolved their disputes amicably inter se them, the FIR as well as consequential proceedings arising out of the same- ordered be quashed and set aside, reiterating the decision of the Hon'ble Supreme Court in ***Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466***- The guidelines formulated in the aforesaid judgment reiterated to hold that powers conferred under Section 482 of the Code is different than the powers under Section 320 of the Code- The guiding factors for quashing criminal proceedings, if the parties have entered an amicable settlement enumerated:- (i) to secure the ends of justice (ii) to prevent abuse of the process of the any court (iii) such powers not to be exercised in prosecution involving heinous and serious offences (iv) Criminal cases having overwhelming and predominants civil character particularly those arising out of commercial transactions or arising out of matrimonial relationship can be considered for quashing (v) the High Court may also examine whether the possibility of conviction is remote and bleak (vi) while exercising power under Section 482 Cr.P.C., timing of settlement would also play a crucial role- In the facts and circumstances of the case, FIR quashed. (Para-7 to 10)

Cases referred:
Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466
Gian Singh v. State of Punjab and Anr. (2012) 10 SCC 303
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497

For the petitioner. : Mr. Prashant Sharma, Advocate.
For the respondents. : Mr. Rajat Chauhan, Law Officer, for respondent No.1.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Cr.MP No. 95 of 2018

By way of instant application filed under Section 482 of Cr.PC, permission has been sought to place on record order dated 5.1.2015, passed by the learned Presiding Magistrate, Juvenile Justice Board and for deletion of name of petitioner No.4 namely Pappi.

2. Averments contained in the application suggest that applicants/petitioners approached this Court by way of instant petition i.e. Cr.MMO No. 3 of 2018, for quashing of FIR No. 110 of 2014, registered against the applicants/petitioners at the behest of respondent No.2. However, at the time of drafting/filing of the petition, applicants/petitioners inadvertently, failed to mention factum with regard to the acquittal of the applicant/petitioner No.4 i.e. Pappi, son of Jumaldeen by the learned Presiding Magistrate, Juvenile Justice Board, at Dharamshala, and as such, this Court while considering prayer having been made by the applicants/petitioners in the main petition, whereby they sought quashing of FIR, directed them to place on record the order, if any, passed by the Juvenile Justice Board, acquitting the applicant/petitioner No.4.

3. Perusal of order dated 12.1.2018, passed by this Court further suggests that statements of parties i.e. respondent No.2-complainant and accused-petitioner Nos. 1 to 3 and 5 have already been recorded. Accordingly, this Court after having perused averments contained in the application, which is duly supported by an affidavit and order dated 5.1.2015, passed by the Juvenile Justice Board in case No. 48-I/14, wherein applicant/petitioner No.4, namely Pappi, has been released by the Juvenile justice Board, on executing bond under Section 15 (e) of the Juvenile Justice (Care and Protection of Children) Act, by his guardian for a period of two years for good behavior and well being of the juvenile, undertaking therein that he will be responsible for his good behavior, sees no impediment in accepting the prayer made in the application at hand.

4. Accordingly, for the reasons stated in the present application, same is allowed and name of applicant/petitioner No.4 namely Pappi, is ordered to be deleted from the array of parties. Registry to carry out necessary correction in the memo of parties with red ink. Application stands disposed of.

Cr.MMO No. 3 of 2018

5. By way of instant petition filed under Section 482 of Cr.PC., prayer has been made on behalf of the petitioners-accused for quashing of FIR No. 110/14 dated 8.6.2014, under Sections 451, 323, 341, 382, 147, 149, 504 and 506 of IPC registered at PS Indora, District Kangra, H.P. and all consequential proceedings arising out the aforesaid FIR.

6. Learned counsel representing parties while inviting attention of this Court to the compromise arrived inter-se parties (Annexure P-3) contended that since parties have resolved their dispute amicably inter-se them and as such, aforesaid FIR as well as consequential proceedings arising out of the same, can be ordered to be quashed and set-aside.

7. Averments contained in the compromise (Annexure P-3) though suggest that with the intervention of elders of their families, parties have resolved to settle their dispute amicably and accordingly, entered into a compromise, however, this Court solely with a view to ascertain the correctness and genuineness of the aforesaid compromise also recorded the statements of the complainant (respondent before this court) as well as petitioner-accused, wherein both the parties (complainant and accused) categorically stated on oath before this Court that with a view to maintain cordial relation with each other, they have resolved to live in peace and harmony and accordingly, they have compromised the dispute and as such, now complainant is no more interested to prosecute the criminal case against the applicants/ petitioners. Complainant further stated before this Court that he is making this statement of his own free will and volition without there being any external pressure and shall have no objection in case, FIR as referred herein above, registered against the applicants/petitioners and consequential proceedings arising out of the same, are ordered to be quashed and set-aside by this Court. Their statement is already on record.

8. The Hon'ble Apex Court in case titled ***Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466,*** has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> ***"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising***

its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

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

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court. While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

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

29.4. On the other, those criminal cases having overwhelmingly and predominantly 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".

9. 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 serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

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

> ***"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr. Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:***
>
> > ***"...In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."***
>
> ***14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:***
>
> > ***"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."***
> >
> > ***"...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."***
>
> ***15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:***

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

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

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

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

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

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

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

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

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

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is

involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

11. Accordingly, in view of 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 proceedings pending in the trial Court.

12. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court and this Court, present petition is allowed and FIR No. 110/14 dated 8.6.2014, under Sections 451, 323, 341, 382, 147, 149, 504 and 506 of IPC registered at PS Indora, District Kangra, H.P. and all consequential proceedings arising out the aforesaid FIR, are quashed and set- aside. Pending application(s), if any, also stand(s) disposed of.

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

Zahur Haidar Zaidi ... Petitioner

Versus

Central Bureau of Investigation ... Respondent

CrMP(M) No. 1519 of 2017
Reserved on: January 12, 2018
Decided on: January 19, 2018

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 302, 330, 331, 348, 323, 326, 218, 195, 196 and 201 readwith Section 120-B of I.P.C.- Petitioner a Senior IPS Officer, IG Police - alleged to have entered into a criminal conspiracy to commit the aforesaid offences resulting in the death of one Suraj while in the custody of the police- Petitioner had approached the Special Judge, CBI for bail- Petition was dismissed- Hence, bail application under Section 439 Cr.P.C. filed before the Hon'ble High Court- **High Court Held-** that no doubt freedom of an individual cannot be curtailed for indefinite period and Gravity alone cannot be a decisive ground to deny bail, but at the same time the Court is required to consider the reasonable apprehension of the petitioner tempering with the evidence or threatening the complainant- On facts held that in the present case several materials witnesses were from the police department and there was a possibility of the petitioner interfering with the trial. (Para-30 and 31)

Code of Criminal Procedure, 1973- Section 439- Bail- Sections 302, 330, 331, 348, 323, 326, 218, 195, 196 and 201 readwith Section 120-B of I.P.C.- Further held- that the personal liberty of an individual is not absolute- It can be withdrawn when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves - Court cannot abandon its sacrosanct obligation and pass an order at its own whims or caprice- Since, it was a case of custodial death, which occurred due to the high handedness of the police officials who are otherwise expected to protect life and liberty of its citizens, discretion of bail cannot be exercised in favour of the petitioner- Custodial death is a heinous crime and even the persons involved in the crime being highly placed, such crime needs to be dealt with severely.

(Para- 35, 36 and 40)

Cases referred:

Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565

Bhadresh Bipinbhai Sheth vs. State of Gujarat, (2016) 1 SCC 152

Sanjay Chandra v. CBI, (2012) 1 SCC 40
Sidhharam S. Mhetre v. State of Maharashtra, (2011) 1 SCC 694
Esher Singh vs State of AP, (2004) 11 SCC 585
State of Kerala vs. P. Sugathan, (2000) 8 SCC 203
Kehar Singh vs. State, (1988) 3 SCC 609
Satyajit B. Desai vs. State of Gujarat, (2014)14 SCC 434
Manubhai Ratilal Patel v. State of Gujarat, 2013 (1) SCC 314
Surinder Kumar vs. State of Punjab, (1999) SCC (Crl) 33
Virupakshappa Gouda and another vs The State Of Karnataka & another, (2017) 5 SCC 406
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. R.S. Cheema, Senior Advocate with Mr. Arshdeep Cheema and Mr. Dheeraj K. Vashisht, Advocates.
For the respondent	:	Mr. Nikhil Goel, Advocate and Mr. Anshul Bansal, Standing Counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner, Zahur Haidar Zaidi, who is at present in custody, has approached this Court by way of instant criminal miscellaneous petition under Section 439 of the Code of Criminal Procedure, praying therein for grant of bail in FIR No. RC.9(S)/2017-SC.I/CBI/New Delhi dated 22.7.2017 under Sections 120B, 302, 330, 331, 348, 323, 326, 218, 195, 196 and 201 of the Indian Penal Code (hereinafter, 'IPC') registered at New Delhi by the Central Bureau of Investigation (hereinafter, 'CBI').

2. Sequel to order dated 19.12.2017, CBI has filed a status report/reply, opposing therein prayer for grant of bail made on behalf of the bail petitioner. Perusal of reply /status report suggests that FIR detailed hereinabove came to be registered against the bail petitioner as well as other co-accused on the directions issued by Division Bench of this Court in CWPIL No. 88 of 2017. Division Bench of this Court, while transferring investigation in FIR No. 97 of 2017 under Sections 302 and 376 IPC and Section 4 of Protection of Children from Sexual Offences Act (hereinafter, 'POCSO Act'), also directed CBI to conduct investigation in FIR No. 101 of 2017 registered at Police Station, Kotkhai, District Shimla, Himachal Pradesh, relating to custodial death of one of the accused namely Suraj Singh arrested by police in connection with FIR No. 97 of 2017, relating to rape and murder of a minor girl in Halaila forests in District Shimla on 4.7.2017. The minor girl (given name of 'Gudiya') after having attended her school at Government Senior Secondary School, Mahasu, left for her home at about 4.30 pm. Unfortunately, on the way to her home, she was allegedly raped and murdered by some unknown persons. Her body was found lying in Halaila forests near Mahasu at around 7.40 am on 6.7.2017. FIR No. 97 of 2017 came to be registered under Sections 302 and 376 IPC and Section 4 of POCSO Act at Police Station Kotkhai, District Shimla, Himachal Pradesh, against unknown persons. Since there was huge public outcry against aforesaid brutal act committed by unknown persons, and accused could not be arrested even after four days of the alleged incident, Director-General of Police, Himachal Pradesh vide letter dated 10.7.2017 constituted a Special Investigation Team (in short, 'SIT') headed by the bail petitioner, who was the then Inspector-General of Police (Southern Range). Additional Superintendent of Police (Rural), Shimla Bhajan Dev Negi Deputy Superintendent of Police Manoj Joshi and SI/SHO Rajinder Singh were also the members of the aforesaid SIT, whereas D.W. Negi, the then Superintendent of Police, Shimla, was entrusted with responsibility of timely and sustained investigation of the case, same being in his jurisdiction. After formation of SIT, bail petitioner, D.W. Negi and Manoj Joshi alongwith other co-accused conducted investigation of the case and in this regard, made inquiries from several people in and around Halaila forests. As per case of the prosecution, bail petitioner, Manoj Joshi and other

accused entered into criminal conspiracy to falsely implicate deceased Suraj Singh, who subsequently died in custody and others, in FIR No. 97 of 2017, relating to rape and murder of minor girl on 4.7.2017 in Halaila forests. In pursuance to aforesaid criminal conspiracy, SIT arrested Suraj Singh and four others on 13.7.2017. In pursuance to said criminal conspiracy, a team of police officers/officials consisting of Deputy Superintendent of Police Manoj Joshi, SI Rajinder Singh, ASI Deep Chand Sharma, HC Rafee Mohammed, HHC Mohan Lal, HHC Surat Singh and Constable Ranjeet Sateta, tortured Suraj in order to extract confession of the crime and in this process, caused bodily injuries intentionally on the person of Suraj in the police custody continuously from 13.7.2017 till his death in the intervening night of 18th and 19th July 2017, which injuries were sufficient in the ordinary course of nature to cause his death. On 13.7.2017, bail petitioner left Police Station Kotkhai and participated in a press conference held by Director-General of Police, Himachal Pradesh at Shimla. In the press conference, Director-General of Police claimed that the police had solved the case and arrested five accused in connection with the case relating to rape and murder of the minor girl on 4.7.2017. Since public at large was not satisfied and convinced with the story put forth by the police in the press conference held on 13.7.2017, Director-General of Police, Himachal Pradesh sent a communication to the Secretary (Home) to the Government of Himachal Pradesh to get the matter investigated from CBI. On 14.7.2017, Secretary (Home) to the Government of Himachal Pradesh sent a communication to the Secretary Personnel to the Government of India, requesting therein to issue direction to CBI to take over the investigation of the case relating to rape and murder of minor girl on 4.7.2017.

3. On the intervening night of 18th and 19th July, 2017, members of SIT in pursuance to criminal conspiracy tortured accused Suraj in custody to extract confession of crime and in this process caused bodily injuries to him. During the intervening night of 18th and 19th July, 2017, accused Suraj died in custody due to torture by the police officials namely Deputy Superintendent of Police Manoj Joshi, SI Rajinder Singh, ASI Deep Chand Sharma, HC Rafee Mohammed, HHC Mohan Lal, HHC Surat Singh and Constable Ranjeet Sateta, tortured Suraj. Immediately after death of Suraj, Dy.SP Manoj Joshi after issuing necessary directions to other police personnel present in the Police Station Kotkhai, left for Shimla. While leaving Police Station, Manoj Joshi told SHO Rajinder Singh that incident will be given colour of fight between accused Suraj and other accused Rajinder alias Raju. As per prosecution, Dy.SP Manoj Joshi, at the first instance met D.W. Negi, the then Superintendent of Police, Shimla and discussed the matter with regard to custodial death of Suraj and thereafter both of them went to the residence of bail petitioner, the then Inspector-General of Police, who was heading SIT, in late night hours of 18.7.2017, where they further conspired to lodge FIR on account of death of Suraj, knowing fully well that Suraj died due to custodial torture. In furtherance to criminal conspiracy hatched by aforesaid members of SIT, Dy.SP Manoj Joshi made a call to Station House Officer Rajinder Singh from the residence of the bail petitioner to lodge an FIR (later registered as FIR No. 101 of 2017) against arrested person namely Rajinder alias Raju, under Section 302 IPC, stating wrong facts of alleged killing of Suraj in police lockup of Police Station, Kotkhai. As per investigation conducted by the prosecution, Dy.SP Manoj Joshi after having met bail petitioner and Superintendent of Police, Shimla, returned back to Police Station Kotkhai early in the morning of 19.7.2017 and conducted inspection of police lockup before visit of Illaqua Magistrate, who was supposed to conduct magisterial inquiry into the matter under Section 176(2) of the Code of Criminal Procedure (hereinafter, 'CrPC'). Above named police officers also pressurized Constable Dinesh (Sentry Duty) to tow the line of seniors and forced him to sign the complaint containing false/ concocted story so as to make it part of FIR No. 101 of 2017 but the fact remains that Constable Dinesh did not sign said complaint at that time. Subsequently, bail petitioner, pursuant to orders issued by Director-General of Police, visited Police Station Kotkhai to conduct a fact-finding inquiry into the death of Suraj in police custody. During said inquiry, bail petitioner examined Sentry Duty Constable Dinesh, who disclosed the truth by giving entire sequence of events relating to death of Suraj during custodial torture. Allegedly, the bail petitioner recorded the statement of Sentry Duty Constable Dinesh on his mobile phone but did not report the same to the Director-General of Police in his report and despite having knowledge with regard to the

real facts, supported the version of false/concocted FIR that Suraj was killed in police lockup by Rajinder alias Raju. As per prosecution, on the direction of bail petitioner, a complaint under Section 154 CrPC was got signed from Sentry Duty Constable Dinesh by MHC Vipan Kumar and Constable Mukesh Kumar. Bail petitioner after having conducted inspection submitted his report vide letter dated 20.7.2017, annexed with charge sheet as D-73, disclosing therein that in the matter of custodial death, FIR No. 101 of 2017 under Section 302 IPC has been registered at Police Station Kotkhai on the statement of Constable Dinesh. In his aforesaid communication, bail petitioner also stated that he questioned MHC Vipan Kumar No. 952, Constable Sudhir Rangta No. 1556 and Constable Dinesh Kumar No. 608 (Sentry Duty between 9 am to 12 midnight). He further stated that inquiry was disrupted due to law and order breakdown that followed at Police Station Kotkhai.

4. On 19.7.2017, Division Bench of this Court, acceding to the request made on behalf of the State and taking note of the fact that one of the accused died in custody and Police Station Kotkhai was ransacked by mob, entrusted investigation of FIR No. 97 of 2017 dated 6.7.2017, relating to rape and murder of minor girl and FIR No. 101 of 2017 dated 19.7.2017 registered against accused namely Rajinder alias Raju, under Section 302 IPC, to the CBI. Pursuant to aforesaid direction issued by Division Bench of this Court, CBI registered fresh FIR RC No. 9(S)/2017-SC.I/CBI/New Delhi dated 22.7.2017 in connection with custodial death of Suraj. CBI arrested bail petitioner as well as other police personnel namely Manoj Joshi, Rajinder Singh, Deep Chand Sharma, Mohan Lal, Rafee Mohammed, Surat Singh and Ranjeet Singh Steta. Other accused namely D.W. Negi was arrested on 16.11.2017 and at present they are in judicial custody. After completion of investigation, CBI has presented *Challan* /charge sheet under Section 173 CrPC against the bail petitioner and other police personnel named herein above. Bail petitioner has been challaned under Section 120B read with Sections 302, 330, 331, 348, 323, 326, 218, 195, 196 and 201 IPC.

5. By way of bail application No. 23-S/22 of 2017, bail petitioner approached learned Special Judge (CBI) under Section 439 CrPC, seeking therein bail during pendency of the trial, which came to be rejected vide order dated 28.10.2017.

6. Mr. R.S. Cheema, learned senior counsel duly assisted by Mr. Arshdeep Cheema and Mr. Dheeraj K. Vashisht, Advocates, while praying for grant of bail in favour of bail petitioner, strenuously argued that bare perusal of charge sheet, copy whereof is also made available to the Court, suggests that no case, if any, is made out against bail petitioner under Sections 120B, 302, 330, 331, 348, 323 and 326 IPC, as such, there is no occasion to keep the bail petitioner in custody for indefinite period. Learned Senior counsel further contended that the bail petitioner has been falsely implicated in the case and he has no role to play, if any, in the custodial death of Suraj, who allegedly died in the police custody. While inviting attention of this Court to order dated 10.7.2017 issued by Director-General of Police constituting Special Investigation Team to investigate FIR No. 97 of 2017 registered under Sections 302 and 376 IPC and Section 4 of POCSO Act, dated 6.7.2017, learned senior counsel contended that SIT consisting of three officers namely Bhajan Dev Negi, Additional Superintendent of Police (Rural), Shimla, Manoj Joshi, Sub Divisional Police Officer (SDPO), Theog, District Shimla and SI Rajender Singh, SHO Police Station Kotkhai, District Shimla was constituted, and as such, it can not be said that bail petitioner was part of SIT constituted by Director-General to investigate FIR detailed herein above. Learned Senior counsel while inviting attention of this Court to statements of various prosecution witnesses recorded under Section 161 CrPC, contended that at no point of time, bail petitioner was directly involved in the investigation conducted by the members of SIT. While referring to the statements of accused, who came to be arrested at first instance by State police in connection with FIR No. 97 of 2017, learned senior counsel made an endeavour to persuade this Court to agree with his contention that torture, if any, of aforesaid accused was done by other members of SIT, especially Additional Superintendent of Police, Bhajan Dev Negi, PW-9, who has been made prosecution witness. Learned Senior counsel further contended that none of the prosecution witnesses named in charge sheet filed under Section 173 CrPC has stated anything

specific with regard to torture, if any, done by the bail petitioner, who had no direct control, if any, over the SIT constituted by Director-General of Police.

7. Learned Senior counsel further contended that it is a matter of record that on 13.7.2017, a press conference was held by Director-General of Police and not by the bail petitioner as is being projected by the CBI. Learned Senior counsel further contended that it is also a matter of record that with effect from 14.7.2017 till 17.7.2017, bail petitioner was on leave, which was sanctioned by the then Director-General of Police, HP. Learned Senior counsel, while making this Court to peruse charge sheet, contended that unfortunate incident, wherein person namely Suraj died due to torture allegedly done by other police officers, occurred/happened during the intervening night of 18th and 19th July 2017 at Police Station Kotkhai. Bail petitioner was not present at the time of death of Suraj, as is evident from chargesheet submitted by CBI, as such, it is not understood how he could be charged under Section 120B read with Section 302 IPC, for criminal conspiracy and murder of Suraj. Learned Senior counsel further contended that as per the story of prosecution itself, bail petitioner went to Kotkhai on 19.7.2017 i.e. after death of Suraj. He further submitted that record itself reveals that bail petitioner after reaching Police Station Kotkhai conducted necessary investigation and also recorded statement of Constable Dinesh Kumar, who was on Sentry Duty at the relevant time, on his mobile phone but since the mob *Gheraoed* the Police Station, inquiry could not be completed.

8. Learned Senior counsel further contended that it is also apparent from the record that FIR No. 101 of 2017 had already come into existence prior to visit of bail petitioner as such, by no stretch of imagination, it can be said /concluded that bail petitioner entered into criminal conspiracy to register false FIR against accused Rajinder alias Raju. Learned Senior counsel further contended that there is no evidence on record to substantiate the charge of CBI that in furtherance of criminal conspiracy, bail petitioner alongwith other SIT members, dishonestly and fraudulently fabricated evidence and registered FIR No. 101 of 2017 at Police Station, Kotkhai on false/ concocted facts against Rajinder alias Raju under Section 302 IPC and as such, no case, if any, is made out against bail petitioner under Sections 120B and 302 IPC. Lastly Mr. Cheema, learned senior counsel, contended that though there is no evidence at all against bail petitioner, suggestive of the fact that he was involved in the crime alleged to have been committed by him but even if for the sake of arguments, it is admitted that he was also involved in the case, offence under Sections 201 and 218 IPC is made out against him, which is a bailable offence.

9. Learned Senior counsel, while placing reliance upon judgments of Hon'ble Apex Court in Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565 (Paras 4 and 27), Bhadresh Bipinbhai Sheth vs. State of Gujarat, (2016) 1 SCC 152 (paras 21 and 22), Sanjay Chandra v. CBI, (2012) 1 SCC 40 (paras 14, 25 and 26), Sidhharam S. Mhetre v. State of Maharashtra, (2011) 1 SCC 694, forcibly contended that it is well settled by now that gravity alone can not be a decisive ground to deny bail, rather, competing factors are required to be balanced by Court while exercising its discretion. Learned Senior counsel further argued that it has been repeatedly held by Hon'ble Apex Court that object of bail is to secure appearance of accused at the time of trial by reasonable amount of bail and object of bail is neither punitive nor preventive. While specifically inviting attention of this Court to judgment rendered by Constitutional Bench in **Gurbaksh Singh Sibbia'**s case (supra), learned senior counsel contended that object of bail is to secure attendance of accused in trial and in this regard proper test to be applied in solution of question whether bail should be granted or refused is whether it is probable whether a party will appear to take its trial. He further contended that it has been repeatedly held in judgments/pronouncements by Hon'ble Apex Court that normal rule is bail and not jail. Learned Senior counsel also contended that bail petitioner is a reputed police officer belonging to IPS cadre, who prior to lodging of case, had been rendering services to State as Inspector-General of Police (Southern Range) and he has an unblemished service career to his credit.

10. Learned Senior counsel further contended that no material is placed on record by CBI, suggestive of the fact that in the event of petitioner being enlarged on bail, he may flee from justice and it shall be difficult for the investigating agency to secure his presence during trial.

Learned Senior counsel also placed reliance upon Esher Singh vs State of AP, (2004) 11 SCC 585, State of Kerala vs. P. Sugathan, (2000) 8 SCC 203 and Kehar Singh vs. State, (1988) 3 SCC 609, to suggest that as in all other criminal offences, prosecution is required to discharge its onus to prove its case against accused beyond all reasonable doubt as far as criminal conspiracy is concerned. Learned Senior counsel further contended that offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more minds, but in the agreement of two or more to do a lawful act by unlawful means. While making this Court to travel through aforesaid judgments, learned senior counsel made an endeavour to persuade this Court to agree with his contention that the "essence" of a conspiracy "is an agreement to commit an unlawful act" and such agreement can be proved by direct evidence or circumstantial evidence or by both and such circumstances prevailing before, during and after the occurrence have to be considered to decide about complicity of accused. While applying ratio as laid down in aforesaid cases to the case at hand, learned senior counsel made a serious effort to demonstrate that there is no evidence at all adduced on record by prosecution suggestive of the fact that there was prior meeting of minds between the alleged conspirators for the intended object of committing an illegal act or an act which is not legal by illegal means.

11. Mr. R.S. Cheema, Learned Senior counsel further contended that there is not even an iota of evidence suggestive of the fact that bail petitioner at any point of time gave beatings or tortured Suraj, who died in police custody at Police Station Kotkhai and as such, it cannot be adduced that he conspired with the other police officials to lodge false case against accused named in FIR No. 97/2017. Lastly, learned senior counsel contended that irreparable loss would be caused to the bail petitioner in case he is allowed to incarcerate in jail for indefinite period. While specifically referring to the judgment rendered by Hon'ble Apex Court in **Sanjay Chandra** vs. **CBI**, learned senior counsel contended that right to bail is not to be denied merely because sentiments of the community are against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required. While concluding his arguments, learned senior counsel contended that there are more than seventy (70) prosecution witnesses intended to be examined by prosecution and as such, considerable time would be consumed in conclusion of trial and during this period, freedom of bail petitioner can not be allowed to be curtailed as such, bail petitioner is entitled to be released on bail.

12. Though, Mr. R.S. Cheema, learned senior counsel, while placing reliance upon Satyajit B. Desai vs. State of Gujarat, (2014)14 SCC 434, Manubhai Ratilal Patel v. State of Gujarat, 2013 (1) SCC 314 and Surinder Kumar vs. State of Punjab, (1999) SCC (Crl) 33, made an endeavour to advance his arguments qua the order of remand repeatedly issued /passed by Court below but this Court is not inclined to look into that aspect of the matter because remand orders issued by Special Judge, CBI were neither laid challenge nor are these subject matter of the present petition, as such, this Court sees no occasion to deal with the aforesaid aspect of the matter raised by the learned senior counsel.

13. While refuting aforesaid submissions having been made by the learned senior counsel and opposing the prayer made on behalf of the bail petitioner for grant of bail, Mr. Nikhil Goel learned Advocate duly assisted by Mr. Anshul Bansal, learned Standing Counsel for CBI, contended that keeping in view the gravity of offence allegedly committed by the bail petitioner, he is not entitled to be released /enlarged on bail, rather he needs to be dealt with severely. Mr. Nikhil Goel strenuously argued that bare perusal of material adduced on record by prosecution in support of charge sheet, discloses prima facie case against bail petitioner as such, he does not deserve to be shown any leniency as is being prayed by the learned senior counsel representing the bail petitioner. Mr. Nikhil Goel, learned counsel representing CBI, further contended that seriousness of offence allegedly committed by bail petitioner and possible punishment, which may be awarded to him on the basis of evidence collected on record by investigating agency, is clearly

made out from the prima facie case set up by the prosecution. He further contended that conduct of accused, which is quite apparent and evident from his continuous participation in the investigation entrusted to SIT constituted under his leadership clearly suggests that in the event of bail petitioner being enlarged on bail, he shall influence and tamper with the prosecution witness so as to dissuade them from deposing against him.

14. Learned counsel representing CBI further contended that the investigation in another case of rape and murder is still underway and in view of repeated attempts having been made by bail petitioner and other members of SIT to falsely implicate five accused in rape and murder case, CBI has already sought permission from Special Judge (CBI) to investigate bail petitioner in that case also as such releasing of bail petitioner at this stage may not be in the interest of justice. Learned counsel while referring to the reasons cited by the prosecution for letting off persons cited as accused by SIT headed by bail petitioner in rape and murder case of 'Gudiya', further contended that role played by bail petitioner in the investigation of FIR No. 97 of 2017 into the rape and murder of 'Gudiya', needs to be investigated and bail petitioner on being enlarged on bail, may make efforts to destroy the evidence, which may have been collected against him in another case i.e. FIR No. 97 of 2017.

15. Learned counsel for CBI while referring to oral and documentary evidence forming part of charge sheet further contended that the bail petitioner solely with a view to earn a name for himself, concocted false story in connivance with other members of SIT and falsely implicated five innocent persons including Suraj, who subsequently died in police custody. Learned counsel while referring to the documents available on record contended that SIT was constituted by Director-General of Police on 10.7.2017 comprising of three officers but it was categorically mentioned in the order that the team will be closely monitored and investigation shall be supervised by bail petitioner, the then Inspector-General of Police (Southern Range), Shimla. He further contended that as per aforesaid communication, bail petitioner was under obligation to intimate daily progress of case to the Director-General of Police. While referring to another communication available on record, dated 12.7.2017, learned counsel appearing for CBI contended that at the behest/order of bail petitioner, subsequently three officers namely Rattan Singh Negi, Dy.SP (Traffic), SI Dharam Sen Negi, SHO PS West and ASI Rajiv Kumar came to be associated with the SIT constituted by the Director-General of Police, Himachal Pradesh.

16. While referring to the statements of PW-7 Ashish Chauhan, PW-8 SI/SHO Babu Ram and PW-9 ASP Bhajan Dev Negi, learned counsel contended that the bail petitioner physically tortured persons falsely implicated in the case and he repeatedly issued directions to the police officials/members of SIT to extract confession from the accused. Learned counsel further contended that on 13.7.2017, SIT headed by bail petitioner, who without making any formal arrest of persons named in FIR No. 97 of 2017 held a press conference alongwith Director-General of Police and claimed that SIT has solved the case and arrested five persons in connection with rape and murder of the girl named 'Gudiya', whereas in fact till 13.7.2017, there was no evidence available on record against accused named in FIR No. 97 of 2017. While referring to the material forming part of *Challan* filed under Section 173 CrPC, learned counsel contended that even after 13.7.2017, whereafter bail petitioner proceeded on leave till 18.7.2017, he kept on directing members of SIT to extract confession from the accused. While referring to statement of PW-14, the then Director-General of Police, learned counsel for CBI, contended that on 14.7.2017 intimation was sent to State by Director-General of Police to get the investigation done from CBI, whereafter on 14.7.2017, Principal Secretary (Home) sent a communication to the Government of India, requesting therein to direct CBI to take up the investigation of the matter, but despite that, bail petitioner on 18.7.2017 directed members of SIT, as has been categorically stated by PW-9, Bhajan Dev Negi, Additional Superintendent of Police, to extract confession from the accused.

17. While referring to the statement of PW-70, Sentry Duty Constable Dinesh, learned counsel representing CBI contended that the bail petitioner despite having acquired knowledge with regard to the fact that Suraj was not killed by co-accused Rajinder alias Raju but he was killed by police officials during interrogation, compelled Sentry Constable, who was on

duty at the relevant time, to sign on *Rukka* so that false FIR is registered against Rajinder alias Raju. He further stated that as per statement of PW-70, his statement was recorded by bail petitioner in his mobile phone, which fact came to be later substantiated by the report procured by CBI after confiscation of mobile phone of the bail petitioner. Mr. Nikhil Goel, learned counsel representing CBI, further contended that the communication/report sent to Director-General of Police by bail petitioner nowhere suggests that factum with regard to statement given by Dinesh (PW-70) was ever made known to the Director-General of Police, rather, the bail petitioner recommended his suspension for dereliction of duty. While referring to the statement of PW-14, Director-General of Police, learned counsel appearing for CBI contended that the bail petitioner met Director-General of Police on 20.7.2017 but did not inform him with regard to version put forth by Sentry Dinesh. While referring to the statement of PW-5 Atul Verma, ADG (Law and Order), Himachal Pradesh, it is contended on behalf of CBI that one week prior to death of Suraj, who died during the intervening night of 18th and 19th July, 2017, there was discussion in the Department about transfer of investigation of 'Gudiya' case to CBI, as such, there was no occasion at all for SIT headed by bail petitioner to interrogate Suraj on the intervening night of 18th and 19th July, 2017. Similarly, PW-8 Babu Ram, a police official, also stated that on 16.7.2017, he was stopped from further investigating 'Gudiya' case on the pretext that matter has been transferred to CBI.

18. Learned counsel representing CBI, invited attention of this Court to the statement of PW-59, Soumya Sambasivan, the then Superintendent of Police, Shimla, who categorically stated that petitioner was pressurizing her for early disposal of dead body of Suraj, however, she did not do so because she was instructed to the contrary by CBI officials. While referring to the medical evidence adduced on record by investigating agency, learned counsel contended that person namely Suraj was given merciless beatings solely with a view to extract confession and he died due to the atrocities inflicted by the members of SIT, on the directions of bail petitioner, who repeatedly asked members of SIT to extract confession from the accused named in FIR No. 97 of 2017.

19. Lastly learned counsel for CBI invited attention of this Court to the scientific evidence adduced on record by CBI, wherein all the accused named in FIR No. 97 of 2017 were found to be innocent. While referring to the reports referred to herein above, learned counsel for CBI contended that it is apparent from the reports that accused named in FIR were falsely implicated and they were tortured repeatedly by SIT including bail petitioner. He further contended that even in the present case of custodial death, CBI has carried out further investigation and a supplementary *Challan* is expected to be filed shortly. While praying before this Court for rejection of the present bail application, learned counsel appearing for CBI contended that bail petitioner is an influential person and in the past and after transfer of investigation has attempted to influence the then Superintendent of Police, Shimla for destruction of evidence. He further contended that since most of the material witnesses are from the Police Department, release of bail petitioner has a greater possibility of influencing trial of the case. Mr. Nikhil Goel, learned counsel while placing reliance upon judgment passed by Hon'ble Apex Court in titled **Virupakshappa Gouda and another** vs **The State Of Karnataka and another**, (2017) 5 SCC 406**,** contended that Hon'ble Apex Court has specifically dealt with the parameters laid down by it in **Sanjay Chandra'**s case, and has laid down new parameters for grant of bail. While placing reliance upon aforesaid judgment, learned counsel contended that this court can not lose sight of the fact that the present case is that of custodial death, which occurred pursuant to conspiracy hatched by highest placed police officers, who otherwise are expected to protect life and liberty of its citizens and as such, case at hand needs to be dealt with carefully by this Court, while considering prayer for grant of bail having been made on behalf of the bail petitioner.

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

21. Before examining and evaluating correctness of the submission having been made by the learned counsel representing the parties in light of the pronouncements of Hon'ble

Apex Court occupying the field, it may be noticed that since Division Bench of this Court, in which undersigned is one of the members, after having noticed request made on behalf of the State and taking note of the fact that one of the accused died in police custody, had ordered handing over of the investigation in FIR No. 97 of 2017 relating to rape and murder of 'Gudiya' and FIR No. 101 of 2017 relating to custodial death of accused, Suraj, this Court specifically asked the learned counsel representing the parties, whether they have any reservations regarding hearing of the present bail petition by this Bench, to which Mr. R.S. Cheema, learned senior counsel representing the bail petitioner categorically stated before this Court that the bail petitioner has no objection to the hearing of the present bail application by this Bench, as such, this Court proceeded to hear the present bail application preferred on behalf of bail petitioner, who subsequently came to be named as an accused in FIR lodged by CBI pursuant to the directions issued by this Court.

22. Though, perusal of communication dated 10.7.2017, suggests that the then Director-General of Police, constituted a SIT of three police officers namely Bhajan Dev Negi, Additional Superintendent of Police, Manoj Joshi, SDPO and SI Rajender Singh, SHO, Police Station, Kotkhai, to investigate FIR No. 97 of 2017, dated 6.7.2017 registered under Sections 302 and 376 IPC and Section 4 of POCSO Act involving rape and murder of minor girl, but it was categorically mentioned in the letter referred to herein above that the team named herein above, shall be closely monitored and its investigation shall be supervised by the bail petitioner, the then Inspector-General of Police (Southern Range), Shimla. Communication further suggests that Superintendent of Police, Shimla was also made responsible for timely and sustained investigation of the case being in his jurisdiction. Most importantly, there is specific mention in the letter that Inspector-General of Police (Southern Range)(bail petitioner)/Superintendent of Police, Shimla shall intimate the daily progress of the case to the Director-General of Police. This court after having perused aforesaid communication finds no force in the arguments of learned senior counsel representing bail petitioner that the bail petitioner was not associated with the SIT constituted by Director-General of Police to investigate FIR as mentioned herein above, rather, more onerous responsibility was cast upon the bail petitioner to monitor and supervise the investigation conducted by the SIT as referred to herein above.

23. Similarly, communication dated 12.7.2017, signed by bail petitioner, clearly suggests that three other officers as named in the communication were ordered to be associated with the SIT by bail petitioner in his capacity as its head.

24. Another contention having been put forth by the learned senior counsel that at no point of time, bail petitioner was directly involved in the investigation conducted by SIT is also bound to be rejected for the reason that apart from aforesaid communication taken into consideration by this Court herein above, number of official witnesses, who remained associated with the SIT have categorically stated in their statements recorded by CBI that the bail petitioner remained closely associated with the investigation of rape and murder case (Gudiya case). Material adduced on record by the prosecution further suggests that the bail petitioner after having received order dated 10.7.2017, from the Director-General of Police, not only monitored investigation, rather participated in day-to-day investigation of rape and murder case (FIR No. 97 of 2017). It is clearly borne out from record that on 18.7.2017, bail petitioner directly came from Police Station Kotkhai to participate in the press conference held by Director-General of Police, who on the instructions of bail petitioner claimed before the media that they have solved the case (Gudiya case) and have arrested five persons. As such, this Court is not persuaded at all to agree with the contention of learned senior counsel that at no point of time, bail petitioner participated in the interrogation of accused arrested in connection with FIR No. 97 of 2017. Though, during arguments, learned senior counsel with a view to persuade this Court to agree with his contention that at no point of time, bail petitioner tortured accused arrested in connection with FIR No. 97 of 2017, made specific reference to the statements made by certain prosecution witnesses but this Court, after having perused statements made by prosecution witnesses, is not inclined to accept aforesaid submission of learned senior counsel. It has specifically come in the statements of accused arrested in connection with FIR No. 97 of 2017 as well as other official

witnesses, who at the relevant time remained associated with the investigation of the case that bail petitioner not only tortured accused during investigation rather he repeatedly instructed/directed members of SIT to extract confession from the accused named in FIR No. 97 of 2017. One of the prosecution witnesses, who was member of SIT i.e. PW-9 Bhajan Dev Negi has categorically stated that the bail petitioner after having resumed duties on 18.7.2017, directed Manoj Joshi, Deputy Superintendent of Police in his presence to extract confession from the accused. As per the case set up by the bail petitioner himself in his bail application, he proceeded on leave on 14.7.2017 for four days and he thereafter returned to Shimla on 18.7.2017. It has specifically come in the statement of PW-9, as has been taken note herein above that on 18.7.2017, bail petitioner directed Manoj Joshi, Deputy Superintendent of Police, member of SIT to extract confession from the accused lodged in police lockup at Police Station Kotkhai.

25. At this stage, it is important to take note of the fact that the Director-General of Police vide communication dated 14.7.2017 had already recommended for CBI probe and State after having received communication from Director-General of Police had further sent a communication dated 14.7.2017 to Secretary Personnel, Government of India, requesting therein for issuing direction to CBI to take over investigation in FIR No. 97 of 2017. There is ample evidence adduced on record of prosecution, suggestive of the fact that it was very much in the knowledge of bail petitioner that efforts are being made by State to hand over investigation to CBI. PW-5, Atul Verma, who at the relevant point in time was serving as ADG (Law & Order), HP has categorically stated that one week prior to death of Suraj, there was discussion in the Department qua transfer of investigation of Gudiya case to CBI. Similarly, PW-8 Babu Ram also stated that on 16.7.2017, he was stopped from further investigation of Gudiya case on the pretext that matter has already been transferred to CBI.

26. There is yet another aspect of the matter, which clearly suggests that at the time of holding of press conference by Director-General of Police on 18.7.2017, no formal arrest was made by SIT and in a hot haste, press conference was arranged at Shimla making therein claim that police has solved Gudiya case but the evidence adduced on record by the CBI at this stage suggests that by that time, accused arrested in FIR No. 97 of 2017 had not confessed their guilt, rather one of the accused Rajinder alias Raju, who was subsequently named in FIR No. 101 of 2017, lodged at Police Station, in connection with custodial death of Suraj, categorically stated that he had told bail petitioner during interrogation that he has consented to every kind of scientific tests and only after that he should be subjected to custodial interrogation but despite that bail petitioner instructed his officers to extract confession from him. Though this Court, after having perused evidence adduced on record by prosecution is not inclined to agree with the contention of learned senior counsel that no torture of the deceased Suraj was done in police custody by the bail petitioner but, even if for the sake of arguments, proposition as put forth by learned senior counsel is accepted, it is difficult to accept that bail petitioner had no role to play in the custodial death of Suraj. It is quite apparent /evident from the record that person namely Suraj, who was in police lockup was taken upstairs by the police officials namely Manoj Joshi and others for interrogation. During interrogation, Suraj became unconscious and unfortunately he was declared dead by the doctors at CHC Kotkhai. Immediately after alleged incident, Manoj Joshi, Deputy Superintendent of Police rushed to Shimla and contacted D.W. Negi, the then Superintendent of Police, Shimla and thereafter they both went to the official residence of bail petitioner at 1.30 am on the intervening night of 18th and 19th July, 2017. Material available on record further suggests that from the residence of bail petitioner, Deputy Superintendent of Police Manoj Joshi made a call to Rajender Singh, Station House Officer, Police Station, Kotkhai to lodge FIR with regard to death of Suraj in police lock up by stating that he was killed by co-accused Rajinder alias Raju in the police lockup. On 20.7.2017, bail petitioner visited Police Station, Kotkhai to inquire into custodial death of accused namely Suraj. During investigation, Constable Dinesh, who was on sentry duty at the relevant time categorically informed him that accused Suraj died during interrogation by the members of SIT. Aforesaid conversation was recorded by bail petitioner in his mobile phone, as has been also stated by learned senior counsel representing bail petitioner. It has specifically come in the statement of PW-70, Constable Dinesh

that he had disclosed true facts to the bail petitioner and he had recorded his statement in his mobile phone. It has also come in the statement of PW-70 Constable Dinesh, that though he was repeatedly pressurized by staff present in the Police Station Kotkhai to sign *Rukka* under Section 154 CrPC but he refused to do so however, later, on the askance of bail petitioner, MHC Mukesh got his signatures on Rukka, on the basis of which FIR was already registered by Station House Officer, Rajender Singh at the instance of Deputy Superintendent of Police Manoj Joshi, who had told everybody present in the Police Station Kotkhai that he has discussed the matter with the bail petitioner and Superintendent of Police Shimla. Mr. R.S. Cheema, learned senior counsel, while inviting attention of this Court to the conversation recorded by bail petitioner during his interrogation, contended that bare reading of the transcription of the phone recording made available to this Court, suggests that every effort was put in by the bail petitioner to extract truth but inquiry could not be completed by bail petitioner on account of protest/ agitation by mob gathered outside Police Station, Kotkhai, which subsequently also made an attempt to set the Police Station on fire. This Court is not convinced with the aforesaid argument of learned senior counsel because bail petitioner even after having recorded version put forth by PW-70 Constable Dinesh Kumar, who had categorically stated that accused Suraj was not killed by co-accused Rajinder alias Raju, rather he died during interrogation by police officials, failed to report to Director-General of Police with regard to the statement having been made by PW-70. Perusal of document, D-73, clearly suggests that there is no mention with regard to the statement having been made by Constable Dinesh Kumar, which was also recorded by bail petitioner in his mobile phone, rather, bail petitioner reported to the Director-General of Police that in the matter of custodial death FIR No. 101 of 2017 under Section 302 IPC has been registered at Police Station Kotkhai on the statement of PW-70 Constable Dinesh. He further stated that he also questioned MHC Vipan No. 952, Sudhir Rangta No. 1556 and Constable Dinesh Kumar No. 608 (Sentry Duty between 9 am to 12 mid night). Bail petitioner also stated in the report referred to herein above that inquiry was disrupted due to law and order breakdown that followed at Police Station, Kotkhai. Interestingly, bail petitioner in his communication addressed to Director-General of Police stated that for the above lapse, SI Rajinder Singh, Head Constable Vipan Kumar and Constable Dinesh Kumar No. 608, of Police Station Kotkhai have been placed under suspension by Superintendent of Police, Shimla and shifted to Police Lines, Kaithu. Even if it is presumed and concluded that at no point of time, bail petitioner tortured accused arrested in connection with FIR No. 97 of 2017 and at no point of time, he had directed other members of SIT to extract confession from accused, there is no explanation on behalf of bail petitioner that what prevented him from taking corrective measures to get FIR No. 101 of 2017 cancelled from competent court of law after having recorded version put forth by PW-70, who in no uncertain terms disclosed/ stated before him that accused Suraj died during interrogation by police officials. Even if arguments advanced by learned senior counsel that since inquiry was disrupted by mob gathered outside the Police Station Kotkhai, is accepted, there appears to be no attempt on the part of bail petitioner to apprise Director-General of Police with regard to disclosure made by PW-70, Constable Dinesh Kumar, rather, in his report, as has been taken note above, he categorically stated to Director-General of Police that FIR No. 101 of 2017 has been registered with regard to custodial death on the complaint of Constable Dinesh Kumar, who had actually reported to the bail petitioner that Suraj has not died due to fight, if any, between co-accused Rajinder alias Raju and deceased, rather he died during interrogation conducted on the first floor of Police Station Kotkhai by investigating team. It has categorically come in the statement of Director-General of Police, PW-14 that at no point of time, bail petitioner brought to his notice the fact with regard to statement, if any, made by PW-70 rather despite repeated communications, bail petitioner failed to furnish report with regard to custodial death. After having carefully noticed aforesaid contention of bail petitioner, there appears to be considerable force in the case of prosecution that there was prior meeting of minds between bail petitioner, Deputy Superintendent of Police Manoj Joshi and D.W. Negi, the then Superintendent of Police, Shimla, who at 1.30 am, on the intervening night of 18th and 19th July, 2017, directed Station House Officer, Police Station Kotkhai Rajender Singh to lodge FIR, naming therein Rajinder alias Raju as accused. During arguments having been made by learned senior counsel representing the petitioner, it was argued

that bail petitioner made serious efforts to extract truth from the police personnel present in the Police Station on 20.7.2017 and statement made by PW-70 Constable Dinesh Kumar was recorded in his mobile phone but, as has been noticed above, no effort even after 20.7.2017 was made by bail petitioner to get matter reinvestigated in light of disclosure made by PW-70 Constable Dinesh Kumar and as such, at this stage, it is difficult to agree with the contention of learned senior counsel representing the bail petitioner that bail petitioner can not be charged with the offence of criminal conspiracy under Section 120B IPC. Though this aspect of the matter is to be considered and decided by the learned trial Court on the basis of evidence adduced on record by prosecution but this Court sees no reason to disbelieve the version put forth by CBI at this stage, especially after seeing the conduct of the bail petitioner, who, solely with a view to shield erring police officials, completely brushed aside the version put forth by Constable Dinesh Kumar, who was actually an eye witness to the alleged custodial death of accused Suraj. Otherwise also, it is well settled that while deciding bail petition, Courts are not required to sift entire evidence rather, court needs to see whether prima facie case exists against accused or not?

27. This Court after having carefully perused the evidence available on record does not see any reason to agree with the aforesaid contentions/submissions made by learned senior counsel representing the bail petitioner. This Court also deems it necessary to take note of certain facts which adversely reflect upon the conduct of the bail petitioner, as has been taken note above. Division Bench of this Court, after having handed over investigation to CBI is constantly monitoring the progress made by CBI in 'Gudiya' rape and murder case. Interestingly, on 24.8.2017, police officers named in subsequent FIR registered by CBI, filed their affidavits pursuant to direction issued by this Court detailing therein sequence of events or facts that came to their notice during investigation of FIR No. 97 of 2017. Mr. R.S. Cheema, learned senior counsel representing the bail petitioner, while arguing his case specifically referred to the affidavit submitted by bail petitioner before Division Bench to demonstrate that factum with regard to recording of statement of Constable Dinesh made by bail petitioner during investigation on 20.7.2017 was also disclosed to this Court. This Court specifically called for the affidavit filed by bail petitioner in the case pending before Division Bench, perusal whereof nowhere suggests that disclosure, if any, was made by the bail petitioner with regard to contents of statement made by Constable Dinesh Kumar during his interrogation by bail petitioner on 20.7.2017. In his affidavit, bail petitioner has stated that he visited Police Station Kotkhai on 20.7.2017 and recorded statement of police officials including Constable Dinesh Kumar (PW-70) but inquiry could not be completed since mob had gathered outside Police Station Kotkhai. Similarly, affidavit filed by Director-General of Police in the proceedings pending before Division Bench further suggests that he was informed by bail petitioner on 19.7.2017 that FIR No. 101 of 2017 under Section 302 IPC has been registered at Police Station Kotkhai meaning thereby that bail petitioner made an endeavour to justify FIR lodged by SHO Rajender Singh (FIR No. 101 of 2017), which, as per record of prosecution was registered on wrong facts falsely implicating Rajinder alias Raju, who was arrested in FIR No. 97 of 2017.

28. Though this Court finds from the material adduced on record alongwith charge sheet by the prosecution that the accused named in FIR No. 97 of 2017 had never confessed their guilt and they were wrongly mentioned in FIR and a false claim was made before media by the SIT, controlled and monitored by bail petitioner, that too without formal arrest of five accused, who were subsequently investigated by CBI. Scientific evidence adduced on record by CBI further suggests that the persons named in FIR No. 97 of 2017 were not actual culprits, rather they were tortured by SIT to confess their guilt. There is another fact, which casts aspersions on the conduct of bail petitioner and compels this Court to believe the version put forth by prosecution, once it was decided by the police on 14.7.2017 to hand over investigation to CBI, where was the occasion for the members of SIT to interrogate accused named in FIR No. 97 of 2017 on 18/19.7.2017. As has been noticed herein above, it has specifically come on the record of investigating agency that a communication was sent by Director-General of Police to hand over investigation to CBI on 14.7.2017 and pursuant to aforesaid request of Director-General of Police, Secretary (Home) to the Government of Himachal Pradesh had further sent a communication to

the Government of India, seeking therein direction to CBI to take over the investigation. In this background, this Court sees no reason for the bail petitioner or other members of SIT to investigate further the accused named in FIR No. 97 of 2017. In the case at hand, as has been categorically stated by PW-9 Bhajan Dev Negi, Additional Superintendent of Police that on 18.7.2017, bail petitioner ordered Dy.SP Manoj Joshi to extract confession from accused, which certainly suggests that everything was not in order and SIT solely with a view to make its record straight made an attempt to extract confession from accused including deceased Suraj, who unfortunately died during interrogation. There is overwhelming medical evidence adduced on record by prosecution suggestive of the fact that deceased Suraj was given merciless beatings before his death and he died due to injuries allegedly inflicted on his body during investigation.

29. After having carefully perused material available on record, this Court is in respectful disagreement with the learned senior counsel representing the bail petitioner that no role whatsoever was played by bail petitioner as far as custodial death of accused namely Suraj is concerned, rather as has been discussed herein above, bail petitioner throughout remained associated with the SIT and thereafter he purposely withheld information passed to him by PW-70 Constable Dinesh Kumar so that erring police officials, who gave merciless beatings to Suraj in custody, are saved. Apart from above, bail petitioner also conspired with the police officials named in FIR registered by CBI, who falsely implicated Rajinder alias Raju in the case relating to custodial death of Suraj. Aforesaid aspect of the matter though is to be considered and decided by the learned trial Court on the basis of evidence adduced on record by respective parties but this Court can not shut its eyes and order enlargement of petitioner on bail. Admittedly a person has died in custody of police and there is considerable force in the arguments of learned counsel representing CBI that in the event of petitioner being enlarged on bail, there is every likelihood of his influencing witnesses or tampering with evidence, which is or may be adduced on record by prosecution to prove its case against bail petitioner and other co-accused. Otherwise also, as has been taken note above, CBI has already obtained order from concerned magistrate for examination of bail petitioner as well as other accused in connection with FIR No. 97 of 2017 relating to rape and murder of 'Gudiya'. It is quite apparent from the statement of Constable Dinesh that he was repeatedly asked/ harassed by the police officials to give his statement in favour of Department and as such, enlargement of bail petitioner on bail at this stage may not be in the interest of justice.

30. True it is, that it has been repeatedly held by Hon'ble Apex Court that freedom of an individual can not be curtailed and gravity alone can not be a decisive ground to deny bail but at the same time, it has been held by Hon'ble Apex Court in judgments relied upon by the learned senior counsel for the bail petitioner, as has been taken note above that competing factors are required to be balanced by the Courts while exercising its discretion. There can not be any quarrel with regard to proposition of law expounded by Hon'ble Apex Court that object of bail is neither punitive nor preventive but at the same time, nature and gravity of the accusations and exact role of accused needs to be taken into consideration by the court while considering prayer made on his behalf for grant of bail. Similarly, Hon'ble Apex Court in the judgments relied upon by the learned senior counsel has held that court while considering prayer for grant of bail needs to consider the reasonable apprehension of tampering with witnesses or reasonable apprehension of threat to the complainant.

31. In the case at hand, there is overwhelming evidence adduced on record by prosecution at this stage to demonstrate that constant effort has been made by bail petitioner and other police officers named in the FIR to dissuade PW-70 Constable Dinesh Kumar from disclosing true facts, rather FIR No. 101 of 2017 was lodged on the complaint of PW-70, who at the time of lodging of FIR had not signed on *Rukka* and subsequently, MHC Vipan Kumar on the instructions of bail petitioner forcibly got the signatures of bail petitioner on *Rukka*. Bail petitioner is an influential person and after the transfer of investigation to CBI, attempted to influence investigation as is evident from statement of PW-5, the then Superintendent of Police, Shimla Somya Sambahivan. As is evident from the statement of PW-59, Superintendent of Police, Shimla, who categorically stated that bail petitioner was pressuring her for early disposal of body

of Suraj but she did not do so because she was instructed to the contrary by CBI officials. This Court can not lose sight of the fact that since several material witnesses are from the Department of bail petitioner, petitioner's release on bail at stage may not be in the interest of fair trial as there is greater possibility of petitioner influencing trial as he has been doing during investigation as is quite evident from the material collected on record by the prosecution.

32. Since, the Hon'ble Apex Court in its latest judgment reported in **Virupakshappa Gouda and another vs the State of Karnataka and another**, (2017) 5 SCC 406, has dealt with all the judgments relied upon by the learned senior counsel appearing for the bail petitioner, laying therein guidelines to consider grant of bail, this Court deems it not necessary to reproduce those judgments herein. Hon'ble Apex Court in the aforesaid judgment, while dealing with the parameters laid in **Sanjay Chandra**'s case has categorically stated that though passages from **Sanjay Chandra**'s case have relevance but the same can not be made applicable in each and every case for grant of bail. Hon'ble Apex Court has further held that it depends upon nature of crime and manner in which it is committed and bail application is not to be entertained on the basis of certain observations made in different context, rather there has to be application of mind and appreciation of factual score and understanding of pronouncements in the field.

33. Hon'ble Apex Court in the aforesaid judgment, taking note of the observations made by it in Chaman Lal versus State of UP, held that nature of accusation and severity of conviction, reasonable apprehension of tampering with witnesses or apprehension of threat to complainant, prima facie satisfaction of court in support of charge are of paramount consideration while considering request for grant of bail. In the judgment referred herein above, Hon'ble Apex Court while taking note of its earlier judgment in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, reiterated that while exercising power of grant of bail, court has to keep in mind certain circumstances /factors, which are as under:

> "(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."

34. At this stage, it would be apt to take note of judgment passed by Hon'ble Apex Court in **Virupakshappa Gouda and another vs the State of Karnataka and another**, (2017) 5 SCC 406, wherein it has been held that:

> "11. It is submitted by Mr. Patil, learned senior counsel for the appellants that the High Court has erred in cancelling the order of bail as the appellants, after being enlarged on bail, had neither abused the freedom nor have they violated the terms and conditions of the bail order. It is urged by him that there is no allegation of tampering with the evidence or influencing any witnesses and therefore, there was no justification for cancellation of the order of granting bail. Learned Senior counsel would further contend that the analysis made by the learned trial Judge for the purpose of grant of bail cannot be regarded as perverse and he has correctly relied upon the pronouncements as is noticeable from his order. It is put forth by Mr. Patil that at such distance of time not to admit the appellants on bail and give the stamp of approval to the order cancelling the bail by the High Court, would not sub-serve the cause of justice.
>
> 12. Mr. Raghupathy, learned counsel appearing for the State, per contra, would submit that the learned trial Judge should not have entertained the prayer for

bail after this Court has special leave petition for the same relief. It is his submission that the High Court has correctly opined that there is perversity in the approach by the learned trial Judge while dealing with the application under Section 439 Cr.P.C. and hence, it deserved to be set aside.

13. On a perusal of the order passed by the learned trial Judge, we find that he has been swayed by the factum that when a charge-sheet is filed it amounts to change of circumstance. Needless to say, filing of the charge-sheet does not in any manner lessen the allegations made by the prosecution. On the contrary, filing of the charge-sheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet for trial of the accused persons. As is further demonstrable, the learned trial Judge has remained absolutely oblivious of the fact that the appellants had moved the special leave petition before this Court for grant of bail and the same was not entertained. Be it noted, the second bail application was filed before the Principal Sessions Judge after filing of the charge-sheet which was challenged in the High Court and that had travelled to this Court. These facts, unfortunately, have not been taken note of by the learned trial Judge. He has been swayed by the observations made in Siddharam Satlingappa Mhetre (supra), especially in paragraph 86, the relevant part of which reads thus:-

> "The courts considering the bail application should try to maintain fine balance between the societal interest vis-a-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent court."

14. The proposition expounded above, has to be accepted, but that has to be applied appositely to the facts of each case. A bail application cannot be allowed solely or exclusively on the ground that the fundamental principle of criminal jurisprudence is that the accused is presumed to be innocent till he is found guilty by the competent court. The learned trial Judge has also referred to the decision in Sanjay Chandra (supra), wherein a two-Judge Bench while dealing with bail applications, observed thus:- "21. In bail applications, generally, it has been laid down from the earliest times that 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.

> 22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted 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 this country, 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.

> 23. Apart from the question of prevention being the object of a 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 purpose of giving him a taste of imprisonment as a lesson."

15. Be it noted, though the aforesaid passages have their relevance but the same cannot be made applicable in each and every case for grant of bail. In the said case, the accused-appellant was facing trial for the offences under Sections 420-B, 468, 471 and 109 of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. Thus, the factual matrix was quite different. That apart, it depends upon the nature of the crime and the manner in which it is committed. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of the factual score and understanding of the pronouncements in the field.

16. The court has to keep in mind what has been stated in Chaman Lal vs. State of U.P. and another[3]. The requisite factors are: (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (iii) prima facie satisfaction of the court in support of the charge. In Prasanta Kumar Sarkar vs. Ashis Chatterjee and another[4], it has been opined that while exercising the power for grant of bail, the court has to keep in mind certain circumstances and factors. We may usefully reproduce the said passage:-

> "9....among other circumstances, the factors which are to be borne in mind while considering an application for bail are:
>
> (i) whether there is any prima facie or reasonable ground to be believed 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."

17. In Central Bureau of Investigation vs. V. Vijay Sai Reddy[5], the Court had reiterated the principle by observing thus:- "While granting bail, the court has to keep in mind the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words reasonable grounds for believing instead of the evidence which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

18. From the aforesaid principles, it is quite clear that an order of bail cannot be granted in an arbitrary or fanciful manner. In this context, we may, with profit, reproduce a passage from Neeru Yadav vs. State of Uttar Pradesh and another[6], wherein the Court setting aside an order granting bail observed:-

> "The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the 2nd respondent. **We are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bed rock of constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from the member, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible**. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the Court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law."

19. In this context what has been stated by a three-Judge bench in Dinesh M.N. (S.P.) v. State of Gujarat[7] is quite instructive. In the said case, the Court has held that where the Court admits the accused to bail by taking into consideration irrelevant materials and keeping out of consideration the relevant materials the order becomes vulnerable and such vulnerability warrants annulment of the order.

20. In the instant case, as is demonstrable, the learned trial Judge has not been guided by the established parameters for grant of bail. He has not kept himself alive to the fact that twice the bail applications had been rejected and the matter had travelled to this Court. Once this Court has declined to enlarge the appellants on bail, endevours to project same factual score should not have been allowed. It is absolute impropriety and that impropriety call for axing of the order.

21. That apart, as we find from the narration of allegations from the order of the High Court, it is not a case where the trial court could have entertained a bail application by elaborate dissection of facts and appreciation of statements recorded under Section 161 Cr.P.C. The gravity of the crime should have been taken note of by the learned trial Judge. The deceased and his wife (the daughter of the accused-appellant No.1) were staying in peace away from the acrimonious

> community, but due to some kind of "misconceived class honour", the vengeance reigned and awe for law went on a holiday. They thought that their perception mattered and as alleged, they put an end to the life spark of the young man. The choice of the daughter was allowed no space. Her identity was crushed and her thinking was crucified by parental dominance which has roots in an unfathomable sense of community honour. Though the lovers became fugitive, the anger founded on anachronistic values prompted the accused persons to annihilate the life of a young man. In such a situation, the factors that have been highlighted by this Court from time to time were required to be adverted to and the accused persons should not have been granted liberty on the grounds that have been thought appropriate by the learned trial Judge. The perversity of approach by the learned Additional Sessions Judge, who has enlarged the appellants on bail, is totally unacceptable. It is reflective of sanctuary of errors. In such a situation, we are obligated to say that the High Court has performed its legal duty by lancinating the order passed by the learned trial Judge."

35. Careful perusal of aforesaid law laid down by Hon'ble Apex Court clearly suggests that liberty is priceless treasure for a human being and its foundation is on the bedrock of Constitutional right and accentuated to human right principle. Hon'ble Apex Court in aforesaid judgment has further observed that liberty of an individual can not be allowed to be paralyzed and immobilized because deprivation of liberty of a person has enormous impact on his mind as well as body but liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and societal order. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law.

36. This court can not lose sight of the fact that present is a case of custodial death, which occurred due to highhandedness of the police officials who are otherwise expected to protect life and liberty of its citizens. Though, it is yet to be proved in accordance with law but it emerges from the material adduced on record by investigating agency that police officials including bail petitioner, while investigating rape and murder case of minor girl and in an attempt to show an early disposal of case, wrongly arrested and tortured six persons, one of whom unfortunately died in police custody at Police Station Kotkhai, Shimla

37. In **Sanjay Chandra** vs. **CBI**, (2012) 1 SCC 40, which has been also taken note by Hon'ble Apex Court in judgment referred above, it has been categorically held that while granting bail, court has to keep in mind nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and prima facie satisfaction of the court in support of the charge.

38. Otherwise also bare perusal of provisions providing for grant of bail suggests that courts are required to keep in mind purpose of grant of bail. Legislature has carefully used words, "reasonable grounds of belief' in respect of offence, which reasonably casts a duty upon court while granting bail to satisfy itself as to whether there is genuine case against accused and that prosecution will be able to prove prima facie evidence in support of charge.

39. At this stage, court can not expect the prosecution to have evidence establishing guilt of the accused beyond reasonable doubt, as such, contention of the learned senior counsel, Mr. R.S. Cheema, who while placing reliance upon judgments in **Esher Singh** vs **State of A.P.**, (2004) 11 SCC 585, **State of Kerala** vs. **P. Sugathan,** (2000) 8 SCC 203, and **Kehar Singh** vs. **State** (1988) 3 SCC 609, contended that as in all other criminal offences, prosecution is required to discharge its onus to prove its case against accused beyond all reasonable doubt as far as

criminal conspiracy is concerned, is not required to be considered at this stage, rather, same shall be considered and decided by learned trial Court on the basis of evidence adduced on record by prosecution. At this stage, this Court, after having perused material available on record of the case is satisfied that bail petitioner has not only failed to discharge his lawful duly, rather, he turned a blind eye to the heinous offence allegedly committed by police officers probing the case entrusted to them under the supervision of bail petitioner.

40. Needless to add, custodial death is a heinous crime and person involved in crime how highly placed he may be, needs to be dealt with severely. As such, present being a case of custodial death, same needs to be viewed more seriously than a murder case. Hon'ble Apex Court in a catena of judgments especially has termed "custodial deaths to be worst kind of crime in a civil society governed by rule of law."

41. Apart from above, investigation in FIR No. 97 of 2017 relating to rape and murder of 'Gudiya' is still underway and permission has been already granted by magistrate concerned to investigate bail petitioner and other police officials in that FIR. There is every possibility of bail petitioner tampering with evidence already adduced on record or sought to be adduced on record by investigating agency and as such, he can not be ordered to be released on bail at this stage.

42. Consequently, in view of detailed discussion as well as law laid down by Hon'ble Apex Court in **Virupakshappa Gouda and another vs the State of Karnataka and another**, (2017) 5 SCC 406 this Court is not inclined to grant bail to the bail petitioner at this stage.

43. Accordingly, the bail application is dismissed at this stage. However, it is made clear that the observations made hereinabove shall not be construed to be a reflection on the merits of main case and shall remain confined to the disposal of the present application only.

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

Ramesh Kumar ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 91 of 2018
Decided on February 26, 2018

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail- Section 379 IPC and Sections 32 and 33 of the Indian Forest Act- Petitioner found to be in possession of approximately 7200 liters of cedar wood oil without any valid permit/permission from the Forest Department - had illegally and unauthorisedly stored cedar wood oil – Pre-arrest bail sought- **High Court Held-** that freedom of an individual is of utmost importance and cannot be allowed to be curtailed for indefinite period, especially when guilt of the petitioner is yet to be proved in accordance with law- **Further Held-** that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the Court while exercising its discretion and one of the test to be applied while granting bail is whether the party will be present during the course of trial. (Para-13 to 19)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623

Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Romesh Verma, Advocate.
For the respondent	:	Mr. Dinesh Thakur, Additional Advocate General with Mr. Raju Ram Rahi, Deputy Advocate General. ASI Virender Bharwal and HC Rohit Bhardwaj IO, Police Station, Chopal, District Shimla, HP.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Apprehending arrest in FIR No. 14 of 2018 dated 28.1.2018 under Section 379 IPC and Sections 32 and 33 of the Indian Forest Act registered at Police Station, Chopal, District Shimla, Himachal Pradesh, bail petitioner has approached this Court by way of instant bail petition filed under Section 438 CrPC, praying therein for grant of pre-arrest bail.

2. Sequel to order dated 30.1.2018, whereby bail petitioner was ordered to be enlarged on interim bail in the event of his arrest, ASI Virender Bharwal and HC Rohit Bhardwaj, Police Station, Chopal have come present with the status report/record. Mr. Dinesh Thakur, learned Additional Advocate General has also made available status report prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Perusal of record /status report reveals that FIR detailed herein above came to be registered against the bail petitioner on 28.1.2018 at the behest of complainant namely Parshotam, Range Officer, Sarahan, who alleged that on 28.1.2018, he alongwith Divisional Forest Officer Shimla inspected the store of the bail petitioner and found that the bail petitioner without having any valid permit/permission from the Forest Department, had illegally and unauthorisedly stored cedar wood oil. Allegedly, the bail petitioner had stored 28 barrels/drums containing 200 litres of oil each and 32 cans containing 50 litres each of cedar wood oil. During search, approximately 7200 litres of cedar wood oil was found stored in the store of the bail petitioner, without having any licence and permission, as such, a case under Sections 32 and 33 of the Indian Forest Act and Section 379 IPC came to be registered against the bail petitioner.

4. Mr. Romesh Verma, learned counsel representing the bail petitioner, while referring to the record/ status report vehemently argued that no case is made out against the bail petitioner, who at the relevant time was having valid licence to extract and store cedar wood oil. Mr. Verma further contended that it is quite evident from the record/status report that bail petitioner had valid permission from the Forest Department till the year 2015 to extract and store cedar wood oil as such, no case, if any, under Section 379 IPC is made out against the petitioner. Learned counsel for the petitioner, while inviting attention of this Court to the communication placed on record alongwith bail petition strenuously argued that on 20.12.2013, Divisional Forest Officer, Chopal Forest Division, District Shimla, had specifically verified the quantity of cedar wood oil lying in the store of the bail petitioner. While referring to annexure P-2, i.e. communication dated 31.3.2014, learned counsel representing the petitioner contended that licence of the petitioner was renewed from time to time and same was valid till 31.3.2015. While praying for grant of pre-arrest bail, learned counsel contended that bail petitioner has already joined investigation and at this stage, nothing is required to be recovered from him. Learned counsel further contended that another co-accused namely Rama Nand has already been enlarged on bail by the court of learned Chief Judicial Magistrate, Chopal and as such, bail petitioner also deserves to be enlarged on bail. Learned counsel for the bail petitioner further contended that the bail petitioner is a local resident of the area and he shall always remain available for investigation and trial and there is no likelihood of his fleeing from justice and as such, his freedom cannot be curtailed till the time guilt, if any, of the bail petitioner is proved in accordance with law.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while refuting /opposing aforesaid prayer having been made by the learned counsel representing the petitioner, strenuously argued that it has clearly come in the investigation that bail petitioner had been indulging in illegal trade of cedar wood oil and he without having any valid permit, extracted cedar wood oil and thereafter sold the same in the market causing huge loss to the State Exchequer. While refuting the contention of the learned counsel representing the petitioner that bail petitioner was having valid licence, learned Additional Advocate General contended that it has specifically come in the investigation that in the year 2005, a decision was taken not to grant any permit for extraction of cedar wood oil and its sale as such, role of the other forest officials, who illegally issued permit in favour of the bail petitioner, is yet to be ascertained. Mr. Thakur further contended that bail petitioner is an influential person, who, in connivance with the forest officials succeeded in procuring illegal permit from the Forest Department and in the event of his being enlarged on bail, he may influence/tamper with prosecution evidence, as such, he does not deserve to be shown any leniency at this stage. Though, Mr. Thakur, on the instructions of the Investigating Officer, fairly admitted that bail petitioner has joined the investigation and at this stage, nothing is required to be recovered from him but he categorically stated that record pertaining to previous years is yet to be recovered from the bail petitioner. Mr. Thakur, Additional Advocate General, while admitting that accused namely Rama Nand has been enlarged on bail, contended that it has no connection, if any, with the present case.

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

7. After having carefully gone through the record/status report, there appears to be considerable force in the arguments of learned counsel for the petitioner that the bail petitioner had been registered government contractor. As per investigation, record of Forest Division, Chopal was verified, perusal whereof clearly revealed that bail petitioner was having licence/permit till 31.3.2015. Though the investigation reveals that the Forest Department vide communication dated 18.1.2005 had decided not to grant any licence/permit for extraction and sale of cedar wood oil but the fact remains that permit in this regard was issued in favour of the petitioner for the year 2014-15 as is evident from the record itself. As per record, 21 export permits were issued by Forest Department for extraction of cedar wood oil after issuance of aforesaid communication dated 18.1.2005 and in this regard quantity of 1165.7 quintals of cedar wood oil was also shown in the record lying in the store of bail petitioner.

8. Though, this Court after having perused status report finds substantial force in the arguments of the learned Additional Advocate General that there is variation in the quantity of cedar wood oil lying in the store of the bail petitioner but this Court can not lose sight of the fact that it stands duly established on record that bail petitioner was having valid licence till 31.3.2015. Similarly, communication dated 20.12.2013, annexure P-1 issued by Divisional Forest Officer, Chopal Forest Division further reveals that bail petitioner had 97.50 quintals of cedar wood oil in his stock at Depot namely Nandpur and 72.80 quintals at Depot Lingzar.

9. Leaving everything aside, this Court was unable to lay its hand on any document/material adduced on record by the investigating agency suggestive of the fact that complaint, if any, was ever received by investigating agency qua theft or fresh extraction of cedar wood oil by the bail petitioner.

10. Similarly, it is not understood that once decision was taken in the year 2005 by the Forest Department that no more permits would be issued for extraction of cedar wood oil, why action was not taken against the bail petitioner in the year 2013, when stock was verified by the Divisional Forest Officer. If no permit was issued to the bail petitioner after the year 2005, there was no occasion to verify the stock in the year 2013.

11. This Court, after having carefully perused communication dated 31.3.2014, annexure P-2, which has not been denied by the investigating agency, has reasons to believe that bail petitioner was having valid licence till 31.3.2015 to extract and store cedar wood oil.

12. Interestingly, there is no mention, if any, in the FIR with regard to fresh extraction/ sale, if any, made by the bail petitioner, after 31.3.2015. Though, aforesaid aspect of the matter is to be considered and decided by the trial Court on the basis of material adduced on record by the investigating agency, but this Court after having carefully perused material made available on record sees no reason for custodial interrogation of bail petitioner, who otherwise has joined investigation, as has been fairly admitted by the learned Additional Advocate General.

13. It has been repeatedly held by the Hon'ble Apex Court that freedom of an individual is of utmost importance and same can not be allowed to be curtailed for indefinite period, especially when guilt of the bail petitioner is yet to be proved in accordance with law.

14. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

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

15. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

> "111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

16. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or

beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

17. 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 also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction

will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

18. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down 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.

19. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his guilt has not been proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> 2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of

other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

20. In view of above, interim order dated 30.1.2018, is made absolute, subject to the petitioner furnishing fresh bail bonds in the sum of Rs.5,00,000/- (Rs.Five Lakh) with a local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

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

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

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

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

(e) He shall surrender passport if any held by him.

21. 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.

22. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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