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HIMACHAL SERIES, 2020

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

ASSISTANT EDITOR
Dr. Abira Basu
Deputy Director,
H.P. Judicial Academy,
16 Mile, Shimla-Mandi National Highway, Distt. Shimla

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Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20 & 29- Recovery of 938 tablets of Nitrosun-10- Regular bail- Grant of- Held, prohibited psychotropic substance was recovered from residential flat of co-accused 'SB'- Bail petitioners were merely visitors to house of 'SB'- In complaint which was sent by neighbour of 'SB', no allegation that bail petitioners were regular visitors to house of 'SB' or they were part of drug mafia- No material has come on record during police investigation connecting bail petitioners with contraband recovered from premises of 'SB' - Their mere presence in the house is not sufficient to

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Constitution of India, 1950 - Article 226 – **Himachal Pradesh Panchayati Raj Rules, 2002** – Rule 75- Writ petition for seeking directions to state to register FIR against private respondents on account of forgery and embezzlement of public money – Held, reply of official respondents clearly shows that private respondents indulged in forgery and embezzlement of public money while working as Pradhan and Panchayat Secretary of the Gram Panchayat – Department was knowing about misdeeds of the private respondents - Authorities constituted under the Himachal Pradesh Panchayat Raj Act and more particularly, Rule 75 of the Rules, required them to have informed the police when it came to their notice that offences had been committed by them – FIR directed to be registered against private respondents. (Para 8 & 14). Title: Kewal Ram Lothta vs. The Secretary Panchayati Raj and others Page - 82

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Constitution of India, 1950 - Article 226- Jurisdiction of High Court- Extent and scope vis-à-vis orders passed by National Green Tribunal- Held, jurisdiction conferred under Article 226 of the Constitution is a part of basic structure and can neither be tampered with nor diluted- High Court has jurisdiction to examine the decision of all Tribunals including National Green Tribunal. (Para 4 to 6) Title: State of Himachal Pradesh & ors. vs. Bhag Singh & others. **D.B.** Page - 242

Constitution of India, 1950 - Article 226- Setting up of stone crushers on rivers and rivulets – National Green Tribunal vide order dated 29.10.2018 cancelling licence(s) granted to such stone crushers who were operating within 100 Mtrs. of water bodies and directing H.P. State Pollution Control Board to stop any such stone crusher- State of Himachal Pradesh and Stone Crushers filing writ and seeking review/modification of order of National Green Tribunal dated 29.10.2018- Held, non-perennial rivers may have different characteristics and may function very differently in maintaining hydrological and ecological balance- Non-perennial river is relatively sensitive to change and can easily lead to degradation of the river system- However, in order to exploit the natural resources without damaging the earth, ecology, environment and for overall sustainable development interim order dated 29.8.2019 that limit of 100 Mtrs., as directed by National Green Tribunal, may not be applied to non-perennial rivulets made absolute but subject to conditions to be followed by State/ Stone Crushers. (Para 9, 10, 17 & 18) Title: State of Himachal Pradesh & ors. vs. Bhag Singh & others. **D.B.** Page – 242

Constitution of India, 1950 – Articles 14 & 226 – Allotment of shop(s) by Municipal Council – Challenge thereto by petitioner – Held, power or discretion of Government in matter of grant of largesses including award for jobs, contracts, quotas, licences must be confined and structured by rational, relevant and non-discriminatory standard or norm – If Government departs from such standard or norm in any particular case, its action would be struck down unless it can be shown by it that departure was not arbitrary and it was based on some valid principle – Petitioner cannot claim possession of shop of Municipal Council contrary to Rules framed by the Government – Petition dismissed with costs. (Para 1,15, 29 & 30) Title: Suman Aggarwal vs. Municipal Council & Anr. Page - 89

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Constitution of India, 1950 – Articles 14 & 226 – Discretionary powers- Exercise of – Held, discretion means sound discretion guided by law or governed by known principles of rules, not by whims or fancy or caprice of the Authority. (Para 6). Title: Dharam Parkash vs. State of H.P. and another Page - 121

Constitution of India, 1950 - Articles 14 & 226- Regularization of services- Writ jurisdiction- Petitioner claiming regularization of services on completing 10 years on and w.e.f. August, 1996- Held, petitioner remained absent on medical grounds from 19.12.1987 to 06.03.1990- No material on record that he had claimed condonation of aforesaid entire period- Petition disposed of with direction that if petitioner had also sought condonation of absence period from 19.12.1987 to 6.3.1990 and same stood allowed, then said period is to be counted for benefit of regularization of service. (Para 2 & 3) Title: Dharam Vir Sharma vs. State of H.P. & others Page – 262

Constitution of India, 1950- Article 226 – Regularization of service- Effect - Held, regularization is not a form or mode of appointment – Regularization would mean conferring quality of permanence on appointment which was initially made on temporary, ad-hoc or contract basis – Regularization would relate back to initial date of appointment – Petition allowed- Petitioner is held entitled for pension as per Rules. (Para 11, 12, 14 & 16). Title: Ram Krishan Sharma vs. The Accountant General (A&E) HP and Ors. Page – 107

Constitution of India, 1950- Article 226 – Transfer of government employee – Role of State Commission for Women – Held, State Commission for Women is an outsider to the affairs of administration and has no business to recommend transfers or other measures concerning employees of the State Government otherwise it will amount to interference in the working of executive. (Para 7). Title: Sh. Joginder Rao vs. State of Himachal Pradesh & another Page - 103

Constitution of India, 1950- Article 226– Claim of higher pay band from back date – Entitlement – Police department advertised recruitment notice dated 17.7.2012 for posts of constables – Petitioner though qualified written examination but finally not selected after interview – In previous writ, his exclusion from selection list was held malafide and actuated with **vice** – Thereafter, Police department gave appointment to petitioner against vacancy of home District but from 20.8.2015 – Petitioner claiming pay benefits from back date on ground that he ought to have been offered appointment from recruitment notice dated 17/7/2012 – Respondents contending that as per Rules, he can be granted higher pay scale of Rs.10300–34800 plus Rs.3200 grade pay after completion of eight years of service from date of actual joining – Held, in previous judgment, High Court had recorded finding that grant of less marks in interview to petitioner was actuated with malice to exclude him from selection– He was given appointment pursuant to recruitment notice dated 17/7/2012 for all intents and purposes - He is to be treated like other candidates recruited pursuant to notice dated 17/7/2012 – Persons recruited vide recruitment notice dated 17/7/2012 got higher pay band from their initial appointment and not after eight years of service – Petitioner entitled for higher pay as if appointed vide recruitment notice dated 17/7/2012 – Petition allowed. (Para 12 to 14, 17 & 19) Title: Ajay Kumar Kapoor vs. State of H.P.& others Page – 125

Contempt of Courts Act, 1971- Sections 2 (b) & 12- Disobedience of Court order- Proof- Held, in previous case, the Court disposed of contempt petition on submission of petitioner's counsel that petitioner intended to avail other remedies available under law qua exchange of land- If petitioner has availed any such remedy and no action is being taken on his representation, then proper course for him is to approach the appropriate court of law for appropriate directions in this regard- In absence of there being a direction issued by the Court which stands willfully disobeyed, the power of contempt cannot be used as a tool either by the party or the Court to force other party to do an act qua which there is no command in the main order- Petition dismissed. (Para 3) Title: Anil Kumar Sharma vs. Shiv Prashad Kadam Nakate & another Page – 211

'E'

Evidence Act, 1872 – Section 3 – Discrepancies and differences in deposition of witnesses – Appreciation of evidence – Held, on account of long gap between date of occurrence of incident and examination of witnesses during trial discrepancies in deposition of witnesses qua timings of events are bound to happen – Case of prosecution cannot be discarded on this ground alone. (Para 17) Title: Des Raj Vs. State of Himachal Pradesh Page – 18

Evidence Act, 1872 –Section 3 – Hostile witness – Appreciation of evidence – Held, deposition of hostile witness is not to be discarded in toto – Part of his evidence found reliable and credible and getting corroboration by other evidence on record can be taken into consideration in favour of either party. (Para 16) Title: Des Raj Vs. State of Himachal Pradesh Page - 18

Evidence Act, 1872- Sections 101 & 102- Burden of proof in criminal case- Defence plea- Relevancy- Held, plea raised by accused in his defence is of no consequence in a criminal case- Burden to prove case beyond reasonable doubts is always on prosecution (as per Hon'ble Shri Justice Dharam Chand Chaudhary, J.) . (Para 9) Title: Lal Chand vs. State of H.P. Page – 199

Evidence Act, 1872- Sections 101 & 102- Burden of proof- Principles summarized- Held, stringent the punishment, higher the assurance of evidence for conviction and sentencing is required. (Para 18) Title: Lal Chand vs. State of H.P. Page - 199

'H'

Himachal Pradesh State Commission for Women Act, 1996 – Section 10 – Functions of Commission – Explained – In a matter pending before it, State Commission directing employer of employee not to transfer him from that place or get his official accommodation vacated till matter between employee and his wife is finalized by it – Also directing employer to enter name of wife in the official record of employee – Held, Commission is a creation of Statute and thus it is bound to act within the forecorners of Statute that created it – Commission had no authority to give declaration qua marital status of parties – Over accommodation in question, Commission had no jurisdiction as to how it is to be utilized nor it had any jurisdiction to request that employee is not transferred from the station till finalization of proceedings before it – What the Commission could not directly exercise under powers vested with it under Section 10 of Act, cannot be permitted to be done under garb of so called 'request' – Petition allowed – Orders of Commiossion set aside. (Para 10 to 12 , 16 & 19) Title: Varun Khari vs. State of H.P. and others. DB Page - 271

'I'

Indian Penal Code, 1860 - Section 376 – Rape – Consent under misconception of fact – What is? - Held, to establish that the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established; firstly the promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given and; secondly, the false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. (Para 21) Title: Kuldeep Kumar vs. State of Himachal Pradesh Page – 32

Indian Penal Code, 1860 – Section 376 – Sexual intercourse on promise to marry – When would not amount to rape? – Held, parties belong to tribal area of district Chamba – Custom if any, merely permits man and lady engaged to have physical relations with each other after engagement and before marriage – It is not compulsory to have such relationship before marriage – But accused actually had such relationship with victim is doubtful - In Complaint made to SDM, Pangi by her father, no allegation of physical relationship between accused and his daughter after their engagement were made – Alleging this fact for first time in FIR, indicates that on refusal of accused to marry prosecutrix and his inability to pay damages of Rs. 5 lakh as demanded by her father, the story of physical relationship between him and prosecutrix was introduced in the case- Enormous unexplained delay in reporting matter with police creates doubt as to its veracity – Appeal allowed – Conviction set aside. (Para 15 to 17).Title: Kuldeep Kumar vs. State of Himachal Pradesh Page - 32

Indian Penal Code, 1860- Section 376 (2)(j)- Rape on woman incapable of giving consent- Appeal against conviction of Trial Court- Proof of- Held, victim was suffering from severe mental retardness- Her parents had to go to attend a marriage and thus had called their elder daughter 'ND' to their house to take care of victim and cattle- On reaching house, 'ND' did not find victim and went in search for her- She saw accused without pant and her sister not wearing salwar and accused laying over victim and on her questioning, accused fled away- No enmity of complainant with accused- Absence of injuries on private parts of victim, in view of her mental retardness, meaningless as résistance would not occur to her which otherwise would happen on reflex action when force is applied- However hymen was in fact and swabs collected from victim's private parts did not find traces of semen- Possibility of slightest penetration having not taken place cannot be ruled out- It was an attempt to commit offence- Conviction altered to one under Section 376 (2)(j) read with Section 511 of Code- Appeal party allowed and sentence modified. (Para 16 to 20) Title: Kartar Singh alias Ajeet vs. State of Himachal Pradesh **D.B.** Page - 296

Indian Succession Act, 1925 – Section 63 – **Evidence Act 1872** – Section 68- Will, whether was duly executed? – Proof –Held, 'KG' and 'OP' advocates, who are attesting witnesses, specifically deposing of executant having put thumb mark on Will in their presence –Also stating about their presence as well as of testator before the Registering Authority- Attesting witnesses deposing about Will as scribed on instructions of testator and of its having been read over to him by the scribe – They are also stating before the Court qua sound and disposing state of mind of 'AR' testator at the relevant time – Scribe of will an advocate was a relative of testator – Last rites of testator were performed by defendant No.2, who was given share under Will – Share under Will also given to 'PL' to whom gift of property was made earlier by the deceased – Said gift deed never challenged by plaintiff- Due execution of will stands proved on record – RSA dismissed. (Para 32 to 35). Title: Rukmani Devi (since deceased) through her legal representative Sh. Gulab Singh son of late Sh. Tule Ram vs. Prem Lata & Anr. Page - 153

'L'

Land Acquisition Act, 1894 - Sections 18 & 23 - Acquisition of land for public purpose- Reference- Market value of land- Determination- Held, for determining market value of acquired land, it is the purpose of acquisition and not its nature and classification which is relevant- Where nature and classification of land has no relevance for purpose of acquisition, the market value is to be determined as a single unit irrespective of nature and classification of land- Uniform rate to all kinds of land under acquisition as a single unit is to be awarded. (Para 5) Title: The Land Acquisition Collector (Central Zone) HP. PWD, I&PH and another vs. Narotam Singh, deceased through his LRs Page – 269

Land Acquisition Act, 1894- Sections 11 & 25- Acquisition of land for public purpose- Reference- Held, Court cannot award compensation lesser than the compensation awarded by the Land Acquisition Collector under Section 11 of Act. (Para 4) Title: The Land Acquisition Collector (Central Zone) HP. PWD, I&PH and another vs. Narotam Singh, deceased through his LRs Page – 269

Letters Patent Appeal- Constitution of India, 1950 - Articles 14 & 226- **Guidelines for engagement of Anganwari Workers, 2009**- Clause 7(1)(b)- Award of marks qua past experience- Challenge thereto- Selection of appellant based on award of additional marks for rendering service in private institution- Quasi-judicial Authorities holding award of such marks contrary to provisions of the Scheme pursuant to letter dated 1.12.2006 of Director, Social Justice & Women Empowerment and ordering redrawing of seniority list- High Court allowing writ and remanding matter to Appellate Authority- Appellate Authority again dismissing appeal of appellant and holding that experience certificate obtained from private institution could not have been considered for grant of additional marks- Hon'ble Single Bench upholding order of Appellate Authority- Letters Patent Appeal- Held, by virtue of latest Notification, previous Schemes were superseded- New Scheme does not discriminate between whether experience is from private institute or government or semi-government institution- Quasi-judicial Authorities were wrong to set aside selection/ appointment of appellant by ordering deduction of two marks given for past experience- LPA allowed – Judgment of Hon'ble Singh Bench set aside. (Para 13 to 18) Title: Roshani Devi vs. State of Himachal Pradesh & others **D.B.** Page – 263

Limitation Act, 1963 – Article 54 – Agreement of sell – Period of limitation and its commencement – Held, period of limitation for specific performance is three years from the date fixed for performance or if no such date is fixed, when plaintiff has noticed that its performance is refused – No date was fixed in the agreement in question for execution of sale deed – Period of limitation would commence from date when plaintiff issued notice to defendant requiring him to execute sale deed. (Para 16 & 17).Title: Deep Ram vs. Sohan Lal Sharma Page – 167

Limitation Act, 1963- Section 5- Application for condonation of delay- Mode of disposal- Held, if appeal is not filed within period of limitation as per law, then party is required to explain everyday's delay- Though in interest of justice, Courts do not insist that each and every day's delay should be explained by a party- Yet it is expected that party should approach the Court with clean hands and give some cogent explanation for it- There should not be mechanical disposal of application seeking condonation of delay in filing appeal- Court must assign reasons which are borne out from pleadings as why a particular view has been taken by it. (Para 6 & 7) Title: Shri Dev Raj vs. Shri Bhupender Singh and another Page - 209

'N'

Narcotic Drugs & Psychotropic Substances Act, 1985- Section 50 – Compliance thereof when mandatory – Held, recovery of 'charas' was made from steel container possessed by accused – No personal search was conducted before search of steel container on suspicion of accused having contraband with him – Personal search was conducted after recovery of contraband from steel container and after making formal arrest of accused in accordance with law – Section 50 of Act, has no applicability in facts and circumstances of case. (Para 27). Title: Des Raj Vs. State of Himachal Pradesh Page - 18

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Sections 20- Recovery of 4.5 Kgs. of charas- Appeal against acquittal recorded by Special Judge- Divergence of opinion between Hon'ble Judges of Division Bench- Reference to Hon'ble Third Judge- Prosecution alleging chance recovery of 4.5 Kgs. of 'charas' from accused while on patrol- Held, judgment of conviction recorded by one of the Hon'ble Judge is totally based on documents like seizure memo and NCB forms- There is no discussion of oral evidence nor any findings that statements of official witnesses are consistent and it would be safe to place reliance upon them- Alleged recovery and seizure of contraband took place on National Highway, admittedly a busy road even during odd hours- No effort was made to join independent person at any stage of apprehension of accused, search, recovery and seizure of alleged contraband- Even 'CK' from whose shop weighing scale and weights were brought for weighing contraband not associated in search and seizure- 'SK' probablising plea of defence that accused were actually travelling in a bus and they were nabbed from Sanwara, where passengers had stopped for tea– Accused belong to distant place and it is difficult to infer that they were present at Kasauli Chowk at 10.45 PM- Evidence regarding recovery of identity card(s) from bag carried by accused contradictory- True genesis of case has been concealed- Recovery of contraband from conscious and exclusive possession of accused is doubtful- Appeal dismissed- Acquittal recorded by Special Judge upheld. (Para 14, 16, 17, 21 & 26) Title: State of Himachal Pradesh vs. Ashok Kumar & anr. Page – 216

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 (b)(ii)(c) – Recovery of commercial quantity of 'charas'- Proof of- Appeal by accused against conviction and sentence- Accused alleged to be holding bag in his lap while travelling in a bus from which contraband was recovered- Accused taking plea that said bag was taken by police from luggage rack of the bus and it was not recovered from him- Held on facts, (i) bus conductor ignorant as to exactly from where in the bus bag was lifted by the police prior to his calling by them to seat where accused was sitting, (ii) version of Investigating Officer that he searched bag outside the bus is not corroborated from other witnesses including a police witness or documents on record, (iii) it is otherwise improbable that without noticing contents of bag, the police would make passenger alight along with driver and conductor, (iv) co-passengers of bench occupied by accused who were material witnesses, not associated in the investigation, (v) signatures of witnesses 'HK' and 'HC' on seizure memo appear to have been obtained on blank paper and contents scribed later on as handwriting seems to have

overlapped the signatures, (vi) Font size and spacing in between writings evidently leading to inference that contents were made to fill in the space above signatures, (vii) other tampering in seizure memo qua quantity of 'charas' alleged to be recovered from accused- Prosecution failed to connect bag in question to have been recovered from accused and in proving its case beyond reasonable doubts- Appeal allowed- Conviction set aside and accused acquitted. (Para 18, 19 & 29 to 31) Title: Manohar Lal vs. State of Himachal Pradesh D.B Page - 173

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 – Recovery of commercial quantity of 'charas'- Appeal against conviction and sentence- Divergence of opinion between Hon'ble Judges of the Bench qua guilt of accused- Reference to Hon'ble third Judge- Held, on facts (i) independent witness 'RK' of recovery and seizure not supporting prosecution case during trial, (ii) he specifically stating that his signatures were obtained by police on blank papers, (iii) 'RK' having no acquaintance with accused and has no reason to depose falsely, (iv) police witness also contradicting prosecution case on material particulars and showing ignorance when he left spot with rukka and when he reached police station, (v) contradictions in his statement vis-à-vis photographs qua time of sealing of contraband, (vi) mode of proceeding of police party for patrol duty from police post not reflected in departure report and (vii) Police personnel in whose private vehicle police party claimed to have gone for patrol not examined during trial- Case of prosecution doubtful- Appeal dismissed- Conviction and sentence set aside. (Para 12, 15, 16, 19 & 20) Title: Shri Diwakar vs. The State of Himachal Pradesh Page - 177

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 – Recovery of commercial quantity of 'charas'- Proof of- Appeal against conviction and sentence recorded by Special Judge- Accused arguing that evidence of prosecution witnesses is full of contradictions and benefit of doubt should have been given to him- Effect of contradictions- Held, individual contradiction, discrepancy or embellishment in prosecution case, if considered singly may not be fatal but the cumulative effect thereof creates doubt, then its benefit is to be extended to accused. (Para 27) Title: Lal Chand vs. State of H.P. Page - 199

'T'

Trade Marks Act, 1999 – Section 93 – Bar of jurisdiction of Civil Court – Held, against order of Registrar of Trade Marks, aggrieved party has a remedy to file appeal before the Appellate Authority – Civil Court has no jurisdiction to entertain suit against such decision or order. (Para 5). Title: The North Face Apparel Corp. vs. Pranay Kant Sharma Page – 134

Trade Marks Act, 1999 (Act)- Section 12- **Code of Civil Procedure, 1908-** Order XXXIX Rule 4 - Temporary injunction against use of similar trade mark – Alteration of order– Grounds – Held, trade mark styled as 'North Face' was allocated to the plaintiff by the Competent Authority under the Act – Defendant was assigned trade name "North Face Adventure Tours" though prior to allocation of trade mark to plaintiff but it was by the Tourism Department of State of H.P. and not by Competent Authority under the Act – Application of defendant for allocation of said trade mark to it already pending before Competent Authority for consideration – And said Authority is authorized to grant concurrent use of similar trade mark by more than one proprietors subject to appropriate conditions- Trade mark 'North Face Adventure Tours' thus is legally assignable to defendant also – Case of undue hardship being faced by defendant on account of temporary injunction restraining it from using its aforesaid trade mark is made out – Injunction order granted in favour of plaintiff is ordered to be vacated. (Para 5). Title: The North Face Apparel Corp. vs. Pranay Kant Sharma Page - 134

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Union of India v. Reliance Industries Limited and others, (2015) 10 SCC 213, Eitzen Bulk's and Imax Corporation's cases supra.
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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, JUDGE, J.

Gulzar Singh and others ….Petitioners.

Vs.

Bhajan Singh …..Respondent.

CMPMO No.: 511 of 2018
Date of Decision: 01.01.2020

Code of Civil Procedure, 1908 – Order VI Rule 17 – Post-trial amendment in pleadings – Permissibility- Held, after commencement of trial in suit, the Court may permit a party to amend its pleadings only if it comes to conclusion that inspite of due diligence party could not have raised matter earlier.(Para 7)

Whether approved for reporting?[1] *Yes.*

For the petitioners: Mr. Dheeraj K. Vashisht, Advocate.

For the respondent: Mr. Rahul Majahan, Advocate.

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the petitioners/defendants have assailed order dated 26.09.2018, passed by the Court of learned Senior Civil Judge, Court No. I, Amb in CMA No. 40/VI/2018 (Reg. No. 117/18), Civil Suit No. 169/I/2007, titled as *Bhajan Singh Vs. Gulzar Singh and others,* vide which, an application filed under Order 6 Rule 17 of the Code of Civil Procedure by the respondent/plaintiff stands allowed by the learned Trial Court.

2. Brief facts necessary for the adjudication of present petition are that a suit for injunction is pending adjudication before the learned Trial Court, which has been filed by the respondent/plaintiff against the petitioners/defendants. This suit was filed in the month of October, 2007. When the Civil Suit was at the stage of hearing, an application was filed by the plaintiff before the learned Trial Court under Order VI, Rule 17 of the Code of Civil Procedure for amendment of the plaint, *inter alia,* on the ground that defendants had preferred an appeal against the order dated 28.02.2000, passed by the Land Reforms Officer before the Divisional Commissioner, Kangra at Dharamshala, which was pending adjudication. This fact was realized by the plaintiff when the case was being prepared for the purpose of arguments and the amendment sought for could not be incorporated in the plaint earlier erroneously and due to due to over sight. On these counts prayer was made for permission to amend the plaint in the following terms:

> *"(i) That the applicant wants to add the following words "till the final decision of revenue authorities" after the word "HP" and before the word "Under Section" in the sub para (b) of the head note of the plaint as well as in prayer clause.*
>
> *(ii) That the applicant further wants to delete the words "do so till final partition of land detailed in para (a) of the head note of the plaint in the end of para No. 4 of the plaint by adding words "take forcible possession of land as described in sub para (b) of the head note of the plaint till the decision of*

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1 Whether the reporters of the local papers may be allowed to see the Judgment?

revenue authorities against the appeal preferred by the defendants."

3. This application stands allowed by the learned Trial Court vide impugned order by assigning reasons that the amendment would facilitate the adjudication of the suit and further the nature of the suit would not be changed in case the amendment was permitted to be incorporated.

4. Feeling aggrieved, the petitioners/defendants have filed this petition.

5. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

6. Order VI, Rule 17 of the Code of Civil Procedure provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties, provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

7. A bare perusal of said statutory provision makes it amply clear that the Court can permit a party to amend the pleadings only if it comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

8. Coming to the facts of the present case, the impugned order demonstrates that in the application which was filed under Order VI, Rule 17 of the Code of Civil Procedure by the plaintiff seeking permission to amend the plaint, it stood admitted by the plaintiff that the proposed amendment could not be incorporated earlier in the plaint erroneously and due to over sight. Record further demonstrates that it was not the case of the plaintiff before the learned Trial Court that the amendments which it intended to incorporate in the plaint, were with regard to the events which had happened subsequent to the filing of the plaint or near to the time when the application was filed under Order VI, Rule 17 of the Code for amendment of the plaint. This demonstrates that the application filed under Order VI, Rule 17 of the Code was nothing but an attempt to fill up the lacunae in the case. This is not the spirit of Order VI, Rule 17 of the Code of Civil Procedure, because a party cannot be permitted to fill up the lacunae by resorting to the provisions of Order VI, Rule 17 of the Code of Civil Procedure. This extremely important aspect of the matter has been ignored by the learned Trial Court while passing the impugned order and by permitting the plaintiff to amend the plaint.

9. There is another aspect of the matter, which needs to be dwelled at this stage. A perusal of the order passed by the learned Trial Court demonstrates that what weighed with it was the fact that there was an appeal pending before the Divisional Commissioner between the parties and adjudication thereof would have had assisted the decision of the Civil Suit. Thus, it would have been more prudent for the learned Trial Court to have had directed the parties to make a request before the learned Divisional Commissioner for early hearing of the appeal pending before the said authority, rather than allowing a belated attempt made by the plaintiff to fill up the lacunae in the Civil Suit. Therefore, the impugned order is not sustainable in the eyes of law.

10. Accordingly, the petition is allowed. Order dated 26.09.2018, passed by the Court of learned Senior Civil Judge, Court No. I, Amb in CMA No. 40/VI/2018 (Reg. No. 117/18), Civil Suit No. 169/I/2007, titled as *Bhajan Singh Vs. Gulzar Singh and others*, vide which, it permitted the respondent herein to amend the plaint, is set aside.

11. At this stage, learned counsel for the parties jointly submit that this Court may issue a direction to the Divisional Commissioner, Kangra at Dharamshala to decide the appeal, which has been filed by the petitioners, at the earliest and learned Trial Court be directed not to hear the suit till the decision of the appeal in issue.

12. In view of the submission so made by learned counsel for the parties, it is directed that the appeal pending before the learned Divisional Commissioner, Kangra at Dharamshala shall be decided by the said Authority positively on or before ***31st March, 2020*** (if not already decided) and learned Trial Court shall decide the suit after the decision of the appeal by the learned Divisional Commissioner. Parties shall independently file applications before the learned Divisional Commissioner bringing into the notice of the said authority the order which has been passed today, so that appropriate date can be fixed by the learned Commissioner for adjudication of the appeal. It is made clear that the time which has been granted by this Court to the learned Divisional Commissioner for deciding the appeal is sacrosanct and no extension etc. with regard to the same shall be granted, keeping in view the fact that the appeal was filed as far back as in the year 2000.

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

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

Smt. Veena Devi ....Petitioner.

Vs.

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

CWP No.: 6406 of 2012
Date of Decision: 02.01.2020

Constitution of India, 1950 – Article 226 – Ex-gratia – Grant of on ground that husband of petitioner died while on election duty– Government communication dated 25th April 2014 stipulating for payment of ex-gratia to family of polling personnel dying or sustaining injuries while on election duty - Held, husband of petitioner, a police constable with State Government was deputed on election duty– He reported in police station for duty and from there he was to go to polling station– He went missing while on way to polling station and his dead body was recovered - Person is to be taken on election duty as soon as he leaves his office/residence for election duty including training till he reaches back – It is to be treated as an accident which occurred on election duty – Husband of petitioner died while on election duty and she is entitled for ex-gratia payment – Petition allowed. (Para 8 to 12).

Whether approved for reporting?[2] *Yes.*

For the petitioner: Mr. Lovneesh Kanwar, Advocate.

For the respondents: M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents No. 1 to 4.

Mr. Balram Sharma, Senior Panel Counsel, for respondent No. 5.

Mr.Ankush Dass Sood, Senior Advocate, with Mr. Arjun K. Lall, Advocate, for respondent No. 6.

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has, *inter alia,* prayed for the following relief:

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2 Whether the reporters of the local papers may be allowed to see the Judgment?

> *"(a) This Hon'ble Court may kindly be pleased to issue a writ of mandamus directing respondents to release a sum of Rs.5 lacs as compassionate compensation alongwith 12% interest from the date of death of the husband of the petitioner."*

2. Undisputed facts necessary to be referred for the purpose of adjudication of the present petition are that deceased Hans Raj, husband of the petitioner, was serving as a Constable in the Himachal Pradesh Police Department. In the year 2009, he was working as Constable No. 282 at Police Station Sundernagar, District Mandi, H.P. On account of ensuing Lok Sabha elections, he was deputed for election duty to Police Station Gohar, where he reported as such alongwith other police officials, as is evident from entry in Annexure P-2, i.e., Daily Station Diary of Police Station Gohar, which was so entered one Shri Tej Ram, in which, the name of deceased Hans Raj is also entered. Thereafter, deceased Hans Raj was supposed to reach at Polling Booth Gawar at Government Middle School Janjahar, District Mandi (Lok Sabha Constituency Mandi, Himachal Pradesh), but he did not reach there. Sector Incharge Jashmer Singh telephonically intimated Dy.S.P. Headquarters qua the absence of deceased from duty. Thereafter, his dead body was found on 20.05.2009 floating in BSL Canal/Reservoir, which was subsequently taken out of the same.

3. Case of the petitioner is that as her husband had died while on election duty, therefore, she is entitled for ex-gratia amount on account of death of her husband in terms of Annexure P-1, which is Communication dated 29th April, 2009, issued by Additional Secretary (Election), Government of Himachal Pradesh.

4. While resisting the claim of the petitioner, the stand taken by the respondent-State is that as deceased Hans Raj was actually deputed for election duty at Polling Booth Gawar at Government Middle School Janjahar and he did not report for duty there, therefore, the case is not covered under Instructions dated 29th April, 2009 and accordingly, the petitioner is not entitled for any relief.

5. During the pendency of this petition, the Election Commission of India was impleaded as a party vide order dated 17.06.2019 and the said respondent was called upon to file its reply/short affidavit. Short affidavit so filed on behalf of the said respondent is on record. The same has been filed on the affidavit of Additional Chief Electoral Officer, Himachal Pradesh.

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

7. It is not in dispute, as I have already mentioned hereinabove also, that deceased Hans Raj was deputed on election duty from Police Station Sundernagar and for the said purpose, he initially reported at Police Station Gohar, which is evident from Annexure P-2. From Police Station Gohar, deceased Hans Raj was supposed to reach at Polling Booth Gawar at Government Middle School Janjahar for the purpose of election duty, however, while on his way, he went missing and his dead body was recovered from BSL Canal/Reservoir at Sundernagar on 20/21 May, 2009.

8. Communication dated 25th April, 2014, which is appended with the short affidavit filed by respondent No. 6, *inter alia*, envisages in Clause-3 therein that payment of ex-gratia compensation to family of polling personnel, who die or sustain injuries while on election duty, will be applicable to all personnel deployed in all types of election duties. The applicable period of election duty would start from the date of announcement of the elections and it would be reasonable to consider a person on election duty as soon as he/she leave his/her residence/office to report for any election related duty including training and until he/she reaches back, his/her residence/office after performance of his/her election duty. If any mishap takes place during this period, it should be treated as having occurred on election duty, subject to condition that there should be a casual connection between occurrence of

death/injury and the election duty. For ready reference, Clause 3(c) of the said communication is quoted hereinbelow:

> *"3 (c) It is clarified that it would be reasonable to consider a person on election duty as soon as he/she leaves his/her residence/office to report for any election related duty including training and until he/she reaches back his/her residence/office after performance of his/her election related duty. If any mishap takes place during this period, it should be treated as having occurred on election duty subject to condition that there should be a casual connection between occurrence of death/injury and the election duty. (As explained in Commission's letter No.218/6/2006/EPS dated 05.11.2008)."*

9. In my considered view, the case of the petitioner is clearly covered under the provisions of Clause-3(c) of communication dated 25th April, 2014, as deceased Hans Raj went missing after he had left his original office, i.e., Police Station Sundernagar while on election duty and when he was on his way to Polling Booth Gawar at Government Middle School Janjahar. In fact, the stand which has been taken by the respondent-State is also that it was while deceased Hans Raj was on his way to the Booth concerned to which he was deputed for the purpose of election duty that he went missing.

10. As Hans Raj had already left his office to report for election duty and he died before he reached the Booth in question, the same has to be treated as an accident, which occurred on election duty in terms of Clause-3(c) of Communication dated 25.04.2014, because as there is no material to the contrary from which it can be inferred that Hans Raj did not die while on election duty.

11. Clause-3(e) of Communication dated 25th April, 2014 categorically lays down that the expenditure on account of payment of ex-gratia compensation to the polling personnel has to be borne by Government of India during election of Lok Sabha. As deceased was deputed on election duty pertaining to Mandi Constituency of Lok Sabha, therefore, the expenditure qua ex-gratia compensation, but natural, has to be borne by the Government of India in terms of Communication dated 25.04.2014 issued by the Election Commission of India.

12. In view of the above observations, this writ petition is allowed by holding that petitioner-Veena Devi is entitled for ex-gratia payment in terms of Annexure P-1, as her husband lost his life while on election duty, with issuance of mandamus to the Government of India (Ministry of Law and Justice, Legislative Department, New Delhi), to pay compensation to the petitioner in terms of Clause-3(e) of Communication dated 25th April, 2014. Government of Himachal Pradesh is initially directed to make payment of ex-gratia compensation to the petitioner and thereafter, it may proceed to recover the said amount from the Government of India under Clause 3(f) of Communication dated 25th April, 2014 (Annexure R6/C). Let the needful be done within a period of two months from today. It is clarified that in case the ex-gratia payment is not made within a period of two months from today, then the amount shall carry interest @ 9% per annum from the date of filing of the writ petition till the date of actual payment.

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

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

Actis Consumer Grooming Products Ltd. ....Petitioner.

Versus

Tigaksha Metallics Private Limited and others

…Respondents.

Arbitration Case No.8 of 2018
Reserved on : December 10, 2019

Arbitration and Conciliation Act, 1996 – Part-I (Act) – Sections 2(2) to 2(5) – Applicability – 'Legal seat of arbitration' vis-a-vis 'venue of arbitration' - Inter se distinction– Held, 'venue of arbitration' is geographically convenient place or places for holding hearings and by having 'venue of arbitration' outside India would not exclude applicability of Act to such proceedings where for convenience 'venue of arbitration' is fixed outside India – Whereas 'location or seat of arbitration' will determine the Courts which will have exclusive jurisdiction to oversee the arbitration proceedings. (Para 21).

Arbitration and Conciliation Act, 1996 (as amended vide Amendment Act, 2015 w.e.f. 23.10.2015) – Section 2(2), proviso – Applicability – 'Legal seat of arbitration' or 'venue of arbitration' outside India – Test for determination – Held, three factors namely (i) law governing the substantive contract, (ii) law governing the agreement to arbitrate and its performance and (iii) law governing the conduct of arbitration shall determine the applicability or inapplicability of Part–I of Act, but even in the such cases provision of Sections 9, 27, 31(1) and 37 (3) of Act will be applicable in view of proviso added to Section 2(2) vide amendment Act of 2015 – Therefore Court has jurisdiction to pass interim directions under Section 9 of the Act. (Para 28 & 32).

Arbitration and Conciliation Act, 1996 –Section 21 **–** Commencement of arbitral proceedings – Held, unless otherwise agreed by parties in respect of particular dispute, commencement of arbitral proceedings will be on date on which request for referring dispute for arbitration is received by the respondent. (Para 34).

Cases referred

Alluminium Company v. Kaiser Alluminium Technical Services Inc., (2016) 4 SCC 126;
Bharat Alluminium Company (BALCO) v. Kaiser Alluminium Technical Services Inc., (2012) 9 SCC 552,
Bhatia International v. Bulk Trading S.A. and Another, (2002) 4 SCC 105

Eitzen Bulk A/S v. Ashapura Minechem Limited and another, (2016) 11 SCC 508;
Imax Corporation v. E-City Entertainment (India) Private Limited, (2017) 5 SCC 331;
Marriott International Inc. and others v. Ansal Hotels Limited and another, AIR 2000
Venture Global Engg. V. Satyam Computer Services Ltd, (2008) 4 SCC

Videocon Industries Limited v. Union of India and another, (2011) 6 SCC 161
Enercon (India) Limited and others v. Enercon GMBH and another, (2014) 5 SCC
Reliance Industries Limited and another v. Union of India, (2014) 7 SCC 603
Harmony Innovation Shipping Limited v. Gupta Coal India Limited and another, (2015) 9 SCC 172,
Kaiser Alluminium Technical Services' case {(2016) 4 SCC 126} supra, applying Bhatia International's case {(2002) 4 SCC 105} supra and referring Bharat Alluminium Co.'s case {(2012) 9 SCC 552} supra,
Union of India v. Reliance Industries Limited and others, (2015) 10 SCC 213, Eitzen Bulk's and Imax Corporation's cases supra.
Union of India v. Hardy Exploration and Production (India) Inc., (2018) 7 SCC 374,

Whether approved for reporting? Yes.

For the Petitioner	:	Mr. Randeep Rai & Mr. T.N. Subhramanian, Senior Advocates, with M/s Anurag Arora, Ashish Kamat, Anoj Menon, Arunshka Shah, Shreevardhini Parchure, Pranay Chitale and Ms Oendri Neogi and Ms Trisha Sarkar, Advocates.
For the Respondent	:	Mr. Virender Ganda, Mr. Jishnu Saha & Mr. Ajay Kumar, Senior Advocates, with M/s Sharan Thakur, Gautam Sood, Ayandeb Mitra, Vipul Ganda, Ishan Saha and Shreya Jain, Advocates, for respondents No.1 to 6. Mr. Bipin C. Negi, Senior Advocate, with Ms Rubina Virmani & Mr. Pranay Pratap Singh, Advocates, for respondents No.7 to 9.

Vivek Singh Thakur, Judge

Instant petition has been filed, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act' for short), against the alleged threatened and apprehended illegal actions by respondents No.1 to 6, in violation of: (a) the Companies Act, 2013; (b) the Articles of Association; and (c) Subscription and Shareholders' Deed dated November 4, 2010 (in short 'SSD')(as amended), executed *inter alia* between the petitioner and respondents NO. 1 to 3 and others, for passing of interim directions, especially keeping in view the proposed invocation of arbitration by petitioner under SSD, seeking restraint orders against respondents No.2 to 6 pending commencement, hearing and final disposal of the proposed arbitral proceedings under the SSD, the passing of the arbitral award therein and for a period of ninety days thereafter.

2. Respondent No.1 Tigaksha Metallics Private Limited (in short 'TMPL')is a company incorporated under the laws of India and engaged in business of manufacturing of packaging of products, on job-work basis.

3. Petitioner is a company registered in Mauritius, a part of Actis Group, a multi-asset emerging market investor, which holds 40.17% of the paid-up equity capital of respondent No.1.

4. Respondent No.3 Super-Max Mauritius (in short 'SMM') is a company incorporated and registered in Mauritius, holding 59.83% of the paid-up equity capital of respondent No.1 and respondent No.2 Rakesh Malhotra (also referred to as 'RM') owns and/or controls respondent No.3.

5. Admittedly, parties are governed by SSD dated November, 4, 2010, wherein amongst other rights, right to nominate Directors on the Board of Directors of each entity, falling within the Group, has been granted and in the SSD and the Articles of Association of respondent No.1, "A" Shareholders means the petitioner and/or its entities; "B" Shareholders means respondent No.3 Super-Max Mauritius, "A" Director means any Director appointed by the ACTIS and "B" Director means any Director appointed by respondent No.2 (RM).

6. Clause 17 of SSD deals with Directors and Shareholders Advisory Board, wherein Clause 17.2 provides for mode and manner of appointment and removal of Directors, whereby respondent No.2 Rakesh Malhotra (RM) on behalf of respondent No.3 (SMM), is entitled to appoint to, and remove from the Board of Directors of TMPL and Board of Directors of any other Group Company (each as SMM Director), and upon removal, to appoint other in their place.

7. Till February, 2018, respondent No.7 Upendra Gupta and respondent No.8 Sanjay Jagtap were Directors of respondent No.1, i.e. "B" Directors of TMPL, appointed by respondent No.3 (SMM) (through Rakesh Malhotra (RM) on behalf of respondent No.3) and respondent No.9 Alan Edward Greenough was Nominee Director of Actis Consumer Grooming Products Ltd., i.e. "A" Director of respondent No.1 TMPL.

8. In February, 2018, respondent No.2 (RM), acting on behalf of respondent No.3 (SMM), had appointed two nominee “B” Directors, namely Rakesh Malhotra (respondent No.2) and Sameer Khan (respondent No.4) and thereafter removed respondent No.7 Upendra Gupta and respondent No.8 Sanjay Jagtap, and appointed two more nominee “B” Directors, namely Subhash Chaudhuri (respondent No.5) and Chanchal Sharma (respondent No.6) in their place and thereafter vide letter dated February 8, 2018, requisition was moved on behalf of respondent No.3 (SMM) for convening Extra Ordinary General Meeting (herein after referred to as EoGM) of respondent No.1 (TMPL) for ratifying the appointment and removal of Directors of respondent No.1 (TMPL) carried on behalf of respondent No.3 (TMM) and also to appoint Executive Chairman of respondent No.1 (TMPL) and to amend Articles of Association of respondent No.1 (TMPL), whereafter a notice dated February 8, 2018 was also issued by newly appointed Director Subahsh Chaudhuri (respondent No.5) for holding an Extra Ordinary General Meeting of Shareholders of respondent No.1 (TMPL), on 23.2.2018, for the above referred purposes.

9. Petitioner, disputing the manner of removal of respondent No.7 and respondent No.8, and appointment of respondents No.4 to 6 as Directors of respondent No.1 and also questioning right of respondent No.2 (RM) to do so without consent of petitioner, in violation of: (a) the Companies Act, 2013; (b) the Articles of Association; and (c) Subscription and Shareholders’ Deed dated November, 4, 2010 (as amended), executed *inter* alia between the petitioner and respondents No.1 to 3; and also proposed invocation of arbitration under SSD and before making request for arbitration in London Court of International Arbitration (“LCIA” in short), petitioner has preferred present petition under Section 9 of Arbitration Act, seeking interim relief.

10. Relevant clauses in SSD, referred on behalf of petitioner, to substantiate its claim, are as under:

<u>Clause 16 – Reserved Matters</u>

16.1 – Each of the Malhotra Parties undertakes for the benefit of ACTIS that he or it will procure that none of the acts specified in Schedule 2 (The Reserved Matters) are carried out by any group company without the prior written consent of ACTIS.

<u>Clause 17.2 – Appointment of Directors</u>

17.2.1 Subject to clause 17.2.5, RM shall, on behalf of SMM, be entitled from time to time to appoint to, and remove from the Board, the board of directors of TMPL and the board of directors of any other Group Company (each a “SMM Director”), four directors, and, upon removal, to appoint other people in their place. One of the SMM Directors on the Board and on th board of directors of TMPL shall be RM. The parties agree that RM shall be the executive Chairman of the Board and the Group (the “Chairman”), provided that in the event that the RM Service Contract is terminated or expires for any reason whatsoever, RM shall only be entitled to be a non-executive chairman of the Board and the Group. The Chairman shall not have a casting or second vote.

17.2.2 Actis shall be entitled from time to time to appoint to, and remove from, the Board, the board of directors of TMPL and the board of directors of any other Group Company, two non-executive directors (each an “Actis Director”) and, upon removal, to appoint other people in their place.

17.2.3 In addition to the SMM Directors and the ACtis Directors (as the case may be), Actis and RM may, by agreement between them, appoint, and remove from, the Board, the board of directors of TMPL and the board of directors of any Group Company, one

independent, non executive director (each an "INED") and, upon removal, appoint another person in his place.

17.2.4 Prior to Completion:

(a) SMM shall notify ……………………
(b) Actis shall notify ……………………

The initial appointments of the Actis Directors and the SMM Directors, shall be made pursuant to this clause 17.2.4 and Schedule 7 and clause 18.9.13, and the initial appointment of the Independent Member and the INED in respect of each of SMOH and TMPL shall be made pursuant to clause 18.9.3, and subsequent appointments and removals shall be made by notice in writing to the relevant Group Company and shall take effect immediately.

17.2.5 The Malhotra Parties agree that RM shall be the only member of the Malhotra family represented on the Advisory Board, the Board or the Board of directors of any other Group Company or any committees thereof for as long as Actis holds shares in SMOH, TMPL or any other Group Company.

Schedule 2 – Reserved Matters (as contemplated under the SSD)

Clause 2 – Memorandum and Articles of Association and Structure:

2.1 The alteration of the memorandum of articles of association of SMOH, TMPL or any other member of the group (or any equivalent document) other than as required by law or regulation.

2.2 The alteration of any member of the group's name and registered office.

Clause 5 – Directors and Senior Management

5.1 The appointment or removal of any member of the advisory board or any director of any member of the group (other than the appointment or removal of any member of the advisory board or a director in accordance with Clause 17) or any variation in the remuneration of other benefits or terms of service of any such person.

5.2 The appointment or removal of the CEO (subject to clause 18.6.1), India CEO, the CFO and the India CFO or any variation in the remuneration or other benefits or terms of service of any such person.

11. Relevant articles of Articles of Association of TMPL, after the execution of SSD, referred on behalf of petitioner, are as under:

VI Reserved Matters – Article 11

The "B" Shareholders shall procure that none of the acts specified in Schedule 1 (the "Reserved Matters") are carried out by the company or any Group Company without the prior written consent of ACTIS.

X Proceedings at General Meetings

Article 20 – Except in case where by any provisions contained in the Act and compulsorily applicable to this company notice for a longer period is required, at least twenty one days specifying the place, day and hour of the general meeting, provided that a general meeting may be convened by shorter notice if consent thereto is given by Shareholders in accordance with the provisions of the Act.

Article 21 – Quorum

(a) No business shall be transacted at any general meeting, unless a quorum of Shareholders is present at the time when the meeting proceeds to business.

(b)

(c) One "A" Shareholder and one "B" Shareholder present in person shall be a quorum.

Article 27 – Appointment of Directors

(a) SMM shall be entitled from time to time to appoint to, and remove from the Board, four Directors (each a "B" Director", and, upon removal, to appoint other people in their place. One of the "B" Directors shall be the executive chairman of the Board (the "Chairman"). The Chairman shall not have a casting or second vote.

(b) Actis shall be entitled from time to time to appoint to, and remove from, the Board two non-executive Directors (each an "A" Director") and, upon removal, to appoint other people in their place.In addition to the "A" Directors and the "B" Directors (as the case may be), Actis and SMM by agreement between them, appoint to, and remove from, the Board one independent, non-executive Director (the "INED") and, upon removal, appoint another person in his place.

(c) The initial appointments of the "A" Directors, and the "B" Directors and the INED shall be made in such manner as may be agreed between the Shareholders and the Company, and subsequent appointments and removals shall be made by notice in writing to the Company and shall take effect immediately.

Article 41 – Proceedings and Quorum (at board meetings)

(a) No business shall be transacted at any meeting of the Board unless a quorum is present at the time when the meeting proceeds to business and remains present during the transaction of such business. The quorum for the transaction of business of the Board shall be three Directors, one of whom must be an "A" Director and one of whom must be a "B" Director, subject in each case to Articles 13, 14 and 41(c). In the event Article 41(c) applies, then the quorum shall be any two Directors who are not prohibited from voting pursuant to Article 41(c), or in the case of any matter referred to in Articles 13 or 14, the quorum shall be any two "A" Directors.**Schedule 1 – Reserved Matters under Articles of Association**

Article 5. Directors and Senior Management

(a) The appointment or removal of any member of the Advisory Board or any director of the Company or any Group Company controlled by the Company (other than the appointment or removal of a member of the Advisory Board or a director in accordance with Article 27) or any variation in the remuneration or other benefits or terms of service of any such person.

(b) The appointment or removal of the India CEO, and the India CFO or any variation in the remuneration or other benefits or terms of service of any such person.

12. Clause 43 of SSD contains provisions relating to Governing Law and Jurisdiction, which reads as under:

"43. GOVERNING LAW AND JURISDICTION

43.1 This Deed and all matters arising from it (including the agreement at clause 43.2 below to refer any dispute under the Deed to arbitration) are governed by English law.

43.2 the parties agree that any dispute arising from or connected with this Deed, including a dispute regarding the existence, validity or termination of this Deed or the consequences of its nullity:

43.2.1 shall be referred to and finally resolved by arbitration under the Arbitration Rules of the LCIA (the "Rules"), which Rules are deemed to be incorporated by reference into this clause;

43.2.2 the tribunal shall consist of three arbitrators;

43.2.3 the claimant(s) (irrespective of number) and the respondent(s) (irrespective of number) shall each appoint one arbitrator and the third arbitrator shall be appointed either by the two arbitrators appointed by the claimant(s) and the respondent(s) or, if those arbitrators cannot agree on the third arbitrator, by the LCIA Court (as defined in the Rules);

43.2.4 the seat of the arbitration shall be Geneva, Switzerland, and the language of the arbitration shall be English.

43.2.5 the parties agree that the arbitral tribunal shall have power to award on a provisional basis any relief that it would have power to grant on a final award; and

43.2.6 without prejudice to the powers of the arbitrator provided by the Rules, statute or otherwise, the arbitrator shall have power at any time, on the basis of written evidence and the submissions of the parties alone, to make an award in favour of the claimant (or the respondent if a counterclaim) in respect of any claims (or counterclaims) to which there is no reasonably arguable defence, either at all or except as to the amount of any damages or other sum to be awarded."

13. From Clause 43 of SSD, three things are very clear:

(i) SSD and matters arising from it, including reference of dispute under the SSD to arbitration, are to be governed by the English Law;

(ii) any dispute arising from or connected with SSD shall be referred to and finally resolved by arbitration under the Arbitration Rules of LCIA and the said Rules have been deemed to be incorporated by reference into Clause 43; and

(iii) seat of arbitration shall be outside India, i.e. Geneva, Switzerland and language of arbitration shall be English.

14. It is contended on behalf of respondents No.1 to 6 that in view of the aforesaid provisions of SSD, relating to Governing Law and Jurisdiction, the Arbitration Agreement, in present case, is not to be governed by Part-I of the Arbitration Act, which deals with cases where place of Arbitration is in India and, therefore, it is argued that present petition, under Section 9 of Arbitration Act, is without jurisdiction. To substantiate this plea, reliance has been placed on the pronouncements of Apex Court in *Alluminium Company v. Kaiser Alluminium Technical Services Inc.,* (2016) 4 SCC 126; *Eitzen Bulk A/S v. Ashapura Minechem Limited and another,* (2016) 11 SCC 508; *Imax Corporation v. E-City Entertainment (India) Private Limited,* (2017) 5 SCC 331; and *Roger Shashoua and others v. Mukesh Sharma and others,* (2017) 14 SCC 722.

15. Undoubtedly, Part-I of the Arbitration Act deals with the cases where place of arbitration is in India. Sections 2(2) to 2(5) of the said Act defines the scope of Part-I, which reads as under:

> "2(2) This Part shall apply where the place of arbitration is in India:
>
> Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.
>
> 2(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.
>
> 2(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.
>
> 2(5) Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

16. Proviso to Section 2(2) of Arbitration Act has been inserted by Act No.3 of 2016, w.e.f. 23.10.2015. Prior to amendment, Section 2(2) was as under:

> "This Part shall apply where the place of Arbitration is in India".

17. In the light of the unamended provisions of Section 2(2) of Arbitration Act, a Division Bench of the Delhi High Court in *Marriott International Inc. and others v. Ansal Hotels Limited and another,* AIR 2000 Delhi 377, had observed that Section 2(5) of Arbitration Act has to be read with Sections 2(2) & 2(4) and the expressions 'every arbitration under any other enactment' in Section 2(4) and 'all arbitrations' in Section 2(5) do not mean that Part-I of the Arbitration Act will apply even to arbitrations taking place outside India. The applicability of Part-I of the Arbitration Act to 'all arbitrations' means that this Part will apply to all such arbitrations being held and not only under an agreement between the parties but also under the provisions of rules and bye-laws of such associations of merchants, stock exchanges, chambers or commerce etc. also to statutory arbitrations but only when the place of arbitrations is in India. The expressions "every arbitration" and "all arbitrations" in sub-sections (4) and (5) of Section 2 cannot be stretched to mean an arbitration being held outside India.

18. A three-Judge Bench of the Apex Court in *Bhatia International v. Bulk Trading S.A. and Another,* (2002) 4 SCC 105, has held that in case of international commercial

arbitrations held out of India, provisions of Part I would apply, unless the parties by agreement, express or implied, exclude all or any of its provisions and in that case, laws and rules chosen by the parties would prevail and any provision in Part I, which is contrary to or excluded by that law or rules will not apply.

19. The Apex Court in *Videocon Industries Limited v. Union of India and another,* (2011) 6 SCC 161, has held that where parties had agreed that arbitration agreement shall be governed by English Law, there it necessarily implies that parties had agreed to exclude the provisions of Part-I of the Arbitration Act and, thus, the Delhi High Court did not have jurisdiction to entertain petitioner under Section 9 of the Arbitration Act arising out of the said agreement.

20. A five-Judge Bench of the Apex Court in *Bharat Alluminium Company (BALCO) v. Kaiser Alluminium Technical Services Inc.,* (2012) 9 SCC 552, considering its earlier pronouncements, including ratio of law laid down in *Bhatia International's* case {(2002) 4 SCC 105} *supra*; and *Venture Global Engg. V. Satyam Computer Services Ltd,* (2008) 4 SCC 190, has held that the provision contained in Section 2(2) of Arbitration Act is not in conflict with any of the provisions, either in Part I or in Part II of said Act and further that in foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision under Part-I, as applicability of Part-I of Arbitration Act is limited to all arbitrations which take place in India and, similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India, and it was concluded that Part-I of Arbitration Act is applicable only to all arbitrations which take place within territory of India.

21. The Apex Court in *Enercon (India) Limited and others v. Enercon GMBH and another,* (2014) 5 SCC 1, has clarified difference between 'legal seat of arbitration' and 'venue of arbitration' and has held that 'venue of arbitration' is 'a geographically convenient place or places' for holding hearings, which is distinct and different from the 'legal seat of arbitration' and by having 'venue' of arbitration outside India would not exclude the Arbitration Act to such arbitration proceedings, where only, for convenience, 'venue of arbitration' has been fixed outside India. Whereas location of 'the seat of arbitration', will determine the Courts which will have exclusive jurisdiction to oversee the arbitration proceedings and further that applying the closest and intimate connection to arbitration test, provisions of law for which the parties had agreed to apply to the arbitration proceedings would be determined. In this case, after applying three tests, i.e. (i) the law governing substantive contract; (ii) the law governing the agreement to arbitrate and performance of that agreement; and (iii) the law governing the conduct of the arbitration are Indian, it was held that parties had chosen London as a 'venue', as a neutral place to hold the meetings of arbitration only and it was not accepted that the London was the 'seat of arbitration' and it was held that curial law of England would become applicable only if there was a clear designation of 'the seat' in London.

22. In *Reliance Industries Limited and another v. Union of India,* (2014) 7 SCC 603, the Apex Court has held that where the parties, by agreement, have provided that the 'juridical seat of arbitration' shall be London, it would be clearly indicating that the parties understood that arbitration law of England would be applicable to the arbitration agreement, as the Arbitration Act does not define or mention 'juridical' seat and the term "juridical seat", on the other hand, is specifically denied in Section 3 of the English Arbitration Act.

23. Not only 'expressed exclusion' but 'implied exclusion' has also been considered sufficient, making Part-I of Arbitration Act applicable, by the Apex Court. In *Harmony Innovation Shipping Limited v. Gupta Coal India Limited and another,* (2015) 9 SCC 172, after considering stipulation in the arbitration clause, therein, it has been stated that for any dispute or difference arising under the Charter, arbitration in London to apply; and that the Arbitrators are to be commercial men, members of the London Arbitration Association; and the contract is to be construed and governed by the English Law; and that for a claim of lesser sum, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association and, therefore, there is no other provision in the agreement that any other law would govern the arbitration clause. The 'presumed intention' of the parties was taken as crystal clear that judicial seat of arbitration would be London and there is implied exclusion of jurisdiction of Courts in India.

24. A three-Judge Bench of the Apex Court in *Kaiser Alluminium Technical Services'* case {(2016) 4 SCC 126} *supra,* applying *Bhatia International's* case {(2002) 4 SCC 105} *supra* and referring *Bharat Alluminium Co.'s* case {(2012) 9 SCC 552} *supra*, and affirming *Union of India v. Reliance Industries Limited and others,* (2015) 10 SCC 213, has held that once it is found that the law governing the arbitration is English Law, Part-I of Arbitration Act stands impliedly excluded. Similar view has been taken by the Apex court in *Eitzen Bulk's* and *Imax Corporation's* cases *supra*.

25. In *Roger Shashoua's* case *supra*, it has been held that although "venue" is not synonymous with "seat", but in an agreement, which provides for arbitration to be conducted in accordance with Rules of ICC in Paris (a supranational body of rules), a provision that "venue of arbitration shall be London, United Kingdom" does amount to designation of 'juridical seat' as the choice of any other country as the 'seat of arbitration' inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations shall apply to the proceedings.

26. Before two-Judge Bench of the Apex Court, in an appeal, in *Union of India v. Hardy Exploration and Production (India) Inc.,* (2018) 7 SCC 374, a question had arisen that when the arbitration agreement specifies the venue for holding the arbitration seat by Arbitrators but does not specify the seat, then on what basis and by which principle the parties have to decide the 'place of seat' which has material bearing for determining the applicability of laws of a particular country for deciding the post-award arbitration proceedings. No doubt, in this case, exercising the power under Order 6 Rule 2 of the Supreme Court Rules, 2013, the matter has been referred for Larger Bench for its hearing, but the Bench has reiterated that the question regarding seat and the venue for holding arbitration proceedings by the Arbitrator, arising under the arbitration agreement/ international commercial arbitration agreement is primarily required to be decided, keeping in view the terms of the arbitration agreement.

27. Mere reference of an issue of judicial verdict to a Large Bench does not affect enforceability, precedent value or sanctity of established ratio of law under reference, unless stayed or restricted by the judicial order. Therefore, ratio of law, being followed consistently by the Apex Court, is not affected by the reference to the Larger Bench, that too, on a limited question, which has no bearing in the present case.

28. In view of the above discussion, it is evident that consistently, it has been held by the Apex Court that three factors, i.e. (i) the law governing the substantive contract; (II) the law governing the agreement to arbitrate and the performance of agreement; and (III) the law governing the conduct of arbitration, shall determine the applicability or inapplicability of Part-I of the Arbitration Act.

29. Exposition of law, as propounded in the aforesaid judgments, is not in dispute. However, after amendment of the Arbitration Act in 2015 by inserting proviso to Section 2(2) of the Arbitration Act, w.e.f. 23.10.2015, wherein it is provided that provisions of these Sections shall also apply to International Commercial Arbitration, even if the place of arbitration is outside India, and an arbitral award, made or to be made in such place, is enforceable and recognized under the provisions of Part-II of the Arbitration Act, an exception has been carved out with reference to applicability of Sections 9, 27, 37(1)(a) and 37(3) of Arbitration Act, contained in Part-I.

30. In present case, in Clause 43.1, it is specifically provided that SSD and all matters arising from it, including the agreement at Clause 43.2 to refer any dispute under the SSD to arbitration are governed by English Law and Clause 43.2.1 provides that dispute between the parties shall be referred to and finally resolved by arbitration under the arbitration Rules of the LCIA with further qualification that the said Rules are deemed to have been incorporated by reference into this clause and further Clause 43.2.4 provides that seat of arbitration shall be Geneva, Switzerland, i.e. out of India. All three aforesaid factors are unambiguously excluding the applicability of Part-I of Arbitration Act with regard to resolution of dispute between the parties herein, rather the parties have categorically agreed to be governed by English Law and Rules of LCIA. Therefore, 'seat of arbitration', referred in Clause 43.2.4 appears to be the 'venue', as a neutral place to hold the meetings of arbitration only. Even such a situation does not make any difference, as there is express agreement for application of English Law and Rules of LCIA.

31. Dispute between parties herein, has arisen in India, the property, with respect to which dispute has arisen, is also situated in India, which shall be subject matter of execution of arbitral award, after passing thereof. Therefore, the award is to be enforced in India. It is neither in dispute between the parties nor has any objection been raised about the enforceability and recognition of the arbitral award, to be passed made in present case, under Part-II, Chapters I & II, of the Arbitration Act, dealing with 'Enforcement of Certain Foreign Awards'.

32. Though as held by the Apex Court, referred supra, Part-I of the Arbitration Act shall have no applicability in present case, but in aforesaid facts and circumstances, for insertion of proviso to Section 2(2), w.e.f. 23.10.2015, Sections 9, 27, 31(1)(a) and 37(3) of the Arbitration Act are applicable in present case. The property, subject matter of the arbitral proceedings is situated within jurisdiction of this High Court. Therefore, this Court has jurisdiction to entertain the present petition, filed under Section 9 of the Arbitration Act.

33. It is also contended on behalf of respondents No.1 to 6 that present petition has lost its relevance and efficacy, after expiry of ninety days from the date of its filing, as before that it was mandatory for the petitioner to initiate arbitration proceedings but it has failed to do so. Petitioner has placed on record request for arbitration, made on behalf of ACTIS in the LCIA, on 19.4.2018, for resolving the dispute between the parties. Present petition has been filed on 10.2.2018 and date '19.4.2018', of making request for arbitration, is within ninety days from that date and receipt of copy of such request is not disputed. Section 9 of Arbitration Act empowers the Court to entertain an application, before or during arbitral proceedings or at any time after the making of arbitral award but before it is enforced, to pass any order as provided in it as an interim measure of protection as may appear to it to be just and convenient and in case of passing of an order for an interim measure of protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

34. In present case, order for interim measure of protection was passed by this Court before commencement of arbitral proceedings. A request has been made for arbitral proceedings on 19.4.2018 and as per Section 21 of the Arbitration Act, commencement of arbitral proceedings, unless otherwise agreed by the parties in respect of particular dispute, will be on the date on which a request for referring the dispute for arbitration is received by the respondent and it is not in dispute that the said request was sent to respondent No.2, through E-mail, well within ninety days from the date of passing of interim order by the Court. Therefore, I find no force in this contention raised on behalf of respondents No.1 to 6.

35. In the petition, various restraint orders have been prayed, raising different issues. However, from the first date of hearing, whence on giving undertaking by learned counsel for respondents No.1 to 6 not to hold EoGM of Shareholders, scheduled for 23.2.2018, it was ordered accordingly by the Court, no other prayer was ever pressed by or on behalf of the petitioner, during pendency of the petition. Therefore, there is no necessity to discuss other issues printed in the petition, except that whether issuance of notice to convene EoGM of shareholders of TMPL on 23.2.2018, given by Subhash Chaudhuri (respondent No.5), was within his competence or not and if it was within his competence, whether the Special Business notified in the said notice was beyond competence of respondents No.1 to 6, especially respondent No.5 Subhash Chaudhuri, being covered under Reserved Matters, wherein there is prohibition to carry out the said business without prior written consent of petitioner.

36. It is undisputed that on the basis of request made on behalf of the petitioner, arbitration proceedings are undergoing and are at last stage before the Arbitral Tribunal and the same are to be governed by LCIA Rules. In the said petition, respondent No.2 Mr. Rakesh Malhotra is respondent No.1 and respondent No.1 TMPL is respondent No.4, and respondent No.3 Super Max Mauritius is respondent No.5, whereas other respondents are not party therein and Mr. Rajinder Kumar Malhotra, Mr. Rajiv Malhotra and ARVEE Family Foundation are respondents No.2, 3 and 6, respectively.

37. Before Arbitral Tribunal, petitioner has claimed various claims and one of those is that Mr. Rakesh Malhotra (respondent No.2), Mr. Rajinder Kumar Malhotra and Mr. Rajiv Kumar Malhotra are in breach of their obligations under SSD, including under Clause 16(1), 22.6.4 and 14.2; and in relation to the Take Over and the Competition against the

Group, TMPL is in breach of Clause 16.2 of the SSD. Other reliefs before Arbitral Tribunal are in respect to insolvency proceedings, prayer for direction to the respondents not to continue to act in breach of SSD, with further prayer for restraint orders on various issues, including to attempt to breach the SSD Reserved Matters and also for damages for losses suffered by the petitioner as a result of respondents' breaches of SSD and/or pursuant to the indemnity Clause 16.4 of the SSD, and the claim therein relevant to present petitioner is only with respect to breach on the part of Mr. Rakesh Malhotra (respondent No.2), regarding his obligations under the SSD, particularly matters pertaining to the Reserved Matters.

38. Article 25.1(iii) of LCIA Rules empowers the Arbitral Tribunal to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award. Before Arbitral Tribunal, there is no specific issue raised with regard to notice issued by respondent No.5 Subhash Chaudhuri to convene EoGM and Special Business proposed to be transacted therein, but it is the issue being pressed in present petition specifically.

39. Issue agitated in present petition is to be decided purely on the basis of provisions of SSD and Articles of Association, with reference to factual matrix placed on record and no law point, propounded by various Courts, including the Apex Court, in pronouncements referred by learned counsel for parties, is required to be considered therein. Therefore, I do not find any logic to refer plethora of case law cited by learned counsel for parties.

40. In the notice dated 8.2.2018 given to convene EoGM, following Special Business has been proposed to be transacted:

Item No.1: Ratification of appointments of Directors Mr. Rakesh Malhotra (respondent No.2) and Mr. Sameer Khan (respondent No.4).

Item No.2: Ratification of removal of Directors Mr. Upendra Gupta (respondent No.7) and Mr. Sanjay Jagtap (respondent No.8).

Item No.3: Ratification of nomination of Directors Mr. Subhash Chaudhuri (respondent No.5) and Mr. Chanchal Sharma (respondent No.6), effective from 6.2.2018.

Item No.4: To appoint Executive Chairman of TMPL.

Item No.5: To amend Articles of Association of TMPL.

41. On perusal of copy of request for arbitration, it is apparent that the issue of appointment of Mr. Rakesh Malhotra, Mr. Sameer Khan, Mr. Subhash Chaudhuri and Mr. Chanchal Sharma (respondents No.2, 4, 5 & 6 herein) and removal of Directors Mr. Upendra Gupta (respondent No.7) and Mr. Sanjay Jagtap (respondent No.8) has not been specifically raised. The issue raised before the Arbitral Tribunal is general in nature that respondents therein are acting in breach of their obligations under SSD, including the Reserved Matters contained in Clauses 16.1 and 16.2, which may also include act of appointment and removal of Directors by respondent No.2 (RM). Ultimately, parties have to abide by the final decision in arbitral proceedings. However, for interim measure, this Court can look into the provisions of SSD and Articles of Association, referred by the parties, quoted supra, for the purpose of determining that as to whether Special Business notified to be transacted in the EoGM, notified to be convened by respondent No.5 Mr. Subhash Chaudhuri, pertains to Reserved Matters or not and whether said Mr. Subhash Chaudhuri was having authority to give notice for the said meeting or not.

42. In Item No.1 of Special Business of EoGM, appointment of Directors namely Mr. Rakesh Malhotra and Mr. Sameer Khan has been proposed to be placed for ratification from 6.2.2018, under Article 27 of Articles of Association. Similarly, in Item No.2, removal of Directors Mr. Upendra Gupta and Mr. Sanjay Jagtap has been proposed to be placed in meeting with Item No.3, wherein ratification of appointment of Directors Mr. Subhash

Chaudhuri and Mr. Chanchal Sharma as Nominee-B Directors, effective from 7.2.2018, under Article 27 of Articles of Association, has been proposed to be transacted.

43. Article 27(a) provided that SMM (respondent No.3) shall be entitled from time to time to appoint to, and remove from the Board, four Directors (each a "B" Director) and, upon removal, to appoint other people in their place and one of "B" Directors shall be Executive Chairman to the Board (B-Chairman).

44. Article 27(d) also provides that such appointment, subsequent to initial appointment, shall be made by notice in writing and shall take effect immediately.

45. In Schedule-1 of Articles of Association, dealing with Reserved Matters, in Clause 5, it is provided that the appointment or removal of any member of Advisory Board or any Director of the Company or any Group Company but controlled by the Company but other than the appointment or removal of member of Advisory Board or a Director in accordance with Article 27, shall be a Reserved Matter and for dealing with Reserved Matters written consent of the petitioner is necessary. As evident from Clause 5 of Reserved Matters (Schedule 1 of Articles of Association), appointment or removal of a Director, in accordance with Article 27, is not a Reserved Matter under Articles of Association.

46. In SSD also, Clause 16 provides that prior written consent of ACTIS is necessary for carrying out business related to Reserved Matters. Clause 17.2 provides method of appointment of Directors. Clause 17.2.1 provides that subject to Clause 17.2.5, respondent No.2 (RM), on behalf of respondent No.3 (SMM), shall be entitled from time to time to appoint to, and remove from, the Board of Directors of TMPL and Board of Directors of any other Group Company (each a SMM Director), four Directors, and, upon removal, to appoint other people in their place and one of the SMM (respondent No.3) Directors on the Board and on the Board of Directors of TMPL shall be RM (respondent No.2). Clause 17.2.5 provides that RM (respondent No.2) shall be the only member of Malhotra family represented in the Advisory Board or the Board of Directors of any other Group Company or any committees thereof for as long as petitioner holds share in SMOH, TMPL or any other Group Company.

47. Schedule-2 of SSD deals with Reserved Matters, wherein in Clause-2, it is provided that 'Memorandum and Articles of Association and Structure' shall be a Reserved Matter. Clause-5 of it deals with 'Directors and Senior Management', wherein under Clause 5.1 it is provided that appointment or removal of any member of the Advisory Board or any Director or any member of the Group Company but other than appointment or removal of a member of the Advisory Board or a Director in accordance with Clause 17, shall be Reserved Matter.

48. In the terms and conditions of SSD also, as evident from the provisions referred supra, it is clear that appointment or removal of a Director in accordance with Clause 17 of SSD is not a Reserved Matter and under Clause 17.2.1, respondent (Rakesh Malhotra), on behalf of respondent No.3 SMM, is entitled to appoint to, and remove from, the Board, Board of Directors of TMPL, four Directors and upon removal to appoint other people in their place and in this clause it has also been agreed that respondent No.2 shall be Executive Chairman of the Board and the Group.

49. As per Clause 17.2.4, like Article 27(d) of Articles of Association, appointment of Director by RM, subsequent to initial appoint, shall be made by written notice and shall take effect immediately.

50. In view of above relevant provisions of SSD and Articles of Association, referred by the parties and discussed supra, appointment and removal of Directors, proposed to be placed in EoGM for transaction in Items No.1,2&3, is not Reserved Matter and such appointment and removal has taken effect immediately on its notice and thus respondents No.2, 4 to 6 have become "B" Directors of respondent No.1 with immediate effect on issue of notice, including Subhash Chaudhuri and Chanchal Sharma, and they are entitled to act as such unless their appointment is declared invalid by competent Court of law, and as per Clause 5.2 of Schedule-2 of SSD, containing Reserved Matters, and Clause 5(b) of Schedule-1 of Articles of Association, containing Reserved Matters, business contained in Item No.4 to appoint Executive Chairman of the Company is a Reserved Matter and, therefore, is a business prohibited to be carried out without written consent of petitioner, as is required to carry on business related to Reserved Matter. Similarly, the business contained in Item No.5, i.e. to amend Articles of Association of Company, as contained in Clause 2 of Schedule-2 to

the SSD and Clause 2 of Schedule-1 of Articles of Association, is also a Reserved Matter and written consent of ACTIS is necessary for dealing with Reserved Matters, and, therefore, amendment in Articles of Association cannot be carried out without written consent of the petitioner.

51. In view of the aforesaid discussion, this petition is disposed of with observation that Special Business notified in Items No.1 to 3 does not fall in the category of Reserved Matters and respondent No.3 was entitled to appoint and remove the Directors, as proposed to be transacted in Item No.1, 2 and 3 without written consent of petitioner, and business to appoint Executive Chairman of the Company can also be placed before house in the EoGM without written consent of the petitioner and Mr. Subhash Chaudhuri being appointed validly by RM (respondent No.2), exercising its power under Clause 17.2.1 of SSD and Clause 27 of Articles of Association, is competent to act as a Director, but definitely subject to mandatory requirements to be complied with in accordance with law, as applicable to the case. However, respondents No.1 to 6 are not entitled for amending the Articles of Association of Company without written consent of the petitioner.

52. During pendency of petition, it has been brought on record that respondents No.7 and 8 have already resigned as Directors of respondent No.1-Company. In fact their resignation, after their removal, may not have any sanctity, as they have lost lien to the Directorship of the Company on the date when they were removed by respondent No.2 (RM) in Feburary, 2018.

53. As noticed supra, under Article 25 of LCIA Rules, LCIA is also empowered to pass any order for interim measure of protection. The parties are at liberty to approach the LCIA for any further interim order.

54. Any observation made with respect to aforesaid subject matter will not have any impact on the arbitration proceedings, pending before the LCIA, and this order is being passed in the light of the material placed before the Court. Ultimately, the parties shall abide by the decision of Arbitral Tribunal.

55. No other point urged.

Petition alongwith pending application(s), if any, stand disposed of in aforesaid terms.

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

Des Raj …Appellant.

Versus

State of Himachal Pradesh ..Respondent.

Cr. Appeal No. 62 of 2017
Reserved on: 03.01.2020
Date of Decision: 04.01.2020

Evidence Act, 1872 –Section 3 – Hostile witness – Appreciation of evidence – Held, deposition of hostile witness is not to be discarded in toto – Part of his evidence found reliable and credible and getting corroboration by other evidence on record can be taken into consideration in favour of either party. (Para 16)

Evidence Act, 1872 – Section 3 – Discrepancies and differences in deposition of witnesses – Appreciation of evidence – Held, on account of long gap between date of occurrence of incident and examination of witnesses during trial discrepancies in deposition of witnesses qua timings of events are bound to happen – Case of prosecution cannot be discarded on this ground alone. (Para 17)

Narcotic Drugs & Psychotropic Substances Act, 1985- Section 50 – Compliance thereof when mandatory – Held, recovery of 'charas' was made from steel container possessed by accused – No personal search was conducted before search of steel container on suspicion of accused having contraband with him – Personal search was conducted after recovery of

contraband from steel container and after making formal arrest of accused in accordance with law – Section 50 of Act, has no applicability in facts and circumstances of case. (Para 27).

Cases referred

Debotosh Pal Choudhury vs. Punjab National Bank, (2002) 8 SCC 68 ,
Hanif Khan @ Annu Khan vs. Central Bureau of Narcotics Through Inspector L..P. Ojha, passed in Criminal Appeal No. 1206 of 2013
Jankinath Sarangi vs. State of Orissa, (1969) 3 SCC 392;
Khekh Ram vs. State of Himachal Pradesh, (2018) 1 SCC 202;
Krishan Chand vs. State of Himachal Pradesh, (2018) 1 SCC 222;
Mohammad Rafik vs. State of H.P., 2014 (3) Him.LR (DB) 1391;
Naresh Kumar alias Nitu vs. State of Himachal Pradesh, (2017) 15 SCC 684;
Rajesh Jagdamba Avasthi vs. State of Goa, (2005) 9 SCC 773;
State of Andhra Pradesh vs. Thakkidiram Reddy, (1998) 6 SCC 554;
State of H.P. vs. Rakesh, 2018 Latest HLJ 2018 (HP) 214,
State of Himachal Pradesh vs. Achhar Singh, 2016 (2) Him. LR (DB) 816;
State of Himachal Pradesh vs. Kamaljeet, 2016(2) Him.L.R (DB) 855;
State of Himachal Pradesh vs. Trilok Chand and another, (2018) 2 SCC 342;
State of Rajasthan vs. Parmanand and another, (2014) 5 SCC 345,
State of U.P. vs. Shatrughan Lal, (1998) 6 SCC 651;
State versus N.S. Gnaneswaran reported in (2013) 3 SCC 594,
Union of India vs. Leen Martin and another, (2018) 4 SCC 490

Whether approved for reporting?[3] *Yes*

For the Appellant: Mr. N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate.

For the Respondent: M/s Kamal Kant and Kamal Kishore Sharma, Deputy Advocate Generals.

Vivek Singh Thakur, J.

This appeal has been preferred by convict Des Raj (hereinafter referred to as the appellant) against judgment dated 23.11.2016, passed by learned Special Judge-II, Chamba, District Chamba, H.P., in Sessions Trial Filing No.12/2013 (Computer Regd. No.55/2013), titled as *State of Himachal Pradesh vs. Des Raj,* in case FIR No. 66/2013 dated 23.03.2013, registered at Police Station Sadar, Chamba, District Chamba, H.P., under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act'), whereby appellant has been convicted under Section 20 of the NDPS Act and sentenced to undergo rigorous imprisonment for six years and to pay fine of `25,000/- and in case of default of payment of fine, to further undergo simple imprisonment for six months.

2. Prosecution case is that on 23.03.2013, PW.12 HC Raghuveer Singh alongwith PW.13 HC Vijay Singh, PW.3 Constable Kuldeep Kumar and HHG Puran Chand (not examined) after entering their departure vide Rapat No.11 (Ex.PW.4/C) had left the Police Post, City, Chamba, for verification on spot with reference to Rapat Nos.21 and 22 dated 22.03.2013 (Ex.PW.4/A & Ex.PW.4/B) entered in Police Post, City, Chamba, related to a quarrel in Mohal Upper Julakhari in Chamba Town and while returning from the spot, at about 3.15 p.m., near rain shelter at Bharmaur Chowk, they found a person, having a carry bag in his hand, coming towards rain shelter, who, on noticing police party, had left Bharmaur road and diverted himself towards Pathankot road, causing the police party to have suspicion. Whereupon, PW.12 HC Raghuveer Singh, had overpowered him with the help of officials accompanying him. The said person, on inquiry, had disclosed his identity. On the

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3 Whether reporters of the local papers may be allowed to see the judgment?

spot, PW.1 Manoj Singh, who was Up-Pradhan of Gram Panchayat Mehla and PW.2 Pappu, servant in a shop, standing outside the shop of Balwant Singh, were associated in search and seizure procedure and in their presence carry bag of appellant was searched, wherein steel container of capacity of 2 kgs was found. On opening the same, it was found that there was layer of Desi Ghee and some portion of polythene bag, kept whereunder, was visible which was taken out wherein black sticks were found and on smelling and on the basis of experience, these sticks were identified as cannabis and thereafter, the same were weighed in the adjacent shop namely 'Suresh Seth General Store' on electronic weighing machine in presence of appellant and the recovered cannabis was found 650 grams. Thereafter, recovered contraband was again kept in the polythene envelopes and was put in the steel container alongwith Desi Ghee and the steel container was put in the carry bag and was sealed in a cloth by putting seal impression 'X' thereon and taken in possession vide memo Ex.PW.1/B. After filling in NCB form, in triplicate, facsimileing seal impression 'X' thereof and taking sample impression of seal 'X' on separate piece of cloth Ex.PW.1/C, Rukka (Ex.PW.3/A) was prepared by PW.12 HC Raghuveer Singh and sent to Police Station, Sadar through PW.3 Constable Kuldeep Kumar alongwith a copy thereof to be deliveed to the Superintendent of Police, Chamba, for information. Seizure memo (Ex.PW.1/B) and sample of seal Ex.PW.1/C were witnessed and signed by PW.1 Manoj Singh, PW.2 Pappu, PW.13 HC Vijay Singh as well as appellant Des Raj.

3. PW.3 Constable Kuldeep Kumar had delivered copy of Rukka in the office of Superintendent of Police, Chamba at 5.15 p.m. and delivered the original Rukka in the Police Station at 5.25 p.m. to PW.7 SI Bishamber Dass, who on the basis of Rukka, had registered FIR (Ex.PW.7/A) and after making endorsement (Ex.PW.7/B) in that respect on the Rukka, sent the case file through PW.3 Constable Kuldeep Kumar to PW.12 I.O./HC Raghuveer Singh, which was handed over to the Investigating Officer at 7.00 p.m.

4. PW.12 HC Raghuveer Singh had prepared site map (Ex.PW.12/A) on the spot and recorded statements of witnesses and arrested the appellant-accused vide memo Ex.PW.12/D with information to brother of appellant. Articles recovered from personal search, after the arrest of appellant, were taken into possession vide memo of Jama Talaashi Ex.PW.12/E. After recording statement of PW.3 Constable Kuldeep Kumar on the spot, on his arrival there, police party headed by PW.12 HC Raghuveer Singh had gone to the Zonal Hospital, Chamba, for medical examination of the appellant and thereafter, they reached Police Station, Sadar, Chamba at about 7.45 p.m. and handed over case property to ASI/SHO PW.7 Bishamber Dass alongwith its documents, after recording the said delivery in Daily Diary Report No.51-A dated 23.03.2013 (Ex.PW.11/C).

5. PW.7 SI Bishamber Dass, after receiving case property alongwith appellant had resealed the parcel of the contraband with seal impression 'T' and had filled in relevant columns in NCB form (Ex.PW.7/C) and after resealing, sample of seal impression 'T' was also drawn on a piece of cloth (Ex.PW.5/A). GDR Report No.52-A dated 23.03.2013 at 8.30 p.m. was recorded and resealing memo (Ex.PW.5/B) was prepared in presence of PW.5 Constable Vikram Singh. Thereafter, PW.7 SI Bishamber Dass had deposited the case property alongwith documents in Malkhana by handing over the same to PW.11 MHC Neeraj Kumar who sent the contraband alongwith documents to State FSL for chemical analysis through PW.10 HHC Ramesh Kumar.

6. After receiving report (Ex.PY) from Chemical Analyst of the contraband from State FSL, wherein it was confirmed that contraband recovered from the appellant is cannabis and sample of charas, on completion of investigation, challan was presented in the Court.

7. On the basis of material on record, learned Special Judge has charged appellant under Section 20 of NDPS Act for having been found in exclusive and conscious possession of 650 grams of charas (cannabis) without any licence or permit. On claiming not guilty, appellant was subjected to trial, wherein prosecution has examined as many as thirteen witnesses to substantiate its case, whereas, after recording statement under Section 313 Cr.P.C., no evidence has been led in defence.

8. Learned counsel for the appellant has contended that there are major discrepancies and contradictions with respect to relevant timings in the statements of

witnesses, which are material in nature and creating doubt about recovery of contraband from appellant as claimed by the prosecution. He has contended that PW.13 HC Vijay Singh has stated that Rukka was sent at about 4.30 p.m., whereas, in Rukka (Ex.PW.3/A), PW.12 HC Raghuveer Singh had mentioned time of its preparation at 5.00 p.m. and according to PW.3 Constable Kuldeep Kumar, he had delivered Rukka in the office of Superintendent of Police, Chamba, at 5.15 p.m., whereas, he had reached Police Station at 5.25 p.m. and that in the FIR (Ex.PW.7/A), time of occurrence has been mentioned from 3.15 p.m. to 5.00 p.m., whereas, in NCB form (Ex.PW.7/C), time of recovery of contraband has been mentioned as 3.45 p.m. Further that according to PW.13 HC Vijay Singh, police party had left Bharmaur Chowk at about 6.15 p.m., whereas, it is claim of PW.3 Constable Kuldeep Kumar that he had reached on the spot alongwith case file at 7.00-8.00 p.m. and according to PW.12 HC Raghuveer Singh, police party remained on the spot from 3.15 p.m to 7.20 p.m. It is also contended that according to PW.4 Constable Bhagat Ram, police party, came back in Police Post City, Chamba at 9.30 p.m., whereas, according to PW.7 SI Bishamber Dass, he had received the parcel at 7.45 p.m. and had deposited it with PW.11 MHC Neeraj Kumar at 8.30 p.m. and it has not been explained that when police party came back at 9.30 p.m. and how and in what manner the case property was handed over to PW.7 SI Bishamber Dass at 7.45 p.m. and deposited in the Malkhana at 8.30 p.m.

9. Learned counsel for the appellant has argued that from personal search memo (Ex.PW.12/E), it is evident that search of the appellant was conducted in this case, but without complying provisions of Section 50 of the NDPS Act and referring ***State of H.P. vs. Rakesh, 2018 Latest HLJ 2018 (HP) 214*** and ***State of Rajasthan vs. Parmanand and another, (2014) 5 SCC 345,*** he has canvassed that on this sole ground appeal deserves to be allowed as there is non-compliance of mandatory provisions of Section 50 of the NDPS Act. It is also contended that not only this, but personal search of police party and witnesses was also not given to the appellant before searching appellant as admitted by PW.12 HC Raghuveer Singh, in his cross-examination.

10. Another point raised on behalf of the appellant is that offices of Superintendent of Police and Additional Superintendent of Police, Chamba, are adjacent to the spot, but none of them was called on the spot, which also creates doubt about veracity of the prosecution case.

11. Referring admission of Investigating Officer PW.12 HC Raghuveer Singh that on the spot, near the rain shelter, there were Rehri of Tilak Raj and Tea Stall of Puran Chand and they were not associated in the investigation, it is contended that it is fatal for the prosecution as they were natural witnesses of the spot and avoidance of their association during investigation, renders prosecution story doubtful. It is further contended that PW.13 HC Vijay Singh, in his statement, has admitted that Jama Talaashi of appellant was conducted after reaching in Police Station and thereafter memo (Ex.PW.12/E) was prepared, whereas, memo (Ex.PW.12/E) has also been witnessed by PW.1 Manoj Singh, who had not come to the Police Station. It is also pointed out that PW.13 HC Vijay Singh, in his statement, has stated that recovery of contraband was sealed with seal of impression 'S', whereas, claim of the prosecution is that it was sealed with seal of impression 'X'. Further that according to PW.13 HC Vijay Singh, police party did not conduct any traffic checking between Bharmaur Chowk and Julakhari, whereas, according to PW.3 Constable Kuldeep Kumar, they had checked the vehicles on the way.

12. Referring statement of PW.13 HC Vijay Singh that contraband was weighed in the nearby shop namely 'Suresh Seth General Store' on electronic scale, it has also been contended that no one from the said shop has been examined and further that according to PW.12 HC Raghuveer Singh, appellant was taken to the hospital for medical examination, whereas, PW.3 Constable Kuldeep Kumar and PW.13 HC Vijay Singh are completely silent in this regard. Again referring statement of PW.13 Vijay Singh, wherein he has stated that except recording statements of witnesses, preparation of spot map, preparation of recovery memo, preparation of arrest memo, no other documents were prepared by the Investigating Officer, it is contended that it indicates that NCB form was not filled in on the spot, which is contrary to the claim of prosecution story and which is another material ground for disbelieving the prosecution case. Lastly, it is contended that independent persons, available

on the spot, have not been joined and those, who have been claimed to be associated and examined as PW.1 Manoj Singh and PW.2 Pappu, have not supported prosecution case and have been declared hostile and there are material contradictions and discrepancies in the statements of official witnesses, therefore, impugned judgment passed by trial Court is liable to be set aside and appellant deserves to be acquitted.

13. To substantiate plea raised on behalf of the appellant, reliance has been placed on ***Rajesh Jagdamba Avasthi vs. State of Goa, (2005) 9 SCC 773; State of Himachal Pradesh vs. Achhar Singh, 2016 (2) Him. LR (DB) 816; Mohammad Rafik vs. State of H.P., 2014 (3) Him.LR (DB) 1391; Naresh Kumar alias Nitu vs. State of Himachal Pradesh, (2017) 15 SCC 684; Khekh Ram vs. State of Himachal Pradesh, (2018) 1 SCC 202; Krishan Chand vs. State of Himachal Pradesh, (2018) 1 SCC 222; State of Himachal Pradesh vs. Kamaljeet, 2016(2) Him.L.R (DB) 855; State of Himachal Pradesh vs. Trilok Chand and another, (2018) 2 SCC 342; and Union of India vs. Leen Martin and another, (2018) 4 SCC 490.***

14. In response to contentions raised on behalf of the appellant, learned Deputy Advocate General, has contended that independent witnesses available on the spot i.e. PW.1 Manoj Singh and PW.2 Pappu were associated and PW.2 Pappu working in 'Suresh Seth General Store', where contraband was weighed, has been cited and examined as a prosecution witness and both of these witnesses, though have been declared hostile for resiling from their earlier statements, have admitted not only their presence, but also presence of police party and appellant on the spot and fact that proceedings carried on by the police on the spot, has also been proved by them. It is further contended that in cross-examination of PW.12 HC Raghuveer Singh recovery of contraband has not been disputed and minor discrepancies and contradictions with respect to timing are not material. Referring pronouncement of the Apex Court in ***Parmanand's case supra,*** it is contended that Section 50 of the NDPS Act is not applicable in the present case, more particularly when no suggestion, about personal search of the appellant at the time of recovery of contraband, has been given to the prosecution witnesses. Lastly, from the sample seal (Ex.PW.1/C) as well as NCB form (Ex.PW.7/C), it is evident that seal of impression 'X' was used by the Investigating Officer and the said fact has also been found mentioned not only in Rukka (Ex.PW.3/A) but also in statements of all relevant witnesses and has also been mentioned in all relevant documents and, therefore, recording of seal impression 'S' instead of 'X' in the statement of PW.13 HC Vijay Singh is irrelevant. Further, referring reasons assigned for conviction of appellant in the impugned judgment, convicting the appellant, the said conviction of appellant has been justified.

15. In rebuttal, reiterating points raised earlier, recent judgment of the Apex Court in *Hanif Khan @ Annu Khan vs. Central Bureau of Narcotics Through Inspector L..P. Ojha, passed* in Criminal Appeal No. 1206 of 2013, decided on 20.08.2019, it is contended that as there is reverse burden of proof, prosecution is to be put to a stricter test for compliance with statutory provisions and if at any stage, accused is able to create a reasonable doubt, as a part of his defence, to rebut the presumption of his guilt, benefit will naturally have to go to him. There is no quarrel about principle propounded in this judgment, however, whether accused has succeeded to create reasonable doubt, as a part of his defence to rebut the presumption of his guilt is to be assessed on the basis of material on record of present case.

16. It is settled principle that deposition of hostile witness is not to be discarded in toto, but part of that evidence, found to be reliable and credible, on corroboration by other evidence on record, can be taken into consideration in favour of either party. Further, evidence of official witnesses, is not to be rejected only for absence of any independent witness or for not supporting prosecution case by independent witnesses and in such eventuality, evidence of official witnesses ought to have been scrutinized with greater care and caution and in case evidence of official witnesses is found to be reliable and credit-worthy, then conviction can be based on the evidence of official witnesses only.

17. Learned counsel for the appellant has pointed out differences/discrepancies with respect to time in the statement of PW.13 Vijay Singh vis-a-vis other witnesses including Investigating Officer PW.12 HC Raghuveer Singh. Alleged recovery of contraband is dated

23.03.2013. Statements of witnesses were started to be recorded in the trial Court w.e.f. 18.02.2015 and eleven prosecution witnesses were examined in February 2015 and PW.12 HC Raghuveer Singh was examined on 01.04.2015, whereas, PW.13 Constable Vijay Singh was examined on 07.01.2016. Considering long gap between date of recovery and examination of PW.13 HC Vijay Singh, in comparison to other prosecution witnesses, discrepancy with respect to time was bound to occur, but difference in timings of events, as pointed out by learned counsel for the appellant, is not leading the Court to discard the version of prosecution witnesses as the time stated by PW.13 HC Vijay Singh is nearer to time as claimed by the prosecution and deposed by other witnesses in Court. In cross-examination to PW.3 Constable Kuldeep Kumar, PW.5 Constable Vikram Singh, PW.7 SI Bishamber Dass, PW.11 HC Neeraj Kumar and PW.12 HC Raghuveer Singh, it has nowhere been suggested that timings of the events claimed by them are incorrect or false. In examination-in-chief and in cross-examination of these witnesses, timings of events, claimed by them are being corroborated by each other.

18. It has also been pointed out on behalf of the appellant that police party, as alleged, arrived on the spot at 3.15 p.m., whereas, in the NCB form (Ex.PW.7/C) recovery of contraband has been shown as 3.45 p.m., whereas, Rukka (Ex.PW.3/A) has been prepared at 5.00 p.m., which indicates that a false case has been foisted upon the appellant. Prosecution case is that police party arrived on the spot at 3.15 p.m. and it has nowhere claimed that contraband was recovered at 3.15 p.m. In fact, appellant was apprehended; independent witnesses were associated; and then contraband was taken into possession vide memo (Ex.PW.1/B) after sealing it in a parcel. Time mentioned in NCB form is not of recovery but of seizure. For completing all these formalities, consumption of half an hour, rather appears to be reasonable and in NCB form (Ex.PW.7/C) time of seizure mentioned as 3.45 p.m. is genuine time. Thereafter, statements of witnesses were recorded on the spot. Spot map (Ex.PW.12/A) was prepared and the appellant was arrested whereupon his Jama Talaashi was taken and arrest memo as well as memo of Jama Talaashi were prepared and for doing all these activities, time taken on the spot by Investigating Officer up till 7.00 p.m., also appears to be reasonable. Departure of PW.3 Constable Kuldeep Kumar from the spot at 5.00 p.m. alongwith Rukka, delivering a copy thereof by him to the Superintendent of Police, Chamba at 5.15 p.m. and his arrival in the Police Station at 5.25 p.m. and departure thereafter at about 6.15 p.m. and arrival on the spot at 7.00 p.m., has not been disputed at any point of time. It is prosecution case that police party had gone to the Police Station first via Government Hospital, after medical checkup of appellant and thereafter had returned to Police Post, City (Chamba) at 9.30 p.m. Therefore, claim of the prosecution that police party had reached in Police Station at 7.45 p.m. and had returned to Police Post City at 9.30 p.m. is not contradictory, as PW.4 Constable Bhagat Ram has deposed about the return of police party at 9.30 p.m. in Police Post City, but not in the Police Station. PW.7 SI Bishamber Dass, PW.5 Constable Vikram Singh and PW.11 HC Neeraj Kumar, have corroborated the timing of arrival of police party in Police Station as stated by PW.12 HC Raghuveer Singh. Therefore, there is no material contradiction or discrepancy with respect to timings of events deposed in evidence of official witnesses.

19. PW.1 Manoj Singh, who is an independent witness, has accepted his arrival at Bharmaur Chowk when police party was there alongwith a person and charas. Though initially he has stated that charas was not recovered in his presence and in cross-examination he has admitted recording of his statement under Section 161 Cr.P.C. but has denied his statement recorded under Section 161 Cr.P.C. reduced into writing in portion B to B of his statement (Ex.PW.1/A) and has denied that he had stated that after alighting from the bus at Bharmaur Chowk at 3.15 p.m. when he was standing on the side of road to cross it, he and Roshan Lal were called by PW.12 HC Raghuveer Singh and a person carrying a bag was apprehended by the police, who, on inquiry, had disclosed his name Des Raj son of Heera alongwith his address and age and Roshan Lal and Vijay Singh had witnessed that on opening of the carry bag, a steel container of capacity of 2 kgs, was found therein and on opening the cover of container, a layer of Desi Ghee, was found therein, but a portion of polythene bag in the Ghee was clearly visible and on taking out the polythene bag from the Ghee, another polythene bag was found therein, from which solid black coloured sticks were recovered. However he has admitted portion of A to A and C to C of his statement, wherein it is stated that on the day of incident, he was going to ICICI Bank for his personal work and further that solid and black coloured substance was found

to be cannabis/charas, which was weighed on electronic weighing machine by the police in the adjacent shop of Suresh Seth in presence of appellant Des Raj with the help of PW.2 Pappu, a servant of Suresh Seth and it was found to be 650 grams and thereafter police had sealed and seized it alongwith Ghee and steel container in the same bag by affixing six seals of impression 'X' on the parcel and thereafter NCB form in triplicate was filled in and sample of seal 'X' was facsimiled thereon and specimen of seal 'X' was also taken on separate piece of cloth and memos were signed by him, Roshan and Vijay as witnesses and appellant Des Raj had also signed thereon, and copy thereof was handed over to Des Raj.

20. It is evident from the deposition of PW.1 Manoj Singh that he had tried to help the accused by resiling from his statement, but by admitting portion A to A and C to C of his statement recorded under Section 161 of Cr.P.C., he has substantiated the prosecution case. Therefore, despite being declared hostile, his deposition is corroborating prosecution case and his claim in examination-in-chief that, he was going on his motorcycle to Mehla in the morning time, then he had seen police officials and a person were found sitting near Barmour Chowk, becomes immaterial with respect to timings stated in his deposition. In his cross-examination, he has also admitted his statement (Ex.PW.1/A) was recorded by police on spot.

21. PW.3 Constable Kuldeep Kumar has stated that vehicles were checked, whereas, PW.11 HC Neeraj Kumar and PW.12 HC Raghuveer Singh have stated that no vehicles were checked on the way. In view of other overwhelming evidence on record substantiating prosecution case, this contradiction is not materially affecting prosecution case.

22. It is true that in deposition of PW.13 HC Vijay Singh in Court, it has been recorded that contraband was seized and sealed with seal 'S'. All other witnesses have deposed that contraband was sealed with seal of impression 'X' and nowhere in their cross-examination, it has been disputed that there was no seal of impression 'X' but 'S'. Contraband was also produced in the Court. At that time also seal impression 'X' was found on the parcel containing it and in sample seal (Ex.PW.1/C) also, impression of seal is 'X'. Therefore, mention of seal 'S' in deposition of PW.13 Vijay Singh is immaterial. Also for the reason that this witness was examined after one year of examination of other witnesses and there is little resemblance in pronunciation of 'X' and 'S' and no dispute about seal impression 'S' at the time of recording evidence of other witnesses and about production of the seal containing contraband has been raised, this discrepancy is also immaterial.

23. Contention of the appellant that no one has been examined from the shop of Suresh, where contraband was weighed, is also incorrect. PW.2 Pappu is a person, who was working with Suresh General Store at relevant point of time, though he has stated that he did not remember the date, but he has deposed that in the year 2013 police had brought a container in his shop for weighing, whereupon, he weighed the cannabis from the container and after weighing it was found to be 650 grams.

24. In examination-in-chief PW.2 Pappu he has denied that accused was also brought in his shop, but in cross-examination, he has admitted that his statement (Ex.PW.2/A) was recorded by the police on spot. He has admitted the suggestion that portion thereof from A to A and C to C is correct, wherein it is recorded that on 23.03.2013, at about 3.20 p.m. he was present in the shop/Store and on asking of the police, he had weighed the stick shaped cannabis/charas on electronic weighing machine in presence of Des Raj, which was found to be 650 grams and after weighing it, such charas was handed over by him to the police. He has not been further cross-examined on behalf of the appellant despite granting opportunity. Therefore, his statement also corroborates prosecution case despite the fact that he had been declared hostile.

25. Discrepancy pointed out on behalf of the appellant that PW.3 Constable Kuldeep Kumar and PW.13 HC Vijay Singh have not stated anything about the visit of police party to the hospital for medical checkup of appellant in contrast to the claim of PW.12 HC Raghuveer Singh and also admission of PW.13 Vijay Singh that except recording of statement of the witnesses, preparation of spot map, preparation of recovery memo and preparation of arrest memo, no other documents were prepared by the Investigating Officer, indicates that NCB form was not filled in on the spot, are also not material as PW.12 HC Raghuveer Singh has categorically stated about the visit to the hospital and also preparation of documents on the spot, which has been

reiterated by him in cross-examination and also for the reason that in his cross-examination, it has been suggested that he has prepared the documents of his own, but it is nowhere suggested that he had not prepared the documents including filling in NCB form on the spot. His deposition about taking the accused to the hospital for medical checkup, has not been disputed in his cross-examination. Facts stated in examination-in-chief, not disputed in cross-examination, are to be considered as admitted. Therefore, aforesaid discrepancies are also immaterial.

26. No doubt that PW.3 Constable Kuldeep Kumar, in his examination-in-chief, is completely silent about time, purpose and the departure of the police party from the Police Post and noticing and apprehending the appellant at Bharmaur Chowk, but he has started his statement by saying that on 23.03.2013 he was present at Bharmaur Chowk alongwith other police officials and at about 5.00 p.m. Investigating Officer handed over him a Rukka (Ex.PW.3/A), which was delivered by him to the Superintendent of Police as well as Police Station, Chamba and thereafter, he had handed over the file to the Investigating Officer on the spot at 7.05 p.m. His such statement might have created doubt about veracity of the statement of other police officials as in examination-in-chief, he is silent about prosecution story as claimed in the prosecution case. But in his cross-examination, in response to the question put to him, he has narrated entire prosecution story in corroboration of other official witnesses including timings of events. It indicates that his silence about prosecution story, in his examination-in-chief, was not for the reason that he was not present on the spot, but for his wisdom, he in examination-in-chief, had deposed precisely about major role performed by him.

27. Undoubtedly, on suspicion of having possession of contraband, before conducting personal search, compliance of Section 50 of the NDPS Act is mandatory, but for evidence on record, in present case, personal search of the appellant at the time of recovery of contraband, has not been conducted. Neither in Rukka (Ex.PW.3/A), memo of search or seizure (Ex.PW.1/B) nor in statements of prosecution witnesses, it has been claimed that after apprehending the appellant and either before or after searching the steel container carried by him in his hand, at any point of time, personal search of the appellant was conducted for suspicion of having contraband. Reference of memo (Ex.PW.12/E), to substantiate plea of appellant that his personal search was conducted without compliance of mandatory provisions of Section 50 of the NDPS Act, is also misconceived, as in this memo of search (Jama Talaashi), it is categorically stated that on that day on 23.03.2013, person of the appellant was searched after arresting him in accordance with law and mobile phone, charger, memo of search and seizure of 650 grams charas and currency notes of `60/- were found during his Jama Talaashi i.e. personal search. Therefore, plea raised on behalf of the appellant in this regard and case law referred on this count are not attracted in present case.

28. PW.12 HC Raghuveer Singh has stated that after sealing the contraband with seal 'X', the same was handed over to PW.13 HC Vijay Singh, who in his examination-in-chief, has categorically stated that seal after use was handed over to him and he had brought the seal in the Court and in cross-examination, nowhere it has been questioned that seal brought by him in Court is not the same, which was handed over to him and/or with which contraband was sealed at the time of seizure and it is also not the case of the appellant, as no such suggestion has been put to the witnesses, that case property was tampered by PW.13 HC Vijay Singh or any other police official with his help. Therefore, on this count also, no ground for interference is made out and the judgments cited on this issue are also not relevant, wherein non-production of seal was considered by the Court fatal to the prosecution case. Otherwise also, non-production of seal may not be fatal in every case and its impact is to be considered in the given facts and circumstances of each and every case and where no prejudice is proved to have been caused for non-production of seal in the Court and there is sufficient evidence on record other than original seal for comparison of seal affixed on the case property, so as to link contraband recovered on the spot with case property produced in the Court, it may not be fatal particularly when there is nothing on record to suggest that non-production of seal(s) has caused prejudice to the appellant. For availability of other sufficient evidence, non-production of original seal, being a technical defect, does not vitiate the trial unless prejudice is caused.

29. Purpose of production of original seal in the Court is to compare it with seal affixed on parcels of contraband and sample in the Court so as to prove that the parcels

produced in the Court are the same which were prepared and sealed on the spot at the time of recovery from the accused and also to ensure that parcel sent for chemical examination and received back were the same which were seized and sealed on the spot. For that purpose, in present case, Investigating Officer had taken the sample of the seal on separate piece of cloth and had obtained signatures of independent witnesses on sample seal and the documents. The Apex Court, referring ***Jankinath Sarangi vs. State of Orissa, (1969) 3 SCC 392; State of U.P. vs. Shatrughan Lal, (1998) 6 SCC 651; State of Andhra Pradesh vs. Thakkidiram Reddy, (1998) 6 SCC 554;*** and ***Debotosh Pal Choudhury vs. Punjab National Bank, (2002) 8 SCC 68*** in case ***State versus N.S. Gnaneswaran reported in (2013) 3 SCC 594,*** propounding the doctrine of prejudice, has held that issue also requires to be examined on the touchstone of doctrine of prejudice and unless in a given situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/enquiry result and in judging a question of prejudice, the court must act with a broad vision and lock to the substance and not to technicalities.

30. Failure to give personal search by the police party/ raiding party to the accused, in given facts and circumstances, may be fatal for prosecution, but in present case, for evidence on record with respect to commission of offence by the appellant, as discussed supra, such failure, in present case, is not fatal to the prosecution.

31. I have gone through case law referred in order to substantiate plea raised on behalf of the appellant. For facts and evidence on record in present case, ratio of these pronouncements is not applicable in present case. Therefore, while agreeing with the principles of law propounded therein, I do not find them of any help to the appellant.

32. As discussed supra, after considering arguments of respective learned counsel for the parties and minutely examining testimonies of witnesses and other documentary evidence on record, I am of the considered view that no case for interference in the impugned judgment is made out. Hence, the appeal, being devoid of merit, is dismissed and disposed of accordingly. Pending application(s), if any, also stand disposed of. Record be sent back forthwith.

BEFORE, HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Prem Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 135 of 2020
Judgment reserved on: January 23, 2020
Date of Decision: February 19, 2020

Code of Criminal Procedure, 1973 – Sections 437(i) and 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985** – Sections 21 & 29 – Regular bail – Disclosure of criminal history of accused in bail application – Requirement of - Held, criminal history of accused is an important factor while deciding bail petition – Data bank of State is not elaborate enough to contain criminal history of every accused– Burden is on accused/petitioner to mention his criminal history- It is obligatory for petitioner to mention about all pending FIRs and criminal trials where sentence provided is seven years or more and he is also to give details of all cases where he was convicted and sentenced to imprisonment for one year or more. (Para 7, 13 & 15).

Code of Criminal Procedure, 1973 – Sections 437 and 439 – Bail petition- Duty of Court and State – Held, in every bail petition filed in State of Himachal Pradesh, the State shall explicitly mention in the status report about criminal history of petitioner – In its absence, it shall be for the Court concerned to take a call if it so desires depending upon facts of each case. (Para 16).

Cases referred;
Chaman Lal v. State of U.P., (2004) 7 SCC 525]

Chandrakeshwar Prasad @ Chandu Babu v. State of Bihar, (2016) 9 SCC 443
E. Barrett Prettyman, a retired Chief Judge of US Court
Neeru Yadav v. State of U.P., (2016) 15 SCC 422,
Prahlad Singh Bhati v. NCT of Delhi, (2001) 4 SCC 280,
Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496;
Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598,
State of Maharashtra v. Pappu @ Suresh Budharmal Kalani, (2014) 11 SCC 244;

Whether approved for reporting?[4] *Yes.*

For the petitioner : Mr. Manoj Pathak, Advocate, for the petitioner.

For the respondent : Mr. Narinder Guleria, Addl. A.G. and Mr. Bhupinder Thakur, Dy.A.G. with Mr. Rajat Chauhan, Law Officer for the respondent/State.

Anoop Chitkara, Vacation Judge.

For possessing 84 grams of heroin, the petitioner, who is under arrest, on being arraigned as an accused in FIR number 93 of 2019, dated Oct 8, 2019, registered under Sections 21 & 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, in the file of Police Station Kumarsain, District Shimla, HP, disclosing non-bailable offences, came up has come up under section 439 CrPC, seeking regular bail.

2. The status report filed. I have seen the status report(s) as well as the police file to the extent it was necessary for deciding the present petition, and the same stands returned to the police official. I have heard Mr. Manoj Pathak, learned counsel for the petitioner and Mr. Narender Guleria, learned Additional Advocate General for the respondent/State.
ANALYSIS AND REASONING:

3. On 20.01.2020, this Court passed the following order:

> "Notice. Mr. Bhupinder Thakur, Deputy Advocate General appears and waives service of notice on behalf of the respondent-State.
> The petitioner has not mentioned about his criminal history. Consequently the petitioner shall file an affidavit of a relative or a friend disclosing the criminal history except petty offences on or before the next date.
> List on 23.1.2020."

4. Despite directions of the Court, the Petitioner did not file the requisite affidavit. The Petitioner also did not seek amendment of the petition by mentioning criminal antecedents.

5. The State has placed on record a status report in this case. As per the status report, following cases are pending against the Petitioner:

i) FIR No. 95 of 2009, dated Jul 4, 2009 under Sections 457, 342, 511 IPC registered at Police Station Banjar, HP.
ii) FIR No. 212 of 2009, dated Nov 19, 2009, under Section 20 of the ND&PS Act, registered at Police Station Sadar Shimla, Distt. Shimla, HP.
Iii) FIR No. 32 of 2010, dated Apr 15, 2010, under sections 341, 342, 354 IPC, registered at Police Station Anni, HP.
iv) FIR No. 181 of 2019, dated Aug 12, 2019, under Sections 21 & 29 of the ND&PS Act, registered at Police Station West Shimla, Distt. Shimla, HP.

6. During arguments, the Counsel for the petitioner did not dispute the factum of the above-mentioned criminal cases.

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[4] **Whether reporters of Local Papers may be allowed to see the judgment?**

7. The burden is on the petitioner to mention his criminal history. The data bank of the State and of the Country is not elaborate enough to contain the criminal history of every accused. Apart from that, there would be some cases where the petitioner might have committed serious offences outside India. As such, the burden is on the petitioner to mention all such facts in the bail petition.

8. Section 106 of the Indian Evidence Act, 1872, mandates that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

9. In Ravinder Singh @ Ravi Pavar v. State of Gujarat, (2013) 12 SCC 446, Supreme Court observed,

> **"24.** In para 5 of the rejoinder affidavit, the State has highlighted that A-2 is a "habitual offender" and there are 22 cases pending against him in various police stations. It is also mentioned in the counter affidavit that during the period while he was granted temporary bail by the High Court, he indulged in an offence of theft and a case was registered against him vide I-C.R. No. 92 of 2011 under Section 379 of IPC by the Vasad Police Station for which he was arrested on 10.08.2011 and later enlarged on bail. It is also brought to our notice that the respondent A-2, while on regular bail, was arrested on 13.09.2012 in Vadodara city in connection with Javaharnagar Police Station crime registered vide I-C.R. No. 94 of 2012 under Sections 407, 408 and 120B and later on he was released on bail.
>
> **25.**Taking note of all these aspects, his antecedents, the gravity and nature of offence, loss of human lives, the impact on the social fabric of the society, his continuous involvement in criminal activities while on bail, we are satisfied that respondent (A-2) does not deserve to continue to remain on bail."

10. In State of Maharashtra v. Pappu @ Suresh Budharmal Kalani, (2014) 11 SCC 244, Supreme Court holds,

> "14. It is not in dispute that in spite of being acquitted in some of the cases, still there are 15 cases in which trial is pending against the respondent, out of which two cases are under Sections 302 read with 120B, IPC. In the present case also, initially along with charges under Sections 302/120B, IPC offences punishable under TADA were also charged against the respondent but later on the TADA charges were withdrawn. Though we are not inclined to go into the matter in detail at present to interfere in the order passed by the High Court, taking into consideration the peculiar facts and circumstances of the case, we are inclined to interfere and cancel the bail granted by the High Court."

11. In Chandrakeshwar Prasad @ Chandu Babu v. State of Bihar, (2016) 9 SCC 443, Supreme Court holds,

> "13. On a careful perusal of the records of the case and considering all the aspects of the matter in question and having regard to the proved charges in the concerned cases, and the charges pending adjudication against the respondent-accused and further balancing the considerations of individual liberty and societal interest as well as the prescriptions and the perception of law regarding bail, it appears to us that the High Court has erred in granting bail to the respondent-accused without taking into consideration the overall facts otherwise having a bearing on the exercise of its discretion on the issue.

> 14. Judged on the entire conspectus of the attendant facts and circumstances and considering the stage of the present case before the trial court where charge-sheet has already been submitted, together with pending proceedings against the respondent-accused as on date, and his recorded antecedents in the various decisions of this Court, we are thus unable to sustain the impugned order of the High Court granting bail to him."

12. In Neeru Yadav v. State of U.P., (2016) 15 SCC 422, Supreme Court, rejected the bail granted by the High Court, by holding as follows,

> "9. On a perusal of the aforesaid list, it is quite vivid that the respondent No. 2 is a history-sheeter and is involved in heinous offences. Having stated the facts and noting the nature of involvement of the accused in the crimes in question, there can be no scintilla of doubt to name him a "history-sheeter". The question, therefore, arises whether in these circumstances, should the High Court have enlarged him on bail on the foundation of parity.
>
> 10. In Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598, it has been clearly laid down that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of crimes warrants more caution as there is a greater chance of rejection of bail though, however, dependent on the factual matrix of the matter. In the said case, reference was made to Prahlad Singh Bhati v. NCT of Delhi, (2001) 4 SCC 280, and thereafter the court proceeded to state the following principles:-
>
>> "(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.
>>
>> (b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.
>>
>> (c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.
>>
>> (d) 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."
>
> 11. It is a well settled principle of law that while dealing with an application for grant of bail, it is the duty of the Court to take into consideration certain factors and they basically are, (i) the nature of accusation and the severity of punishment in cases of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witnesses for apprehension of threat to the complainant, and (iii) Prima facie satisfaction of the court in support of the charge. [See Chaman Lal v. State of U.P., (2004) 7 SCC 525]

12. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, while dealing with the court's role to interfere with the power of the High Court to grant bail to the accused, the Court observed that it is to be seen that the High Court has exercised this discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in catena of judgments on that point. The Court proceeded to enumerate the factors: -

"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 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. We will be failing in our duty if we do not take note of the concept of liberty and its curtailment by law. It is an established fact that a crime though committed against an individual, in all cases it does not retain an individual character. It, on occasions and in certain offences, accentuates and causes harm to the society. The victim may be an individual, but in the ultimate eventuate, it is the society which is the victim. A crime, as is understood, creates a dent in the law and order situation. In a civilised society, a crime disturbs orderliness. It affects the peaceful life of the society. An individual can enjoy his liberty which is definitely of paramount value but he cannot be a law unto himself. He cannot cause harm to others. He cannot be a nuisance to the collective. He cannot be a terror to the society; and that is why Edmund Burke, the great English thinker, almost two centuries and a decade back eloquently spoke thus: -

"Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters [Alfred Howard, The Beauties of Burke (T. Davison, London) 109]."

14. E. Barrett Prettyman, a retired Chief Judge of US Court of Appeals had to state thus: -

"In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when

restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematised restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realisation, of each separate human mind, soul and body; not in mute, motionless meditation but in flashing, thrashing activity [Speech at Law Day Observances (Pentagon, 1962) as quoted in Case and Comment, Mar-Apr 1963.]"

15. This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history-sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner.

16. In this regard, we may profitably reproduce a few significant lines from Benjamin Disraeli :-

"I repeat......... that all power is a trust-that we are accountable for its exercise- that, from the people and for the people, all springs, and all must exist."

17. That apart, it has to be remembered that justice in its conceptual eventuality and connotative expanse engulfs the magnanimity of the sun, the sternness of mountain, the complexity of creation, the simplicity and humility of a saint and the austerity of a Spartan, but it always remains wedded to rule of law absolutely unshaken, unterrified, unperturbed and loyal."

13. **The summary of the above judicial precedents points out that criminal history of the accused is an important factor while deciding bail petitions.**

14. **The relevant provision of the Code of Criminal Procedure, 1973 read as follows:**

437. When bail may be taken in case of non-bailable offence. -(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognisable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognisable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:
Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:
Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.
Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-Section without giving an opportunity of hearing to the Public Prosecutor.

15. Given above, henceforth it is obligatory that in every bail petition, the petitioner must mention about all pending FIRs and pending criminal trials, where the sentence provided is seven years or more. Furthermore, the petitioner must specify details of all cases where he was convicted and sentenced to imprisonment for one year or more.

16. In addition to above, in every bail petition filed in any Court within the jurisdiction of the State of Himachal Pradesh, the State/Respondent(s) shall explicitly mention in the status report about the criminal history. In bail petitions where there is no pleading about the criminal history, then the State/Respondent(s) shall bring it to the notice of the concerned Court about non-mentioning of the criminal history. In such a situation, it shall be for the concerned Court to take a call, if it so desires, depending upon the facts of each case.

17. Ld. Registrar Vigilance of this Court to circulate a soft copy of this order to all Sessions Judges, Additional Sessions Judges, all Chief Judicial Magistrates, Addnl. Chief Judicial Magistrates and all Judicial Magistrates of Himachal Pradesh. Similarly, Ld. Advocate General of the State of H.P. to circulate a soft copy of this order to all District Magistrates, all Police Stations, as well as to CBI, NCB and all concerned. It is further clarified that both the Registrar Vigilance as well as Advocate General shall circulate only soft copy of the judgment and not the printout/hard copy.

18. At this stage, the Registry has placed on record one affidavit filed by the petitioner and the said affidavit was filed on Feb 18, 2020. However this affidavit is inconclusive and it does not disclose all particulars. Therefore, it is not termed as compliance of previous order.

19. Resultantly, due to non-compliance of the directions of this Court, the petition stands dismissed. The dismissal of this bail shall not come in the way of the petitioner for filing subsequent bail petitions, before this Court.

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

Kuldeep Kumar

.........Appellant.

Versus

State of Himachal Pradesh ....Respondent.

Cr. Appeal No. 654 of 2017
Date of Decision: 7.1.2020.

Indian Penal Code, 1860 – Section 376 – Sexual intercourse on promise to marry – When would not amount to rape? – Held, parties belong to tribal area of district Chamba – Custom if any, merely permits man and lady engaged to have physical relations with each other after engagement and before marriage – It is not compulsory to have such relationship before marriage – But accused actually had such relationship with victim is doubtful - In Complaint

made to SDM, Pangi by her father, no allegation of physical relationship between accused and his daughter after their engagement were made – Alleging this fact for first time in FIR, indicates that on refusal of accused to marry prosecutrix and his inability to pay damages of Rs. 5 lakh as demanded by her father, the story of physical relationship between him and prosecutrix was introduced in the case- Enormous unexplained delay in reporting matter with police creates doubt as to its veracity – Appeal allowed – Conviction set aside. (Para 15 to 17).

I**ndian Penal Code, 1860 -** Section 376 – Rape – Consent under misconception of fact – What is? - Held, to establish that the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established; firstly the promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given and; secondly, the false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. (Para 21)

Cases referred:
Deelip Singh @ Dilip Kumar v. State of Bihar, 2005 (1) SCC 88,
Dinesh Jaiswal v. State of MP, (2010) 3 SCC 232,
Jayanti Rani Panda vs. State of West Bengal [1984 Crl.L.J. 1535'
Pramod Suryabhan Pawar v. The State of Maharashtra and Anr passed in Criminal Appeal No. 1165 of 2019
Rai Sandeep @ Deepu v. State (NCT) of Delhi, 2012 (8) SCC 21,
Rajoo v. State of MP, AIR 2009 SC 858
Uday v State of Karnataka(2003) 4 SCC 46;

Whether approved for reporting[5]? Yes.

For the appellant:	Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rakesh Chauhan, Advocate.
For the respondent:	Mr. Sudhir Bhatnagar, Mr. Anil Jaswal and Mr. Arvind Sharma, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for the State.

Sandeep Sharma, J. *(Oral)*

By way of present appeal filed under Section 374 (2) of Cr.PC, challenge has been laid to judgment of conviction dated 12.12.2017, passed by the learned Sessions Judge, Chamba, H.P., in Sessions Trial No. 42 of 2015, whereby court below while holding the appellant-accused (herein after referred to as "the accused") guilty of having committed offence punishable under Section 376 of IPC, convicted and sentenced him to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs. 50,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of three months.

Case of prosecution, as emerges from the record is that on 12.9.2013, the accused got engaged to victim-prosecutrix as per local customs and rites of Pangi, District Chamba, H.P.. As per custom prevalent in the area, boy and girl can have physical relationship with each other after engagement. Subsequent to engagement *inter-se* accused and victim-prosecutrix, allegedly they had repeated sexual intercourse till December, 2013, under the existing customs/rituals prevalent in the area. After the aforesaid alleged incident, accused remained in constant touch with the prosecutrix till March, 2014, whereafter he stopped using his mobile phone. Marriage *inter-se* accused and prosecutrix though was fixed for December, 2014, but since accused did not return back, marriage inter-se prosecutrix and accused could not take place, whereafter father of the prosecutrix reported the matter to SDM Pangi by way of written complaint. In the aforesaid proceedings, father of the accused made a

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Whether reporters of the Local papers are allowed to see the judgment?

statement before the SDM Pangi that accused, who is studying at Chandigarh, would come back to perform the marriage, but fact remains that accused did not return back and accordingly, matter came to be reported to the police by the prosecutrix. SI Kamlesh Kumar, alongwith other police officials, while on patrolling duty at bus stand Killar, Pangi, recorded the statement of victim-prosecutrix under Section 154 Cr.PC and thereafter, sent the same to Police Station Pangi for registration of FIR. After registration of case as referred above, prosecutrix was medically examined at Regional Hospital Chamba by PW12 Dr. Minakshi, who in her report (MLC Ext.PW12/A) though stated that no internal or external injury is/was found on the person of the victim-prosecutrix, but possibility of sexual intercourse cannot be ruled out. Statement of victim-prosecutrix was also recorded under Section 164 Cr.PC in the court of learned JMIC Chamba. Investigating Officer had also obtained certificate from the former Pradhan of Gram Panchayat, Karyas with regard to custom and rites prevalent in Pangi area (Ext.PW4/A).

2. After completion of investigation, challan came to be filed in the court of learned Sessions Judge Chamba, who being satisfied that prima-facie case exists against the accused charged him for having committed offence punishable under Section 376 of IPC, to which he pleaded not guilty and claimed trial. Prosecution with a view to prove its case examined as many as 13 witnesses, whereas accused in his statement recorded under Section 313 Cr.PC., denied the case of the prosecution in *toto* and claimed himself to be innocent. However, learned court below on the basis of evidence led on record by the prosecution held the accused guilty of having committed offence under Section 376 IPC and accordingly convicted and sentenced him as per description given herein above. In the aforesaid background, the petitioner has approached this Court in the instant proceedings.

3. Having heard learned counsel for the parties and perused material available on record, this Court finds that precisely the case of the prosecution is that accused repeatedly sexually assaulted the victim-prosecutrix on the pretext of marriage. Statements having been made by material prosecution witnesses, if read in conjunction juxtaposing each other, clearly reveal that on 12.9.2013 engagement *inter-se* victim-prosecutrix and accused took place at the residence of victim-prosecutrix in Tehsil Pangi, District Chamba, as per local customs and rites of Pangi. All the witnesses including victim prosecutrix have stated that as per prevalent custom in the area, a boy after his engagement with a girl can live with her in her house and can also have sexual relationship before marriage.

4. Prosecutrix (PW1), at whose instance FIR Ext.PW13/A came to be registered deposed that she was engaged to the accused on 12.9.2013 as per customs and rites prevalent in Pangi, whereafter accused had started residing in the house of the prosecutrix. She deposed that accused had developed physical relations with her up to December, 2013, whereafter accused told her that he was going to Kullu. She deposed that she remained in contact with the accused on phone up to March, 2014, whereafter accused stopped talking to her. She deposed that her marriage with accused was fixed for December, 2014, but accused did not return home in the month of December, 2014. Thereafter, father of the victim-prosecutrix reported the matter to SDM Pangi, wherein father of the accused stated that his son is studying at Chandigarh and will come back to perform marriage, but when accused did not return for one month, they reported the matter to the police. In her cross-examination, prosecutrix while stating that she has studied up to +2 level admitted that she understands her good and bad. In her cross-examination, she stated that custom of the area was told to her by her sister. Victim-prosecutrix stated in her cross-examination that physical relationship was made on 17.9.2013 and accused had not stayed continuously in her house from September to December, 2013, but he used to visit her house twice or thrice in a month. She stated that accused had come to her house last time on 27.12.2013. She also admitted that her father had filed application before SDM Killar, Pangi against the accused and his father. she also admitted that her father wrote in the application that accused had solemnized the marriage and spoiled the life of his daughter. She admitted that her father in application Ext.D3 submitted to SDM Killar, Pangi had not mentioned regarding her physical relationship with the accused. She also admitted that all the witnesses are from her village and in relations. This witness admitted that police station is at a distance of 2 km from her house. If the statements having been made by PW2 and PW9 (father and mother of the

victim-prosecutrix, respectively) are read in conjunction, it also suggests that accused after getting engaged to victim-prosecutrix visited the house of the victim-prosecutrix at several occasions and developed physical relations.

5. PW2 in his cross-examination admitted that his daughter developed physical relations with the accused with her consent. He also admitted that his statement Ext.D4 was recorded by SDM. He stated in his cross-examination that it is compulsory to develop the sexual relationship with the accused after the engagement and it is incorrect that his daughter has herself refused to perform marriage with the accused.

6. PW9 (mother of the victim-prosecutrix) admitted in her cross-examination that nobody had told her daughter about the custom and her daughter was herself aware of the same. This witness denied that they have demanded Rs. 5 lac from the family of the accused as "izat" (damages). This witness also denied the suggestion put to her that there is no custom in the area that boy and girl have to develop physical relations prior to marriage and her daughter herself refused to perform marriage in the October, 2014. If the statement of these aforesaid material prosecution witnesses are read in its entirety, it though suggests that as per local customs prevalent in the area, boy and girl can have sexual relationship prior to their marriage, but no positive evidence in the shape of document suggestive of the fact that such custom is prevalent in the area, ever came to be placed on record.

7. PW3 Shivo Devi, Secretary of Mahila Mandal Jhalwas stated that after the engagement, accused used to visit the house of the victim prosecutrix. She stated that accused had not solemnized marriage with the victim-prosecutrix and she does not know when marriage was fixed between victim-prosecutrix and accused as her house is away from the victim. In her cross-examination, she stated that she saw the accused visiting the house of the victim twice. Though she denied suggestion put to her that she does not know whether the accused had developed physical relations with the victim after the engagement or not, but careful perusal of statement made by this witness also nowhere suggests that she was able to prove custom, if any, of having sexual relationship inter-se boy and girl before marriage.

8. PW4 Jugni Chopra, Ex-Pradhan of Gram Panchayat, Karyas, while stating that accused had not solemnized marriage with the victim stated that she had given certificate to the police Ext.PW4/A, which bears her signatures. She deposed that as per custom of the area, boy and girl can develop physical relations with each other after their engagement. She deposed that it is custom in the area that if anybody refuses to marry a girl and girl is defamed, nobody performs marriage with her. Interestingly, this witness in her cross-examination stated that she is totally illiterate and she does not know, who scribed certificate Ext.PW4/A. She admitted that only her signature and stamp has been obtained by the police. She admitted that she cannot read and write what has been written in Ext.PW4/A. This witness admitted in her cross-examination that she has heard about the custom of the area and Secretary, Gram Panchayat had obtained her signatures on the certificate. This witness categorically stated in her cross-examination that her husband had not developed relations with her after her engagement. She admitted that it is correct that it is not compulsory to develop physical relations after the engagement and prior to marriage by all and sundry, rather it depends upon the wishes of the boy and girl, who develop such relations.

9. PW5 Pan Raj, who otherwise appears to be cousin of the accused, while stating that engagement of victim-prosecutrix and accused was solemnized in October, 2014 stated like PW2 and PW9 that accused used to visit the house of the victim-prosecutrix after the engagement and marriage inter-se them was fixed. Most importantly, it has come in the statement of this witness that when marriage inter-se accused and victim-prosecutrix could not take place, family of girl demanded sum of Rs. 5 lac, which could not be paid. It may be noticed here that this witness had got the marriage of proposal settled inter-se prosecutrix and accused. This witness stated that there is custom to meet each other after engagement, but it is not compulsory to develop sexual relations with each other. He stated that if physical relations are made by the accused, then he may have spoiled the life of the victim-prosecutrix. In his cross-examination, he admitted that engagement was solemnized with the consent of both the parties and he does not know that accused had solemnized marriage in the month of October, 2014 at Village Kufa. This witness also admitted that father of the victim had filed an application before Pradhan Killar and SDM Pangi regarding refusal of

accused to solemnize marriage with his daughter and he had demanded damages from the accused. This witness stated that family of the accused was not able to pay rupees five lac as demanded by the victim's family and thereafter, the matter was reported to the police. This witness also stated that victim herself refused to marry with the accused.

10. PW8 Gajinder Singh Ex-BDC Member stated that he had attended the engagement ceremony of the victim-prosecutrix and accused. He deposed that after the engagement, marriage was fixed, but he does not remember the date. He also stated that after the engagement, accused visited the house of the victim 6-7 times and as per custom of the area, a boy and girl can visit the house and develop sexual relations. In his cross-examination, he admitted that accused used to visit the house of the victim at the time of the festivals and he has not studied such custom. He while stating that he had developed physical relations with his wife prior to marriage stated that such type of relations are optional and not compulsory. He also admitted that if both the parties are agreed, only then, physical relations can be developed.

11. Statements having been made by all the aforesaid prosecution witnesses, which are material and relevant for adjudication of the present case at hand nowhere suggests that prosecution was able to prove that there is custom prevalent in the Pangi area that boy and girl after their engagement can live together and have sex. PW2 and PW9 though have corroborated the version put forth by victim-prosecutrix (PW1), but version put forth by them being parents of victim-prosecutrix is required to be taken into consideration with utmost care and caution because there can be an element of bias and interestedness. Other material prosecution witnesses i.e. PW3 to PW5 though talked about prevalent custom in the area as has been taken note herein above, but they have not specifically stated that during this period, accused having taken undue advantage of custom prevalent in the area sexually assaulted/developed physical relations with the victim-prosecutrix, rather they have simply stated that after engagement, they saw accused visiting the house of victim-prosecutrix. Moreover, PW3 and PW4, who have been specifically cited by prosecution to prove the custom, have not stated something specific with regard to custom prevalent in the area. PW3 while stating that she had seen accused visiting the house of the victim admitted that she does not know whether accused had developed physical relations with victim-prosecutrix after the engagement or not. She has nowhere stated that there is a custom prevalent in the area that after engagement boy and girl can have sexual relations with each other. Most interestingly, PW4 Ex-Pradhan of Gram Panchayat Karyas stated that she does not know, who scribed Ext.PW4/A, this witness while admitting that she is totally illiterate stated that her signatures and stamp were obtained by the police. She stated that she cannot read and write what has been written in the Ext.PW4/A and Secretary Gram Panchayat had obtained her signatures on this certificate. This witness unambiguously stated in her cross-examination that her husband had not developed physical relations with her after her engagement and it is not compulsory to develop physical relations after the engagement and prior to marriage by all and sundry, rather it is upon the wish of a boy and girl to develop such relations. Version put forth by the independent witnesses PW3 and PW4, if read in conjunction juxtaposing statements having been made by PW1, PW2 and PW9, it completely belies the version put forth by victim-prosecutrix and her parents PW2 and PW9 that it is compulsory for a boy and girl to develop physical relations after their engagement as per prevalent custom in the Pangi area, rather it depends upon the wish of the boy and girl after their engagement.

12. Similarly, version put forth by PW5 and PW8 nowhere proves the custom of having sexual relationship before marriage. PW5 though has specifically denied the knowledge, if any, with regard to sexual relationship inter-se victim and accused after their engagement, but he has categorically stated that after refusal on the part of the accused to marry victim-prosecutrix, father of the prosecutrix demanded sum of Rs. 5 lac. He has also denied custom with regard to having sexual intercourse prior to marriage and after engagement as per custom prevalent in the area. PW8 though stated that accused used to visit the house of the victim at the time of the festivals, but nowhere categorically stated that after engagement, accused developed physical relationship with the victim-prosecutrix. He in his cross-examination admitted that he has not studied such custom and he had developed

physical relations with his wife prior to his marriage, but such types of relationship are optional and these are not compulsory.

13. Moreover, onus to prove that there was custom prevalent in the Pangi area that after engagement and prior to marriage, boy and girl can have sexual relationship is /was upon prosecution, especially when the case set up by the prosecution is that accused after getting engaged with victim-prosecutrix not only lived in the her house many times, but also developed physical relations with her. In the case at hand, with a view to prove custom, prosecution besides prosecutrix and her parents (PW2 & PW9) also examined so called independent witnesses i.e. PW3, 4, 5 and 8, but as has been discussed herein above, none of the witnesses have stated something specific with regard to custom prevalent in the area, rather they simply stated that as per custom in the area, accused after his engagement started visiting the house of the victim-prosecutrix and during this period, they had developed physical relations. However, this Court is of the view that prosecution with a view to prove custom as pleaded ought to have placed on record cogent and convincing evidence in the shape of some documentary proof because custom as has been pleaded in the case at hand is totally unheard of. Customs prevalent in the various tribal areas of Himachal Pradesh are either recorded in Wazib-Ul-Arj or gazettes, but in the instant case, no effort ever came to be made on behalf of the prosecution to prove custom as has been pleaded by placing reliance upon the aforesaid documents, if any.

14. Having carefully perused evidence available on record, this Court has no hesitation to conclude that court below has erred in concluding that after engagement, accused developed physical relations with victim-prosecutrix in the garb of custom prevalent in the area on the pretext of marriage. Apart from statement of victim-prosecutrix, none of the prosecution witnesses have stated that after engagement, accused developed physical relations with victim-prosecutrix under the pretext of marriage, rather all the material prosecution witnesses except PWs 1 , 2 and 9 stated that they saw accused visiting the house of the victim-prosecutrix after his engagement. As has been already observed herein above, version put forth by PW2 and PW9, parents of victim-prosecutrix needs to be scanned minutely and same could not have been believed mechanically by the court below without there being any corroboration by the another prosecution witnesses. No doubt, version put forth by the interested witnesses cannot be brushed aside solely on the ground of relationship, but version put forth by such witnesses needs evaluation minutely. In the case at hand, it has come specifically in the statement of PW5 Pan Raj, who as per story of prosecution was instrumental in settling the marriage inter-se victim-prosecutrix and accused that after refusal on the part of the accused to solemnize marriage with the victim-prosecutrix, father of the victim-prosecutrix demanded sum of Rs. 5 lac. Since parents of the accused expressed their inability to pay such huge amount, complainant at hand came to be lodged against the accused. Though other witnesses have denied suggestion put to them with regard to payment of money, but version put forth by this witness remained totally un-shattered. Version put forth by this witness gains significance when it stands duly established on record that prior to lodging of FIR in question, father of victim-prosecutrix lodged complaint with SDM Pangi i.e. Ext.D3, wherein he nowhere stated that his daughter has been sexually assaulted by the accused on the pretext of marriage under the garb of custom prevalent in the area. Careful perusal of Ext.D3 reveals that father of the victim-prosecutrix simply complained that since accused had refused to marry his daughter, life of his daughter has been spoiled.

15. Though in the instant case, learned court below while placing reliance upon various judgment rendered by the Hon'ble Apex Court has proceeded to hold that delay in FIR is not fatal, but having carefully perused material available on record, this Court is in agreement with learned counsel for the accused that no plausible explanation ever came to be rendered on record on behalf of the complainant with regard to delay in lodging FIR. No doubt, delay in lodging FIR is explainable and can be condoned if plausible explanation is rendered on record. In the case at hand as per own case of the prosecution, accused stopped talking to victim-prosecutrix after 27.12.2013, but there is no material available on record suggestive of the fact that after aforesaid date, complaint ever came to be lodged either by the complainant or by the victim-prosecutrix. Even if it is presumed that till December 2014, victim-prosecutrix was under impression that accused would marry her, it is not understood

that what prevented the victim-prosecutrix and her parents to lodge FIR immediately after refusal on the part of the accused to marry in December, 2014. In the case at hand, father of the accused instead of lodging FIR chose to file complaint to SDM Pangi Ext.D3, wherein he chose not to disclose factum with regard to physical relationship. if any, developed by the accused with victim-prosecutrix after engagement, which he ultimately withdrew without any rhyme and reason.

16. If the aforesaid act and conduct of father of victim-prosecutrix is seen and examined, it gives strength to the version put forth by PW5 that after refusal on the part of the accused to marry victim-prosecutrix, father of the victim-prosecutrix demanded sum of Rs. 5.00 lac but since family of the accused failed to pay that amount, father of the victim-prosecutrix withdrew the complaint from SDM and thereafter, after a lapse of two months filed FIR against the accused. Needles to say, delay in lodging report raises considerable doubt regarding the veracity of evidence of the prosecution and points towards the infirmity in the evidence render it unsafe to base any conviction. Delay in lodging FIR quite often results in embellishment, which is definitely a creature of afterthought. In the case at hand, this Court after having carefully perused the conduct of father of the accused, which is apparent from the perusal of Ext.D3, is convinced and satisfied that FIR, which is subject matter of the appeal at hand is an afterthought and has been filed/lodged after considerable delay. It is not in dispute that at the time of the alleged incident, victim-prosecutrix was 26 years old and as such, it cannot be said that she was incapable of understanding the consequences of her being in the company of the accused, who allegedly after his engagement with victim-prosecutrix started residing at her house. She has admitted that police station is at the distance of 2 km from her house.

17. Medical evidence adduced on record by the prosecution in the shape of Ext.PW12/A also does not support the case of the prosecution. PW12 Dr. Minakshi while proving a MLC Ext.PW12/A categorically opined/stated that no external or internal injury was found and seen on the person of the victim-prosecutrix. This witness has categorically opined that no blood scratches or injury were present during internal examination, but opined that on separating labia minora-hymen was absent. In her final opinion, this witness deposed that there was nothing to suggest that sexual intercourse had not taken place with victim-prosecutrix. This witness also admitted in her cross-examination that hymen can rupture due to physical exercise like riding, cycling and masturbation etc. Though, aforesaid medical evidence adduced on record nowhere clearly indicates forcible sexual assault/intercourse, if any, committed by the accused upon victim-prosecutrix, but even otherwise same cannot be of any help/relevance to the prosecution case, especially when there is no sufficient evidence to connect the accused with the offence alleged to have been committed by him under Section 376 IPC.

18. Having seen statements of material prosecution witnesses, as have been discussed herein above especially of victim-prosecutrix, it cannot be said that there was no consent, if any, on the part of the victim-prosecutrix to have sexual relationship with the accused, rather question, which needs to be determined is whether victim-prosecutrix had free consent or same was under the pretext of marriage.

19. In the instant case, learned court below has held that consent under misconception of fact by the prosecutrix on the basis of act and conduct of the offender is not a free consent. On the basis of evidence led on record by the prosecution, court below has concluded that prosecutrix submitted herself under mis-conception of fact that she was consenting for physical relations with her would be husband as the accused by getting engaged to her had intended to adopt her as life partner. The accused in the instant case belonged to the same tribal community and as such, he was having the knowledge that the prosecutrix was submitting herself under misconception of fact that he was going to be her life partner and as such, consent given by the prosecutrix was no consent, as was required under Section 375 of Cr.PC. However, this Court having carefully scanned /examined the evidence, which has been discussed in detail in earlier part of the judgment is not in agreement with the aforesaid finding returned by the court below, especially when prosecution has miserably failed to prove custom, if any, prevalent in the area as pleaded in the case at hand. Independent witnesses associated by the prosecution have nowhere stated that custom as has been pleaded in the case at hand is mandatory, rather all the prosecution

witnesses in one way or the other have admitted that it depends upon boy and girl, whether they want to develop physical relations before marriage or not. Crux of the aforesaid finding with regard to consent recorded by the court below is that prosecutrix surrendered herself under misconception of fact that accused would marry her, meaning thereby, accused repeatedly sexually assaulted victim-prosecutrix on the pretext of marriage.

20. Recently, the Hon'ble Apex Court in case titled ***Pramod Suryabhan Pawar v. The State of Maharashtra and Anr*** passed in Criminal Appeal No. 1165 of 2019 on 21.8.2019 had an occasion to deal with almost similar case. While interpreting "consent" of a woman with respect to Section 375 IPC, the Hon'ble Apex Court held that consent of women in relation to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established; firstly the promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given and; secondly, the false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. In the case at hand, though evidence available on record to certain extent suggests that there was promise on behalf of the accused to marry the victim prosecutrix, but admittedly there is no evidence that such promise was false and given in bad faith. There is no evidence suggestive of the fact that accused from the day one after his engagement with prosecutrix had no intention to marry her. All the material prosecution witnesses have stated that after engagement accused started visiting house of the prosecutrix, but none of the witness has stated that accused had no intention to marry victim-prosecutrix. Though in the case at hand, factum with regard to engagement inter-se victim prosecutrix and accused stands proved with the statement of PW5 Pan Raj, who was alleged mediator, but if his deposition is read in its entirety, it nowhere suggests that accused got himself engaged with the victim-prosecutrix with a view to have sexual intercourse with her. True it is that intention of the accused while making promise of marriage to victim-prosecutrix, cannot be easily gathered from the statements of prosecution witnesses, but definitely same can be inferred in the totality of facts and circumstances of the case. Though in case at hand, prosecutrix made an endeavor to prove that accused despite his having engaged with victim-prosecutrix solemnized married with some other girl, but that may not be sufficient to conclude that accused had made false promise to the prosecutrix to marry her and such promise was given with no intention to being adhered to especially at the time when it was given because as per own case of the prosecution, accused solemnized marriage with other girl in October, 2014, whereas engagement inter-se prosecutrix and accused took place in September 2013. Relevant paras of the aforesaid judgment are as under:-

> "15. In Yedla Srinivasa Rao v State of Andhra Pradesh (2006) 11 SCC 615, the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the court observed:
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> > "10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3

> and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent….”

16 Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman’s “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati this Court observed:

> “21. … There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently.
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> …
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> 24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact

> must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her." (Emphasis supplied)

17 In Uday v State of Karnataka(2003) 4 SCC 46 the complainant was a college going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors:

> "25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married..." (Emphasis supplied)

18 To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

21. The Hon'ble Apex Court in ***Deelip Singh @ Dilip Kumar v. State of Bihar, 2005 (1) SCC 88***, held as under:

27.On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, we have the decision of Division Bench of Calcutta High Court in Jayanti Rani Panda vs. State of West Bengal [1984 Crl.L.J. 1535]. The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

"Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is...... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."

The discussion that follows the above passage is important and is extracted hereunder:

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by

misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her." (emphasis supplied)

The learned Judges referred to the decision of Chancery Court in Edgomgtpm vs. Fotz,airoce (1885) 29 Ch.D 459 and observed thus:

"This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: "There must be a misstatement of an existing fact." Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Sec. 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact."

After referring to the case law on the subject, it was observed in Uday, supra at paragraph 21:

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

22. Ordinarily, the evidence of prosecution should not be suspect and should be believed and if the evidence is reliable, no corroboration is necessary, but the Hon'ble Apex Court in case titled ***Rajoo v. State of MP, AIR 2009 SC 858*** has very carefully observed that statement made by the prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court because rape cases cause the greatest distress and humiliation to the victim but at the same time, false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The Hon'ble Supreme Court in the aforesaid judgment has categorically held that accused must also be protected against the possibility of false implication and it must be borne in mind that the broad principle is that an injured witness was present at the time when the

incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

23. The Hon'ble Supreme Court in case titled ***Rai Sandeep @ Deepu v. State (NCT) of Delhi, 2012 (8) SCC 21***, has held that sterling witness should be of a very high quality and caliber, whose version should, therefore, be unassailable. The Hon'ble Apex Court has held that such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end. Relevant paras of the judgment is reproduced herein below:-

> *22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.*
>
> *23. On the anvil of the above principles, when we test the version of PW- 4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence*

took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.

24. The Hon'ble Supreme Court in case titled **Dinesh Jaiswal v. State of MP, (2010) 3 SCC 232,** has held that there cannot be any quarrel with the proposition that evidence of prosecutrix is liable to be believed save in exceptional circumstances, but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence or not. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon , could be regarded as consent for the purpose of Section 375 IPC.

25. If the evidence led on record by the prosecution is tested on the anvil of principle laid down in the aforesaid judgments relied upon in the instant judgment, this Court has no hesitation to conclude that testimony of material prosecution witnesses including prosecutrix is not worth credence and no conviction if any, under Section 376 IPC could have been based upon the same.

26. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this Court has no hesitation to conclude that learned court below has not appreciated the evidence in its right perspective and as such, findings returned by it deserve to be set-aside. Accordingly, present appeal is allowed and judgment passed by the Court below is quashed and set-aside and appellant-accused is acquitted of the offence punishable under Section 376 IPC. Bail bonds, if any, are discharged. Fine amount, if any deposited by the appellant, be refunded to him. Release warrants be prepared forthwith.

Present appeal stands disposed of, so also pending applications, if any.

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

Sudha Gupta …Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr.MMO No. 307 of 2016
Reserved on: 03.01.2020
Date of Decision: 04.01.2020

Code of Criminal Procedure, 1973 – Section 190 – **Prevention of Corruption Act, 1988** – Section 5(1) - Cognizance of offences – Defective or irregular investigation – Effect – Held, defect or illegality in investigation has no direct bearing on the competence or procedure relating to cognizance or trial – Illegality in investigation must be shown to have brought miscarriage of justice which may lead to vitiation of trial. (Para 33).

Code of Criminal Procedure, 1973 – Section 156 – **Delhi Special Police establishment Act, 1996** – Sections 5 & 6- **CBI Manual, 2005** – Clauses 1.10 to 1.15 – **Prevention of Corruption Act, 1988** – Sections 7 & 13 (2) - Whether State police have jurisdiction to investigate cases of corruption committed by Central Government employees within its territorial jurisdiction? – Held, State police and CBI have concurrent and co-extensive power and jurisdiction to investigate matters related to Central Government employees committed in area of the State concerned – Clauses 1.10 and 1.11 of CBI Manual do not exclude jurisdiction of State police. (Para 23).

Cases referred;

Vineet Narain and others vs. Union of India and another, (1998) 1 SCC 26;
A.C. Sharma vs. Delhi Administration, AIR 1973 SC 913;
Ashok Kumar Kirtiwar vs. State of M.P., 2001 Cr. L.J. 2785;
C. Muniappan vs. State of Tamilnadu, (2010) 9 SCC 567
Debotosh Pal Choudhury vs. Punjab National Bank, (2002) 8 SCC 68,
Dr. Somasekhar I. Tolanur vs. The Inspector of Police, CBI Anti Corruption Branch Shastri Bhavan, Chennai, Crl.O.P.12760 of 2014
Gulzari Lal vs. State of Haryana, (2016) 4 SCC 583,
H.N. Rishbud and another vs. State of Delhi, AIR 1955 SC 196,
Jankinath Sarangi vs. State of Orissa, (1969) 3 SCC 392;
Jaswant Singh vs. State of Punjab, AIR 1958 SC 124; 1978 SCC Online Allahabad 238;
Krishnegowda and others vs. State of Karnataka by Arkalgud Police, (2017) 13 SCC 98,
Kumar vs. State represented by Inspector of Police, (2018) 7 SCC 536,
Mansukhlal Vithaldas Chauhan vs. State of Gujarat, (1997) 7 SCC 622;
MCR. Vyas vs. Inspector of Police, 2014 SCC Online Mad 4930;
Naga People's Movement of Human Rights vs. Union of India, (1998) 2 SCC 109; Romesh Lal Jain vs. Naginder Singh Rana and others, (2006) 1 SCC 294.
Paras Yadav vs. State of Bihar, (1999) 2 SCC 126,
Parbhu vs. King Emperor, 1944 SCC Online PC 1: AIR 1944 PC 73, Sachin Kumar Singhraha vs. State of Madhya Pradesh, (2019) 8 SCC 371
Ripun Bora vs. State (Through CBI), 2011 SCC
S. Murali & another vs. State by the Inspector of Police CBI/ACB/ Chennai.
Shashikant vs. Central Bureau of Investigation and others, (2007) 1 SCC 630;
State of Andhra Pradesh vs. Thakkidiram Reddy, (1998) 6 SCC 554;
State of Haryana and others vs. Bhajan Lal and others, 1992(Suppl.) 1 SCC 335,
State of Madhya Pradesh and others vs. Ram Singh, (2000) 5 SCC 88 Arvind Jain vs. State of Madhya Pradesh
State of U.P. vs. Shatrughan Lal, (1998) 6 SCC 651;
State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others, (2010) 3 SCC 571;
State Represented by Inspector of Police, Chennai vs. N.S. Gnasewaran, (2013) 3 SCC 594
Union of India vs. Prakash P. Hinduja and another, AIR 2003 SC 2612
Yogesh Singh vs. Mahabeer Singh and others, (2017) 11 SCC 195,
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Whether approved for reporting?[6] Yes

For the Petitioner: Mr. R.K. Bawa, Senior Advocate, with Mr.Ajay Kumar Sharma, Advocate.

For the Respondents: Mr.Desh Raj Thakur, Additional Advocate General, for the respondent-State.

Vivek Singh Thakur, J.

Petitioner herein is facing trial under the provisions of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'P.C. Act') in case FIR No.2 of 2012 dated 16.02.2012, registered under Sections 7 and 13(2) read with Section 13(i)(d) of P.C. Act in Police Station, State Vigilance and Anti Corruption Bureau, Shimla (hereinafter referred to as 'SV & ACB Shimla') in Sessions Case No.6.R/7 of 2013, titled as *State vs. Sudha Gupta,* wherein charge has been framed against her.

2. By means of present petition, quashing of FIR, sanction granted by the competent authority to prosecute petitioner, charges framed against her and consequential proceedings of criminal trial, has been sought on the ground: (i) that State Police was not having jurisdiction to investigate the matter and presenting challan in the Court against

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6 Whether reporters of the local papers may be allowed to see the judgment?

petitioner for the reason that (i) she is a Central Government employee, serving as a Principal in Kendriya Vidyalaya (KV), ITBP, Sarahan Bushahr, an Organization and instrumentality of the Government of India under the Union Ministry of Human Resource Development; (ii) challan presented against petitioner is a case of no evidence on record and no *prima facie* case exists against her; and (iii) sanction granted to prosecute the petitioner is a result of non-application of mind having been granted in stereotype manner.

3. Mr. R.K. Bawa, learned Senior Counsel, has contended on behalf of the petitioner that petitioner has been framed for demanding bribe from the complainant, who was serving as a contractual teacher of spoken English language in KV, for renewal of her contract in the next academic session, whereas, as notified vide Office Memorandum dated 18.10.2011 (Annexure P-5), in Clause-6, contractual teacher, once engaged in a school, was not entitled for renewal further in the next academic session and, therefore, there was no occasion for the petitioner to raise any demand for an act, which was not permissible at all and, therefore, story of the prosecution case is not sustainable. Further that it is the claim of prosecution that on the basis of information disclosed by complainant on 16.09.2012, it was found that it was a case of urgent nature and for paucity of time, State Police had to act without informing the Central Bureau of Investigation (CBI) despite the fact that CBI only was having jurisdiction to investigate the matter, from letter dated 15.02.2012 sent from the Office of Superintendent of Police, SV & ACB (SIU) Shimla to Sub-Divisional Magistrate (SDM), Rampur for deputing Executive Magistrate and one official to report Deputy Superintendent of Police, SV & ACB at Sarahan and office order dated 15.02.2012 issued by the SDM, Rampur deputing Mukesh Sharma, Tehsildar (Executive Magistrate), Rampur and Vishnu Lal, Field Kanungo, to report to the Deputy Superintendent of Police, SV & ACB, Shimla, at Sarahan on 16.02.2012 at 9.30 a.m. sharp, filed with challan, it is evident that the information was available with the police on 15.02.2012 itself and there was sufficient time to contact the CBI before proceeding further, as it was mandatory to inform and consult the CBI as provided in Central Bureau of Investigation (Crime) Manual 2005 (in short 'CBI Manual'), however no information was given to CBI not only at initial stage, but till completion of investigation and presentation of challan in the Court, which has vitiated the entire inquiry and resultantly vitiating trial.

4. It has also canvassed on behalf of the petitioner that even if it is considered that on 16.02.2012, on account of emergent situation, State Police i.e. Deputy Superintendent of Police, SV & ACB had to proceed further without informing/ consulting the CBI, even then, it was mandatory for him to inform and consult the CBI and to handover the investigation to the CBI in terms of CBI Manual and it is submitted that CBI was not informed purposely as false case has been framed against the petitioner as a pressure tactics forcing her to succumb to the illegal desire of complainant and the State Police has acted without jurisdiction.

5. Referring various pronouncements reported in ***Vineet Narain and others vs. Union of India and another, (1998) 1 SCC 26; Shashikant vs. Central Bureau of Investigation and others, (2007) 1 SCC 630; State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others, (2010) 3 SCC 571; and State Represented by Inspector of Police, Chennai vs. N.S. Gnasewaran, (2013) 3 SCC 594,*** learned Senior Counsel has contended that compliance of CBI Manual is mandatory and deviation therefrom vitiates the trial and warrants quashing of the FIR, charge-sheet and criminal proceedings against petitioner. For establishing mandatory nature of provisions of CBI Manual, learned counsel for the petitioner has also referred pronouncements of various High Courts passed in ***MCR. Vyas vs. Inspector of Police, 2014 SCC Online Mad 4930; Ripun Bora vs. State (Through CBI), 2011 SCC Online Del 5235;*** and judgment of High Court of Judicature at Madras dated 15.05.2017 in ***Crl.O.P. NO.2245 of 2017, titled as S. Murali & another vs. State by the Inspector of Police CBI/ACB/ Chennai.***

6. Referring ***State of Haryana and others vs. Bhajan Lal and others, 1992(Suppl.) 1 SCC 335***,it is also contended that in cases like present one, as per CBI Manual, it was mandatory for the Investigating Agency to hold preliminary inquiry so as to ascertain the veracity of the allegation levelled by the complainant attracting provisions of P.C. Act and as the Investigating Agency has failed to adhere to the said procedure, petition deserves to be allowed on this ground also.

7. It is also propagated on behalf of the petitioner that competent authority has not applied its judicial mind before signing the sanction but has acted in stereotype manner, without going into the genuineness and correctness of the evidence produced by it at the time of granting sanction to prosecute the petitioner in a case under P.C. Act and it has been alleged that the act of granting sanction, in present case, is in conflict with the pronouncements of the Apex Court in cases ***Jaswant Singh vs. State of Punjab, AIR 1958 SC 124; 1978 SCC Online Allahabad 238; Mansukhlal Vithaldas Chauhan vs. State of Gujarat, (1997) 7 SCC 622; Naga People's Movement of Human Rights vs. Union of India, (1998) 2 SCC 109;*** and ***Romesh Lal Jain vs. Naginder Singh Rana and others, (2006) 1 SCC 294.***

8. Referring Clause 1.10 of CBI Manual, dealing with jurisdiction of Delhi Special Police Establishment (in short 'DSPE/CBI) vis-a-vis State Police, it is canvassed that in this Clause there is a complete procedure prescribed with respect to jurisdiction of DSPE/CBI and State Police, wherein it is provided that cases related to Central Government employees or undertakings of Central Government shall be investigated by DSPE/CBI and even in emergent cases, State Police has to take action and after taking necessary actions and carrying out urgent part of investigation, it has to transfer the investigation to CBI compulsorily and as the Apex Court has held the provisions of CBI Manual mandatory for investigation carried out and challan presented in the Court in pursuant thereto, for deviation therefrom, consequentially, criminal trial pending against the petitioner is vitiated and is liable to be quashed.

9. It is argued that Delhi Special Police Establishment Act, 1946 (in short 'DSPE Act') is a special law, whereas, Criminal Procedure Code (in short 'Cr.P.C.') is a general law and the special law will prevail upon the general law and when CBI has been vested with the jurisdiction to investigate the cases in relation to the Central Government employees, State Police has no right and jurisdiction to investigate the matter invoking provisions of Section 156 of Cr.P.C.

10. It is also pointed out on behalf of the petitioner that it is evident from appointment letter dated 09.04.2011 of the complainant (Annexure P-4) that her appointment was valid up to 09.04.2012 only and, therefore, there was no question of assuring her by the petitioner to continue her contract for next academic session for alleged demand raised by the petitioner, as, for Clause-6 of Office Memorandum (Annexure P-5), it was not permissible at all. Lastly, it is contended that the fact that CBI only was having jurisdiction to investigate the case, also stands admitted by the State Police in its endorsement made on complaint (Annexure P-1) filed by Kaushalya, wherein Deputy Superintendent of Police/Investigating Officer has noted that for paucity of time, it was not possible to inform CBI etc. despite the fact that petitioner was an employee of Central Government undertaking.

11. Mr. Desh Raj Thakur, learned Additional Advocate General, opposing the petition vehemently, has submitted that for the evidence on record and also for the reason that on the basis of material placed before him, learned Special Judge has taken cognizance and, thereafter framed charge against petitioner, no *prima facie* case is made out for quashing the FIR and consequential proceedings thereto. Referring provisions of Section 6 of the DSPE Act, Sections 2(b), 2(c) and 17 of P.C. Act and Section 156 of the Cr.P.C., it is contended that the State Police was competent and having jurisdiction to launch investigation against the petitioner and to present challan against her on completion of the said investigation even without informing and consulting the CBI and it is also contended that CBI Manual is mandatory for regulating investigations, but provisions thereof, in conflict with Statute are to be ignored, as, such provisions cannot have overriding effect on the provisions of Statute. It is contended that under Section 156 Cr.P.C. any Officer Incharge of Police Station is empowered to investigate any cognizable case without order of the Magistrate and the offences under P.C. Act are cognizable offences and further that Section 17 of P.C. Act empowers the Deputy Superintendent of Police or Police Officer of equivalent rank in the State to investigate any offence punishable under P.C. Act without order of Magistrate and to make any arrest therefor without a warrant and Section 6 of DSPE Act, does not exclude jurisdiction of State Police in the cases, wherein CBI has authority to investigate, rather Section 6 provides that CBI is not empowered to exercise its power and jurisdiction in any area of a State without consent of the Government of that State which means that State also has power to investigate

all the cases involving the offences under P.C. Act, committed in territory of the State. It is further submitted that at the time of empowering Deputy Superintendent of Police or any other officer under Section 17 of P.C. Act to investigate the matter under the said Act no distinction has been made out between the 'State Government Public Servants' or 'Central Government Public Servants' and their 'public duty' as defined in Section 2(b) and 2(c) of P.C. Act and, therefore, Deputy Superintendent of Police of State Police is definitely having power to investigate the case against Central Government employees under P.C. Act for commission of offence in the State.

12. To substantiate plea on behalf of the State, learned Additional Advocate General, has also referred pronouncement of the Apex Court in ***A.C. Sharma vs. Delhi Administration, AIR 1973 SC 913;*** judgment of Madhya Pradesh High Court in ***Ashok Kumar Kirtiwar vs. State of M.P., 2001 Cr. L.J. 2785; and State of Madhya Pradesh and others vs. Ram Singh, (2000) 5 SCC 88;*** and judgment dated 04.12.2017 in ***Cr.R.No.544 of 2016, titled as Arvind Jain vs. State of Madhya Pradesh.*** It is further canvassed that State Police is empowered to investigate cases of corruption or bribery against Central Government employees and provisions of P.C. Act do not exclude jurisdiction of State Police to investigate offences of corruption or bribery committed by the Central Government employees in the State and CBI Manual or any other instructions/guidelines cannot exclude jurisdiction of State Police conferred upon it by Cr.P.C. and P.C. Act, and DSPE Act does not confer exclusive jurisdiction upon DSPE/CBI to investigate the offence of bribery or corruption committed by the Central Government employees in a State and, therefore, it is contended that present petition is abuse of process and is liable to be dismissed.

13. CBI has been established under DSPE Act. Section 3 of this Act provides that Central Government, by notification in the official Gazette, will specify offences and clauses of offences, to be investigated by DSPE/CBI and Section 5 provides extension of powers and jurisdiction of DSPE/CBI to other areas by order of the Central Government, but subject to, as provided under Section 6, consent of the State Government for exercising power and jurisdiction by DSPE/CBI in the area of that State. Undisputedly, power and jurisdiction of DSPE/CBI has been extended with respct to the cases of bribery and corruption i.e. offence under P.C. Act to the area in Himachal Pradesh. But it does not establish that authorization of DSPE/CBI to exercise powers and jurisdiction, is ouster of power and jurisdiction of State Police.

14. Chapter-IV of the P.C. Act deals with investigation into cases under the Act, wherein Section 17 prescribes the persons authorized to investigate, which empowers a Deputy Superintendent of Police or a Police Officer of equivalent rank of the State Police to investigate any offence punishable under this Act without order of a Metropolitan Magistrate or Magistrate of First Class, as the case may be or to make any arrest therefor without a warrant with further qualification that even a Police Officer not below the rank of an Inspector of Police can be authorized by the State Government in this behalf by general or special order to investigate any offence without order of a Metropolitan Magistrate or a Magistrate of the First Class, as the case may be or to make arrest therefor without a warrant, with further rider that an offence referred under Section 13(1)(e) of P.C. Act shall not be investigated without order of the Police Officer not below the rank of Superintendent of Police. This Act does not classify the offenders as 'Central Government employee' and 'State Government employee', but prescribes different rank of officers of various agencies, including CBI and State Police, empowered to investigate the matter under P.C. Act. Providing agency to investigate offences of corruption committed by the Central Government employee, or by an employee of institution of Central Government by establishing Special Police Force/CBI, does not confer exclusive jurisdiction upon such agency to exclusion of State Police, which has been conferred power and jurisdiction to investigate any cognizable case under Section 156 Cr.P.C. In none of the provisions either of DSPE Act or P.C. Act, power under Section 156 Cr.P.C. has been circumvented expressly or impliedly, therefore, State Police as well as CBI are having concurrent power and jurisdiction to investigate such cases.

15. In order to avoid any conflict and duplication of efforts, keeping in view concurrent or coextensive powers of DSPE/CBI and State Police, an administrative arrangement arrived at by CBI with the State Police Forces has been incorporated in Clause 1.10 to 1.15 of Chapter-I of CBI Manual, wherein it is provided that cases, substantially or

essentially against Central Government employees or concerning affairs of Central Government, shall be investigated by DPSE/CBI irrespective of the fact that certain employees of the State Government may also be involved therein and in such eventuality, State Police or State Anti Corruption Bureau/Vigilance set-up of the State, on information of such cases, will render necessary assistance to the CBI during investigation and prosecution therein; and cases which are essentially or substantially against the State Government employees or are in respect of the matter of the State Government, shall be investigated by the State Police irrespective of the involvement of certain Central Government employees therein as co-accused and in such cases DSPE/CBI, on information, will assist the State Police or State Anti Corruption / Vigilance set-up, if necessary, in completing investigation.

16. In Clause 1.10.3 of CBI Manual, CBI has also been authorized to investigate certain categories of cases involving Central Government employees which are of special categories as provided in sub-clauses (i) to (iv), but present case does not fall in such category.

17. Petitioner is placing reliance upon provisions contained in Clause 1.10.1 for exclusion of power and jurisdiction of the State Police to investigate in present case. However, petitioner has lost sight of the provisions of Clause 1.10.4 which provide that arrangement contained in previous clauses is the general arrangement and it may not be possible for CBI to take up all cases falling under aforesaid categories because of limited resources and for need to concentrate on cases having interstate or international ramifications and also those involving bribery and corruption and, therefore, it is a matter of discretion, whether the State Police or CBI should investigate a particular offence, even though, it may have been notified under Section 3 of DSPE Act and ordinary cases of theft, misappropriation, cheating etc. even if committed by Central Government employees are, therefore, to be dealt with by the State Police.

18. Clause 1.11 of CBI Manual provides that it has also been agreed that the State Police or Anti-Corruption/Vigilance set-up may take immediate action in respect of the Central Government employees in certain circumstances described in this Clause in sub-clauses (a) to (d), wherein it is provided that where there is complaint of demand of bribe by Central Government employee and trap has to be laid to catch such employee red-handed and there is no time to contact Superintendent of Police concerned of the CBI, the trap may be laid by the State Police/Anti-Corruption or Vigilance set-up and thereafter CBI should be informed immediately and it should be decided in consultation with CBI whether further investigation should be carried out and completed by the State Police or by the CBI. It is also provided in Clause (b) that where there is likelihood of destruction or suppression of evidence, if immediate action is not taken, the State Police/Anti-Corruption or Vigilance set-up may take necessary steps to register the case, secure the evidence and, thereafter, handover the case to the CBI for further investigation. Clause (c) provides that information about cases involving Central Government employees, which are being investigated by the State Police/Anti-Corruption or Vigilance set-up should be sent by them to the local CBI Branch, Headquarter of the Department and/or the office concerned as early as possible, but in any event, before a charge-sheet or final report is submitted. Clause (d) provides that in cases against Central Government employees which are investigated by the State Police/Anti-Corruption or Vigilance set-up, wherever sanction is necessary for prosecution from a Competent Authority of a Central Government Department, shall be referred to the Competent Authority directly under intimation to the CVC. It is evident from perusal of CBI Manual that CBI and State Police/Anti-Corruption or Vigilance set-up supplement and coordinate each other's work in certain spheres. Concurrent or coextensive power of State Police and DSPE/CBI has been recognized in CBI Manual and the arrangements made therein with the State Police are for avoiding conflict and duplication of efforts but definitely not for ousting the jurisdiction of State Police in cases required to be investigated by DSPE/CBI related to Central Government employees, but committed in the territory of the State.

19. There is no dispute that the Apex Court in its pronouncement in ***Vineet Narain's case***, has observed and directed that CBI Manual, based on statutory provisions of Cr.P.C., provides essential guidelines for the CBI's functioning and it is imperative for the CBI to scrupulously adhere to the provisions in the Manual in relation to its investigative functions like raids, seizure and arrests, and any deviation from the established procedure

should be viewed seriously and severe disciplinary action be taken against the officials concerned. Thus, observations and directions shall be relevant in a case being investigated by CBI. The pronouncement of the Apex Court nowhere suggests that for provisions of CBI Manual, jurisdiction of State Police to investigate matters involving Central Government employee, under P.C. Act, has been ousted or barred or provision of CBI Manual excludes or bars jurisdiction of State Police in such matters. Rather, even CBI Manual, itself provides that arrangement contained in Clause 1.10 is general arrangement and the State Police as a matter of discretion in given facts and circumstances of the case may investigate particular offence irrespective of its notification under Section 3 of DSPE Act.

20. Similary, Apex Court in its judgment rendered in ***Shashikant's case***, in paras 8 and 9, relied upon by the petitioner and also in its pronouncement in case of ***Committee for Protection of Democratic Rights,*** in para 33, referred by the petitioner, has reiterated that jurisdiction of CBI to investigate an offence is to be determined with reference to the notification issued under Section 3 of the DSPE Act and not by any separate order not having that character and that in CBI Manual Central Government has laid down procedure for conducting investigation including mode and manner in which preliminary inquiry should be conducted, which has approval of the Apex Court in ***Vineet Narain's case.*** Referring ***Vineeet Narain's case*** supra, similar observations have been made by the Apex Court in ***N.S. Gnasewaran's case***, which has also been relied by the petitioner in his favour.

21. I also find support from the pronouncement of the Apex Court in ***A.C. Sharma's case,*** wherein it is observed that Section 5-A of DSPE Act and Section 17 of P.C. Act, 1988, do not confer power to investigate into the offences mentioned therein solely on DSPE/CBI, to the complete exclusion of regular Police Force.

22. The judgments referred by the petitioner in ***MCR. Vyas's case, Ripun Bora's case, S. Murali's case*** and ***Dr. Somasekhar I. Tolanur vs. The Inspector of Police, CBI Anti Corruption Branch Shastri Bhavan, Chennai, Crl.O.P.12760 of 2014,*** deal with cases, wherein there was violation by the CBI of the procedure prescribed in CBI Manual during the investigation of a case and there is no quarrel on the proposition that during investigation by CBI, it is mandatory for CBI to follow the CBI Manual. The issue in question, in present case, is not that whether CBI was having power and jurisdiction to investigate or not, or whether the CBI has violated procedure prescribed under CBI Manual or not, but issue is as to whether the State Police was empowered and having jurisdiction to investigate it or not. Therefore, judgments referred, irrespective of undisputed ratio of law laid down therein, are not applicable in present case.

23. Undoubtedly, verdict of the Apex Court that provisions of CBI Manual are mandatory to be followed in case of investigation, even if it is considered that each and every part of CBI Manual is mandatory, then also as discussed supra Clauses 1.10 and 1.11 provide not only scope for State Police, but also recognize the concurrent or coextensive power and jurisdiction of State Police Force and CBI to investigate the matters related to Central Government employees committed in area of the State concerned.

24. For assailing the sanction for prosecution against petitioner, reliance has been placed on ***Jaswant Singh's case,*** wherein it is held that it should be clear from the form of sanction that the sanctioning authority has considered evidence before it and after a consideration of all the circumstances of the case, has sanctioned prosecution and, therefore, unless matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority has applied its mind to the facts and circumstances of the case and only a valid sanction gives the Court jurisdiction to try the charge and without such sanction the prosecution would be nullity and trial without jurisdiction.

25. In judgment of the Apex Court, referred on behalf of the petitioner, in ***Mansukhlal Vithaldas Chauhan's case*** referring ***Jaswant Singh's case,*** the Apex Court has held that validity of the sanction would depend upon material placed before sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority and consideration implies application of mind and the order of sanction must *ex facie* disclose that sanctioning authority has considered evidence and other material placed before it and this fact can also be established by extrinsic evidence by placing relevant facts considered by the sanctioning authority, which necessarily follows that the

sanctioning authority has to apply its own independent mind for generation of genuine satisfaction as to whether prosecution has to be sanctioned or not and the mind of the sanctioning authority should be free from any kind of pressure external force enabling the sanctioning authority to exercise its discretion having not been affected by any extraneous consideration.

26. Referring judgment of the Apex Court in ***Naga People's Movement of Human Rights's Case***, it is canvassed that there must be reasoning in an order to sanction the prosecution.

27. Pronouncement of the Apex Court in ***Romesh Lal Jain's case,*** has also been referred to reiterate that it is beyond any cavil of doubt that an order granting or refusing sanction must be preceded by application of mind on the part of the appropriate authority and if complainant or accused can demonstrate such an order, granting or refusing sanction, to be suffering from non-application of mind, the same may be called in question before a competent Court of law.

28. Relying upon aforesaid judgment, it is contended that sanction granted in the present case vide order dated 15.01.2013 (Annexure P-6) to prosecute the petitioner is not a valid sanction order, as after reproducing the case of prosecution, sanction has been accorded under Section 19 of PC. Act for prosecution of the petitioner without reflection of application of mind on the part of the competent authority.

29. On perusal of sanction order (Annexure P-6), it is evidently clear that competent authority has not only reproduced the prosecution case but in second last para has categorically stated that after careful examination of materials placed before it such as pre-trap and post-trap memos etc., including the investigation report, pertaining to the said allegations provided to it by Superintendent of Police, SV & ACB (SIU) Shimla and having applied mind to the facts and circumstances of the case and evidence on record, it considered that there is sufficient oral and documentary evidence to prove the allegation of demand and acceptance of bribe and motive behind the demand of bribe from the complainant by the petitioner and thereupon it is observed that petitioner may be prosecuted in a Court of law under Sections 7 and 13(1)(d) read with Section 13(2) of P.C. Act to prosecute the petitioner. Sanction order is not in the form of performa or in printed form, but it is on the Letter Head of Kendriya Vidyalaya Sanghthan, which contains the details of the relevant facts, material and evidence collected by the prosecution and consideration thereof by the sanctioning authority which implies application of mind. As observed supra, this order of sanction *ex facie* discloses that sanctioning authority has considered the evidence and other material collected during investigation and placed before it. The sanctioning authority has not only stated that it has gone through the relevant record and evidence, but has also reproduced the same in the sanction order. Therefore, I find no force in the contention raised on behalf of the petitioner that sanction order has been issued without application of mind.

30. In present case, petitioner has been caught red-handed by laying trap and in such a case, it is not possible to conduct preliminary inquiry after registration of the case and, rather conducting preliminary inquiry may lead to wiping out evidence. In case of ***Bhajan Lal***, it was observed that mere possession of any pecuniary resources or property is by itself not an offence, but it is the failure to satisfactorily account for such possession of pecuniary resources or property that makes possession objectionable and constitutes the offence and, therefore, it was observed that the police officer with whom investigation of such case is entrusted should not proceed with preconceived idea of guilt of that person indicted with such offence and subject him to any harassment and victimisation, because in case the allegations of illegal accumulation of wealth are found during the course of investigation as baseless, the harm done not only to that person but also to the office he held will be incalculable and inestimable.

31. Plea of the petitioner raised on the basis of pronouncement of the Apex Court in ***Bhajan Lal's case***, that before registering an offence and making full scale investigation into it, keeping in view the status of the petitioner, police officer should have conducted preliminary inquiry, is also not sustainable in the facts and circumstances of the present case and provisions of law on the basis of which the issue has been discussed and decided in ***Bhajan Lal's case.***

32. In present case, complainant has informed about demand of bribe by the petitioner of a particular date and time on which date trap was laid and petitioner was caught and, thereafter only, it was found that petitioner was involved in commission of the alleged offence and from that stage, in my considered opinion, it would be impractical to revert back to the preliminary inquiry. Therefore, in present case, there was no occasion for the police officer to conduct preliminary inquiry before proceeding further. Even if it is considered that during investigation in present case, some irregularity or illegality has been committed by the Investigating Officer, then also, it has been held by the Apex Court in ***A.C. Sharma's case,*** such irregularity or illegality in the course of collection of evidence, can scarcely be considered by itself to affect the legality of the trial, by an otherwise competent Court, of the offence so investigated as the function of investigation is merely to collect evidence and when once, as found in foregoing discussions, investigation in present case by the State Police cannot be considered to be in any way unauthorized or contrary to law, thus defect or illegality in investigation will not have any bearing on the competence or procedure relating to cognizance or trial.

33. The same principle has been propounded by the Apex Court in ***H.N. Rishbud and another vs. State of Delhi, AIR 1955 SC 196,*** wherein it is observed that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial and it cannot be maintained that a valid legal police report is the foundation of the jurisdiction of the Court to take cognizance and the Apex Court in ***Union of India vs. Prakash P. Hinduja and another, AIR 2003 SC 2612,*** has also held that once charge-sheet is filed, then merely because Investigating Agency had no jurisdiction to investigate the matter, charge-sheet cannot be quashed as it is not possible to say that cognizance on an invalid police report is prohibited and, therefore, liable to be quashed. However, the Apex Court in these pronouncements has further clarified that in case illegality in the investigation can be shown to have been brought about a miscarriage of justice, trial may vitiate for that.

34. Referring ***Jankinath Sarangi vs. State of Orissa, (1969) 3 SCC 392; State of U.P. vs. Shatrughan Lal, (1998) 6 SCC 651; State of Andhra Pradesh vs. Thakkidiram Reddy, (1998) 6 SCC 554;*** and ***Debotosh Pal Choudhury vs. Punjab National Bank, (2002) 8 SCC 68,*** Hon'ble Supreme Court in ***Ganeswaran's case*** suprahas held that the issue also requires to be examined on the touchstone of doctrine of prejudice and unless in a given situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/enquiry result and in judging a question of prejudice, the court must act with a broad vision and look to the substance and not to technicalities.

35. In present case, there is nothing on record to establish that investigation undertaken by the State Police has caused miscarriage of justice or any prejudice to the petitioner. Therefore, even if, there is deviation from the arrangement arrived at between the State Police and CBI with respect to informing the CBI and seeking consent of CBI to investigate the matter or to transfer the investigation to CBI, then also, for the evidence available on record whereupon cognizance has been taken by the trial Court the trial cannot be declared to have been vitiated. Other contentions raised on behalf of the petitioner with respect to merits of the allegations levelled in the complaint, evidence before trial Court and an inference to be drawn therefrom, would amount to expression of opinion, by this Court, on merit, which is not warranted in this petition and further from the material on record it cannot be said that *prima facie* no case is made out against the petitioner or it is apparent *ex facie* on the face of record that the petitioner is not involved in the commission of alleged offence and, therefore, taking of cognizance by the trial Court and framing of charge, is not sustainable. Rather material on record establishes the *prima facie* case, so as to take cognizance and frame charge against the petitioner.

36. Plea that State Police was having information about commission of offence by the petitioner on 15.02.2012 itself and was having sufficient time to inform the CBI about it, is also not relevant at this stage, as it has been concluded that CBI as well as State Police were having concurrent and coextensive power and jurisdiction to investigate the case. From the communications dated 15.02.2012 between Superintendent of Police, SV & ACB and Sub-Divisional Magistrate and even dated office order passed by the Sub-Divisional Magistrate, it

is evident that State Police has been planning to trap the petitioner by forming a raiding party, however, it is a fact that written complaint by the complainant was submitted to Deputy Superintendent of Police, SV & ACB (SIU) Shimla at Sarahan on 16.02.2012 at 11.30 a.m. alleging that the complainant was asked by petitioner to pay bribe on very same day. However, for aforesaid documents dated 15.02.2012, it cannot be said that there is no evidence on record so as to proceed in criminal trial against petitioner. The fact of these documents and not informing CBI would only render the investigation defective, but it does not render evidence collected against petitioner inadmissible during trial for lapse on the part of the Investigating Agency or Investigating Officer, as such lapse is not an illegality or irregularity affecting genesis of prosecution case.

37. The Apex Court in ***Gulzari Lal vs. State of Haryana, (2016) 4 SCC 583***, referring ***Paras Yadav vs. State of Bihar, (1999) 2 SCC 126***, has observed that lapse on the part of Investigating Officer should not be taken in favour of the accused as such lapse may be committed designedly or because of negligence and, therefore, prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not.

38. The Apex Court in ***Yogesh Singh vs. Mahabeer Singh and others, (2017) 11 SCC 195,*** relying upon ***C. Muniappan vs. State of Tamilnadu, (2010) 9 SCC 567,*** has reiterated that law with respect to effect of defect and has observed that defect in investigation by itself cannot be a ground for acquittal and if primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded and where there is negligence on the part of the Investigating Agency or omissions etc. which, resulted into defective investigation, there is legal obligation on the part of the Court to examine the prosecution evidence dehors of such lapse, carefully, to find out whether the said evidence is reliable or not and to what extent is reliable and as to whether such lapse affected the object of finding out the truth as the investigation is not the solitary area for judicial scrutiny in a criminal trial and the conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. In that case, delay in sending the FIR to the Magistrate was not considered a fatal irregularity in absence of any prejudice to the accused and for other positive evidence on record that FIR was recorded without unreasonable delay.

39. In ***Krishnegowda and others vs. State of Karnataka by Arkalgud Police, (2017) 13 SCC 98***, the Apex Court has again reiterated that mere lapse on the part of the Investigating Officer itself cannot be a ground for acquitting the accused and if that is the basis, then every criminal case will depend upon the will and design of the Investigating Officer and, therefore, Courts have to independently deal with the case and should arrive at a just conclusion beyond reasonable doubt basing on the evidence on record.

40. In ***Kumar vs. State represented by Inspector of Police, (2018) 7 SCC 536,*** the Apex Court has referred ratio of law laid down in ***Parbhu vs. King Emperor, 1944 SCC Online PC 1: AIR 1944 PC 73,*** wherein it had been ruled that irregularity or illegality of arrest would not affect the culpability of the offence if the same is proved by cogent evidence and it has been reiterated by the Apex Court that criminal justice must be above reproach. Recently, in ***Sachin Kumar Singhraha vs. State of Madhya Pradesh, (2019) 8 SCC 371,*** the Apex Court has recited that criminal justice should not become casualty because of minor mistakes committed by the Investigating Officer.

41. Considering above settled exposition of law on the issue, failure of State Police/Investigating Officer to inform or consult CBI at appropriate stage, cannot be a ground to quash FIR and criminal proceedings arising out thereto against the petitioner. However, it is also observed that State Police/DSPE should have informed CBI after registration of case or laying trap and collecting evidence related thereto, in consonance with CBI Manual. Director General of Police, H.P., is directed to take necessary suitable action for such lapse on the part of concerned officer(s) required to be taken after seeking explanation.

42. In present case, for evidence placed on record, it cannot be said that allegations made in the FIR/complaint, even if they are taken at their face value and accepted in its entirety, do not *prima facie* constitute any offence or make out a case against petitioner or FIR/complaint and evidence collected in support thereof do not disclose commission of any offence to make out a case against petitioner or there is any legal impediment to institute and

continue proceedings against petitioner, warranting quashing of FIR and/or criminal trial pending against petitioner in the trial Court.

43. In view of discussions hereinabove, it is concluded that State Police/State Vigilance set-up is having concurrent and coextensive power and jurisdiction to investigate the cases of bribery and corruption against Central Government employees and P.C. Act, 1988 does not exclude, rather include power and jurisdiction of Police Officers competent to investigate as provided under Section 17 of the P.C. Act to investigate such offences committed by Central Government employees, within their State and DSPE Act, 1946 read with CBI Manual also does not exclude the power and jurisdiction of the State Police to investigate against Central Government employees in cases of P.C. Act and CBI Manual regulates procedure to be adopted by the State Police and CBI to investigate offences wherein both Agencies have power and jurisdiction to investigate.

44. Any expression of opinion in this judgment shall have no bearing in the proceedings pending before the trial Court.

45. Accordingly, present petition is dismissed, being devoid of merits, in aforesaid terms. Parties are directed to appear before the trial Court on 19.02.2020. Record be sent back immediately.

46. The Director General of Police, H.P., also be apprised of passing of this judgment for compliance on his part.

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

Anmol Sharma ....Petitioner

Versus

State of Himachal Pradesh and Anr. ....Respondents

Cr.MMO No.184 of 2018
Reserved on 10.12.2019
Decided on: 7 .1. 2020

Code of Criminal Procedure, 1973 – Section 2(g) – 'Inquiry' – Meaning of - Held, inquiry as defined in Section 2(g) of Code means inquiry after the case is brought to notice of Court on the filing of chargesheet – It is not any inquiry relating to investigation of case by the investigating agency. (Para 10).

Code of Criminal Procedure, 1973 – Section 2(g) – 'Trial' – Meaning of - Held, trial in criminal case commences on framing of charges. (Para 13)

Code of Criminal Procedure, 1973 – Sections 2(g) & 319 – Summoning of additional accused at inquiry stage- Principles – Held, inquiry does not contemplate recording of any evidence as understood in strict legal sense- The only material at this stage is material collected by the Prosecution and Court can apply its mind to it to find out whether a person who can be an accused has been erroneously omitted from being arraigned or has been deliberately excluded by prosecuting agencies – And can summon him to face trial in case if other conditions are satisfied. (Para 10 & 13).

Code of Criminal Procedure, 1973 (Code) – Section 319 –Filing of application for summoning accused after case against sole accused had abated – Validity – Held, petitioner though named in FIR was not chargesheeted by the investigating agency – Chargesheet was only against his father 'HC', who died during trial - Case thus abated on death of 'HC' and Court had become functus officio – It could not have entertained application under Section 319 of Code and summoned petitioner as additional accused thereafter. (Para 16, 17 & 28).

Cases referred:

Shashikant Singh v. Tarkeshwar Singh and Ors, (2002) 5 SCC 738,
Bholu Ram v. State of Punjab and Ors, (2008) 9 SCC 140,
Babubhai Bhimabhai Bokhiria and Ors. v. State of Gujrat and Ors, (2013) 9 SCC 500,
Hardeep Singh and Ors. V. State of Punjab and Ors, AIR (2014) SC 1400,
Rajendra Singh v. State of U.P. and Ors. AIR 2007 SCC 378,
Deepu v. State of Madhya Pradesh, AIR 2019 SC 265,
J.K. International v. State, Govt of NCT of Delhi and Ors., AIR 2001 SC 1142,
Rajesh and Ors v. State of Haryana, AIR 2019 SC 2168,
The State v. Nirmala and Ors., 2017 (4) RCR (Criminal) 667,
M/s Innovative Textiles Pvt. Ltd. and Anr. v. Sh. Hem Chand Sharma and Anr., IA No. 20925 of 2014 in CS (OS) No 1079 of 2009,
Hem Chand Sharma (dead) through LR and Anr v. M/s Innovative Textiles Ltd. and Anr. in RFA (OS) No.10 of 2018 dated 16.8.2018,
Hem Chand Sharma (dead) through LR and Anr v. M/s Innovative Textiles Ltd. and Anr. SLP (C) No. 4941 of 2019).
Hardeep Singh v. State of Punjab AIR 2014 SC 1400'
Raghubans Dubey v. State of Bihar AIR 1967 SC 1167.
The State of Bihar v. Ram Naresh Pandey and Anr AIR 1957 SC 389
Ratilal Bhanji Mithani v. State of Maharashtra and Ors AIR 1979 SC 94
Shashi Kant Singh v. Tarkeshwar Singh and Ors., 2002 5 SCC 738,
Rajendra Singh v. State of UP and Ors., AIR 2007 SCC 378,
The State v. Nirmala and others decided on 13.9.2017 in Criminal Appeal Nos. 1647-1650 of 2017,
Vijay and Anr v. State of Maharashtra and Anr., (2017) 13 Supreme Court Cases 317,
Sukhpal Singh Khaira v. State of Punjab (2019) 6 SCC 638'
Jogendra Pal Yadav and Ors v. State of Bihar and Anr., 2015 (9) SCC 244'
Prabhu Chawla v. State of Rajasthan, 2016 (16) SCC 30'
Girish Kumar Suneja v.Central Bureau of Investigation, 2017 (14) SCC 809.

Whether approved for reporting? [7]

For the Petitioner	:	Mr. Arjun Lal, Advocate.
For the Respondent	:	Mr. Arvind Sharma and Mr. Anil Jaswal, Additional Advocates General, for the respondent-State. Mr. Feroz Khan Ghazi and Mr. Ateendra Saumya Singh, Advocates, for respondent No.2.

Sandeep Sharma, Judge (oral):

By way of present petition filed under Section 482 Cr.PC, prayer has been made to quash and set-aside order dated 7.9.2017 passed by the learned ACJM Nalagarh, District Solan, HP, in case No. 101/ 2 of 2011, whereby an application having been filed by the respondent-complainant under Section 319 Cr.PC, praying there in to summon the petitioner as an additional accused came to be allowed.

2. For having bird's eye view, certain facts, which may be relevant for adjudication of the present case are that on 28.9.2006, an agreement to sell came to be executed inter-se person namely late Hem Chand and respondent No.2-complainant i.e. M/s Innovative Textiles Pvt. Ltd., for the sale of land for a total consideration of Rs. 7.35 crores. As per the complainant, earnest money of Rs. 2,20,50,000/- was paid on the same day vide cheque No. 297051 drawn at HDFC Bank, New Delhi to person namely Hem Chand. However, subsequently, it transpired that land under sale was already mortgaged with State Bank of India as collateral to the loan facilities availed by M/s Heman Noble Biotec Laboratories Pvt. Ltd., wherein present petitioner Anmol Sharma was one of the Director. As per complainant above named person i.e. petitioner in the capacity of Director had executed loan agreement

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[7] *Whether the reporters of the local papers may be allowed to see the judgment?*

with State Bank of India along with his father late Hem Chand. In the aforesaid background FIR bearing No. 108 of 2007 came to be registered against persons namely Hemchand Sharma and present petitioner Anmol Sharma on the complaint having been made by respondent No. 2 at Police Station Connaught place under Sections 406, 415, 420, 467 and 468 read with Section 120 B of IPC. Late Hemchand filed petition in the High Court of Himachal Pradesh, seeking quashment of aforesaid FIR registered at Delhi, but fact remains that FIR as detailed hereinabove was the not quashed, but same was transferred from police station Connaught Place New Delhi to Police Station Nalagarh, Police District Baddi, Himachal Pradesh in terms of order dated 6.10.2019 passed by this court in CWP No. 294 of 2007. Pursuant to aforesaid directions issued by the Court in aforesaid CWP, FIR bearing number 15 of 2010 came to be registered at Police Station Nalagarh, Police District Baddi Himachal Pradesh. It is not in dispute that contents of FIR number 15 of 2010 registered at Baddi are verbatim same as was recorded in FIR No. 108 registered at Police Station Connaught Place, Delhi.

3. After completion of investigation, police presented challan in FIR No. 15 of 2010 in the court of learned JMIC Nalagarh, HP, on 6.4.2011 against person namely Hemchand Sharma. Present petitioner was not charge sheeted on the ground that no evidence was found against him in the investigation. On 20.4.2011, learned JMIC Nalagarh took cognizance, whereafter criminal case bearing No. 101/2 of 2001 came to be registered against late Shri Hemchand Sharma. It is also not in dispute that respondent complainant never laid challenge, if any, to the non-inclusion of present petitioner as co-accused in the aforesaid case filed in the court of learned JMIC pursuant to investigation conducted in FIR number 15 of 2010. Record reveals that late Hemchand filed an application under Section 239 CrPC, seeking his discharge. Vide order dated 8.1.2015 discharge application filed by the late hemchand Sharma was partly allowed, as a consequence of which, charges under sections 467, 568 and 471, were dropped, whereas court below on the basis of material adduced on record along with charge sheet proceeded to frame charge against late Hemchand for having committed offence punishable under section 420 of IPC. Though first order framing charge was also assailed by late Hemchand by way of criminal revision No. 88 of 2015, but same was dismissed vide order dated 27.5.2016. Zimini orders passed by the court below reveal that from 17.4.2015 to 24.8.2015, statements of some of prosecution witnesses were recorded, but since despite sufficient opportunity, witnesses were not cross examined, trial court closed right of the accused to cross examine the prosecution witnesses.

4. Being aggrieved and dissatisfied with closure of right to cross examine the prosecution witnesses, late Hemchand preferred criminal revision petition under section 482 CrPC., seeking therein permission to cross examine the prosecution witnesses. Aforesaid prayer made by the late Hem Chand was allowed and accordingly, he was granted opportunity to cross examine the prosecution witnesses. After passing of aforesaid order, cross examinations of PW1 and P W 4 were conducted and depositions of PW 3 and PW4 were completed.

5. Zimini orders passed by the court below reveal that on 2.3.2017, court below while rejecting an application filed by late Hemchand, seeking therein exemption from personal appearance issued non bailable warrants against him with a view to secure his presence on 3.3.2017. On 3.3.2017, matter came to be adjourned to 4.3.2017. On 4.3.2017, since late Hemchand failed to put in appearance despite issuance of non bailable warrants, court below issued arrest warrants against him returnable for 13.6.2017. On 13.6.2017, the arrest warrants issued against the accused were not received back, but learned counsel representing him before the Court below apprised the court that the accused has expired and as such court below adjourned the matter to 5.7.2017, enabling the prosecution to place on record death certificate of late Hemchand. At this stage, it may be relevant to mention that till passing of order dated 13.7.2017, there is no reference, if any, with regard to filing of application by respondent No.2-complainant under section 319 CrPC, seeking therein summoning of the petitioner, but perusal of endorsement given on the front page of the application having been filed by respondent No.2 under section 319 CRPC (available at page 315 of record of the court below) seeking therein summoning of the petitioner, suggests that such application was presented by counsel representing complainant on 20.5.2017, but same was order to be listed on 13.6.2017 for filing reply.

6. Interestingly, the zimini order dated 13.6.2017 nowhere talks with regard to listing/ filing of aforesaid application under section 319 CrPC., by the respondent-complainant, but definitely order dated 5.7.2017 passed by the court below reveals that some consideration was held on the aforesaid application filed under Section 319 CrPC and court posted the matter for orders on the application as well as for filing of the death certificate of the accused on 3.8.2017. On 3.8.2017, court below issued notice to SHO Police Station Nalagarh, directing him to produce death certificate of accused on 7.9.2017. Perusal of aforesaid order dated 7.9.2017, reveals that though case was listed for orders under section 319 CrPC, but same was adjourned for reconsideration on the request of counsel representing the applicant, who wanted to tender some documents. Record of the court below reveals that on 7.9.2017, case at hand was listed twice. In pre-lunch session, death certificate of accused late Hemchand Sharma came to be placed on record and court after having heard parties reserved the order in the application under Section 319 CrPC, which ultimately came to be pronounced or dictated after lunch, whereby court below ordered the petitioner Anmol Sharma to be summoned/tried. In the aforesaid background, petitioner has approached this court in the instant proceedings, praying therein for quashing of order passed by the court below summoning him as an accused.

7. Having heard Shri Arjun Lal, learned counsel for the petitioner, and perused grounds raised in the petition viz-a-viz reasoning assigned by the court below while passing the impugned order, this court finds that precisely challenge to impugned order is merely on following grounds:

(a.) Since entire criminal trial in case number 101/2 of 2011 stood abated on 13.3.2017 on account of death of sole accused Hem Chand, court below ought not have entertained the application filed by the respondent complainant under section 319 CrPC, seeking therein summoning of the petitioner herein, who was not named in the chargesheet.

(b.) Learned Magistrate on being informed about the death of the sole accused was duty bound in law to order the abatement of the proceedings on account of death of sole accused under section 319 CrPC, especially when on the date of death, no application under section 319 CrPC having been filed by the respondent complainant was pending adjudication.

(c.) Since on 13.3.2017, criminal case initiated against accused late Hemchand stood abated on account of his death, court below had no jurisdiction/authority to pass order, if any, on the application under section 319 CrPC, as it had become functus officio.

(d.) Court below ought to have issued notice to the petitioner herein before summoning him as an accused.

(e.) Delay and conduct of the respondent-complainant in moving application under Section 319 CrPC after the death of the sole accused.

(f.) An application under section 319 CrPC was not maintainable as it was not filed by the complainant, rather by private party at whose instance FIR as well as case came to be initiated against late Hemchand .

8. While refuting aforesaid submissions and grounds raised by the learned counsel representing the petitioner, Shri Feroz Khan, learned counsel representing the respondent-complainant contented that impugned order is based on facts as well as law and as such no interference is called for. He contended that petitioner's name and role has been specifically mentioned in the FIR, in the statement recorded under Section 161 CrPC during investigation and in the depositions of PW3 and PW4 recorded during trial, perusal whereof clearly reveals that petitioner actively participated in transaction with respondent No.2 since the very inception of transaction and as such, it cannot be said that he could not be summoned as an accused in the instant case. Learned counsel representing the respondent while making this court to peruse material adduced on record along with reply/affidavit contended that petitioner, who had executed loan agreement with State Bank of India, as Director of M/s Hem-an-Noble Biotec Laboratories Pvt. Ltd has received part of earnest money in his bank account through his father. He contended that civil suit for recovery filed by respondent No.2 in Delhi High Court stands decreed against the petitioner as well as late father vide judgment dated 27.5.2016, perusal whereof clearly reveals that petitioner actively

participated in the transaction with respondent No.2 along with his father. While making this Court peruse the depositions of PW 3 and PW 4, wherein role attributed to the petitioner herein has gone unchallenged and un-entertained, Mr. Khan contended that bare perusal of impugned order clearly reveals that sufficient and cogent reasons have been assigned in the impugned order and there is sufficient prima facie evidence on record to summon the petitioner as an additional accused. Learned counsel contended that by now it is well settled that while considering an application under section 319 CrPC by the trial court, neither prior notice to the proposed accused is necessary nor he is required to be heard as the right of representation is unavailable to the proposed accused at the stage of summoning. Mr. Khan further contended that application filed under section 319 CrPC cannot be rejected on the ground of delay because same can be filed at any stage, even at the stage of conclusion of trial. Mr. Khan further contended that material available on record clearly suggests that delay in trial cannot be attributed to the respondent, rather it is late Hemchand, i.e. father of the petitioner, who delayed the trial by adopting delaying tactics from the beginning of investigation. Mr. Khan further contended that trial of the case does not automatically abate on the death of an accused. He placed reliance on various judgments in cases titled ***Shashikant Singh v. Tarkeshwar Singh and Ors, (2002) 5 SCC 738, Bholu Ram v. State of Punjab and Ors, (2008) 9 SCC 140, Babubhai Bhimabhai Bokhiria and Ors. v. State of Gujrat and Ors, (2013) 9 SCC 500, Hardeep Singh and Ors. V. State of Punjab and Ors, AIR (2014) SC 1400, Rajendra Singh v. State of U.P. and Ors. AIR 2007 SCC 378, Deepu v. State of Madhya Pradesh, AIR 2019 SC 265, J.K. International v. State, Govt of NCT of Delhi and Ors., AIR 2001 SC 1142, Rajesh and Ors v. State of Haryana, AIR 2019 SC 2168, The State v. Nirmala and Ors., 2017 (4) RCR (Criminal) 667, M/s Innovative Textiles Pvt. Ltd. and Anr. v. Sh. Hem Chand Sharma and Anr., IA No. 20925 of 2014 in CS (OS) No 1079 of 2009, Hem Chand Sharma (dead) through LR and Anr v. M/s Innovative Textiles Ltd. and Anr. in RFA (OS) No.10 of 2018 dated 16.8.2018, Hem Chand Sharma (dead) through LR and Anr v. M/s Innovative Textiles Ltd. and Anr. SLP (C) No. 4941 of 2019).***

9. Before ascertaining the correctness and genuineness of aforesaid submissions having been made by the learned counsel for the parties vis-à-vis reasoning assigned by the court below while passing impugned order, it would be apt to take note of provisions of Section 319 CrPC.

> 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.

10. Section 319 of CrPC springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted). Aforesaid doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 of CrPC to do justice by punishing the real culprit. Careful perusal of aforesaid provision of law suggests that when the Investigating Agency for one reason or the other does not array one of the real culprits as an accused, court is not powerless in calling the said accused to face the trial. The question that at what stage and in what circumstances should the court exercise its power as contemplated under Section 319 Cr.PC has been elaborately dealt with and answered by the Hon'ble Apex Court in case titled ***Hardeep Singh v. State of Punjab AIR 2014 SC 1400.*** In the aforesaid case, Hon'ble Apex Court for proper appreciation of the stage of invoking of the powers under Section 319 CrPC and to understand the meaning that can be attributed to the words "inquiry" and "trial" as used under the section 319 C.r.PC referred to the following cases.

1. ***Raghubans Dubey v. State of Bihar AIR 1967 SC 1167.***
   "Once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

2. ***The State of Bihar v. Ram Naresh Pandey and Anr AIR 1957 SC 389***
   "The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular context in which they are used and with regard to the scheme and purpose of the provision under consideration."
3. ***Ratilal Bhanji Mithani v. State of Maharashtra and Ors AIR 1979 SC 94***
   "Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end."

For determining the issue, the Hon'ble Apex Court also referred to the Section 2 (g) of Cr.PC defining INQUIRY as follows:

"inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."

The Hon'ble Supreme Court after referring to Section 2 (g) of Cr.PC and the case laws held that the word 'inquiry' is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial and at the time of filing of the charge-sheet, the court reaches the

stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Cr.P.C. can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. The Hon'ble Apex Court also opined that the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.

11. In ***Hardeep Singh's*** case (supra), the Hon'ble Court framed followings questions for its consideration :

1. What is the stage at which power under Section 319 of Cr.P.C. can be exercised? and whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?
2. Whether the word "evidence" used in Section 319(1) Cr.P.C., could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?
3. What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?
4. Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR, but not charge sheeted or who have been discharged?

12. Hon'ble Apex Court having taken note of various judgments passed on different occasions answered the aforesaid questions in following manners:

1. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial.
   As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge sheet. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.
2. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

3. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for ?framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.
4. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

13. Careful perusal of aforesaid judgment reveals that Hon'ble Apex Court while holding that trial commences after framing of charge held /ruled that inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 and Section 398 Cr.PC are species of the inquiry contemplated by Section 319 Cr.P.C, meaning thereby material coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused, whose name has been shown in Column 2 of the charge sheet. It also emerges from the aforesaid judgment passed by the Hon'ble Apex Court that under Section 319 Cr.PC, a person against whom material is disclosed is only summoned to face the trial and in such an event, under Section 319(4) Cr.P.C., the proceeding against such person is to commence from the stage of taking of cognizance and the Court needs not wait for the evidence against the accused proposed to be summoned, to be tested by cross-examination. Most importantly, it has been held in the aforesaid judgment that though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, but the degree of satisfaction required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge, meaning thereby, trial court while considering summoning of a person as an additional accused while exercising power under Section 319 Cr.PC is only required to infer prima-facie case, if any, against him on the basis of evidence adduced on record. A person not named in the FIR or a person though named in the FIR but not chargesheeted or a person who has been discharged can also be summoned under Section 319 Cr.P.C as has been ruled in the aforesaid judgment; provided it clearly emerges from the evidence that such person can be tried along with the accused already facing trial. An accused, who stands discharged cannot be summoned afresh unless requirement of Section 300 and 398 Cr.PC is not complied with. Careful reading of aforesaid judgment makes it abundant clear that Section 319 Cr.PC can be invoked for arraigning any person as an accused not named in the FIR or named in the FIR, but not charge sheeted before the stage of framing of charge by the court.

14. No doubt, applying the aforesaid test/analogy/law laid down by the Hon'ble Apex Court, petitioner herein, who was originally named in the FIR, but not charge sheeted could have been summoned by the court below as an accused while exercising power under Section 319 Cr.PC provided it was satisfied that prima-facie case is made out against the petitioner on the basis of evidence available on record. However, in the case at hand, question which falls for consideration of this Court is that "*whether court below could have entertained application under "Section 319 Cr.PC after the death of sole accused, especially when criminal case bearing 101/2 of 2011 stood abated on account of death of sole accused.*"

15. At this stage, at the cost of repetition, it may be noticed that though petitioner herein was named in the FIR, but fact remains that he was not charge sheeted. Non-inclusion of the present petitioner as an accused was never objected by the respondent-

complainant, who after passing of order dated 20.4.2012, on which date, learned JMIC Nalagarh took cognizance, allowed the trial to proceed against the sole accused Hem Chand for good four years i.e. whereafter an application under Section 319 after the death of the sole accused came to be filed, seeking therein summoning of present petitioner as an additional accused in criminal Case No. 101/2 of 2011.

16. Delay, if any, in filing application on the part of the respondent to summon the petitioner as an accused in criminal case No. 101/2 of 2011 may not have much relevance in view of the categorical finding recorded by the Hon'ble Apex Court in ***Hardeep Singh's Case*** supra that Section 319 Cr.PC can be invoked for arraigning any person as an accused not named in FIR or named in the FIR but not charge sheeted at any stage of the trial. But in the instant case, where admittedly application under Section 319 Cr.PC, seeking therein summoning of the petitioner as an additional accused in the criminal case came to be filed after death of sole accused Hem Chand, there appears to be considerable force in the argument advanced by Mr. Arjun Lal, learned counsel for the petitioner that since on account of death of sole accused criminal case as referred herein above, stood abated, court below had become *functus officio* and in no situation, it could have entertained the application filed under Section 319 Cr.PC. Argument advanced by Mr. Feroz Khan, learned counsel representing respondent No.2 that since factum with regard to death of the sole accused was not in the knowledge of the respondent complainant and application under Section 319 Cr.PC was filed much prior to placing of death certificate on record, court below rightly entertained the application, though appears to be attractive, but same deserves outright rejection being devoid of any merits. Factum with regard to death of sole accused Hem Chand on 13.3.2017 is not in dispute, rather record of court below clearly reveals that on 13.6.2017, learned counsel for the accused apprised the court below with regard to death of the sole accused Hem Chand, whereafter matter was adjourned to 5.7.2017, enabling the SHO Nalagarh to place on record death certificate of accused Hem Chand.

17. It is not understood that once factum with regard to death of sole accused in the criminal case was in the knowledge of the court below how it proceeded to hear the application filed by respondent No.2 under Section 319 Cr.PC on 5.7.2017. No doubt, till 7.9.2017, death certificate of accused was not on record, but as has been recorded herein above that factum with regard to death of the accused had come to the notice of the court on 13.6.2017 and as such, it ought not have proceeded to hear and decide the application, if any, filed under Section 319 Cr.PC by the respondent before deciding the issue of abatement of the criminal trial if any, on account of death of the sole accused. As has been taken note in the earlier part of the judgment that though there is no mention with regard to fling of application under Section 319 Cr.PC by the respondent-complainant, prior to passing of order dated 5.7.2017, but definitely endorsement (page 315) given on the aforesaid application by the learned presiding Judge reveals that on 20.5.2017, application was presented and it was ordered to be listed on 13.6.2017, but interestingly, perusal of order dated 13.6.2017, nowhere talks about filing /pendency of the application, if any, under Section 319 Cr.PC and suddenly. on 5.7.2017, learned court below while adjourning the matter for filing of death certificate, records in the order that consideration held and matter to come up for order on 3.8.2017. On 3.8.2017, court below granted time to SHO PS Nalagarh to furnish death certificate and listed the application filed by respondent No.2 under Section 319 Cr.PC for re-consideration on 7.9.2017. On 7.9.2017, in the pre-lunch session, court below takes on record the death certificate of Hem Chand sole accused, but without deciding the issue with regard to abatement of criminal proceedings on account of death of the sole accused Hem Chand, proceeded to decide the application under Section 319 Cr.PC in the post-lunch session. Even if submission having been made by the learned counsel for respondent No.2 is accepted that factum with regard to death of the sole accused was not in their knowledge at the time of filing of application under Section 319 Cr.PC, that will not make much difference because as has been noticed herein above, factum with regard to death of the accused, which subsequently, came to be verified in the shape of death certificate placed on record was very much in the knowledge of the court below on 13.6.2017 on which date, application filed by respondent No.2 under Section 319 Cr.PC was not even listed for consideration. Consideration, if any, on the application was held for the first time on 5.7.2017.

18. The Judgment rendered by the Hon'ble Apex Court in ***Hardeep Singh's case*** *supra*, wherein it has taken into consideration its various earlier judgments suggests that person not named in the FIR or named in the FIR , but not charge sheeted can be summoned as an additional accused at any stage of trial. It also emerges from the aforesaid judgment that even if main accused dies, trial does not abate qua the other accused, meaning thereby, that if main accused dies trial can still proceed against other accused, but in the present case, facts are altogether different, wherein petitioner ordered to be summoned as an additional accused by way of impugned order was never arraigned as an accused in the criminal trial bearing 101/2 of 2011 initiated at the behest of the complainant, rather trial only commenced against the sole accused, who was though initially charged under Sections 467, 568, 471 and 420 IPC., but subsequently charges under Sections 467, 568 and 471 were dropped against him and before his death, he was being tried for having committed offence punishable under Section 420 of IPC only.

19. Though submission made by learned counsel for respondent No.2 that trial of case does not automatically abate on the death of the accused has no merit and deserves outright rejection but even otherwise court below in whose knowledge factum with regard to death of the sole accused had come much prior to the consideration of application under Section 319 Cr.PC ought to have decided the issue of abatement of criminal case on account of death of sole accused at the first instance.

20. In support of his aforesaid contention learned counsel placed reliance upon the judgment rendered by the Hon'ble Apex Court in ***Shashi Kant Singh v. Tarkeshwar Singh and Ors***., 2002 5 SCC 738, but having carefully perused aforesaid judgment, this Court finds that facts of that case were altogether different. In the case before the Hon'ble Apex Court, during the pendency of the trial of an accused, another person was summoned by the trial Court under Section 319 Cr.PC but by the time he could be brought before the Court, trial against the accused was over. Hon'ble Apex Court held that the words "*should be tried together with the accused*" were merely directory and as such, a person can be tried even after conclusion of trial of the main accused. However, in the case at hand, petitioner, who has been ordered to be summoned as additional accused by way of impugned order was not an accused with the main accused at the time of filing of the application and an application under Section 319 Cr.PC, seeking summoning of the petitioner was filed after the death of the sole accused.

21. In the case at hand, question before the court below at the time of deciding the application under Section 319 Cr.PC was not that whether petitioner can/should be tried with the main accused or he can be tried as an accused even after death of the sole accused, who was named in charge sheet, rather question before the court below was that whether application under Section 319 Cr.PC filed after death of the sole accused can be entertained or it had become *functus officio* on account of death of the sole accused.

22. Similarly this Court finds that judgment rendered by the Hon'ble Apex Court in ***Rajendra Singh v. State of UP and Ors.,*** AIR 2007 SCC 378, has no application in the present case because in that case, Hon'ble Apex Court while interpreting the provisions contained under Section 319(1) Cr.PC has held that the words as contained under Section 319 Cr.PC are plain and the meaning clear. The Hon'ble Apex Court in the aforesaid judgment has held that when in the course of the inquiry or trial, it appears to the court from the evidence that a person, not arraigned as an accused, appears to have committed offence for which that person can/could be tried together with an accused, the court may proceed against that person. Hon'ble Apex Court has further held that while exercising power under Section 319 Cr.PC, it must surely appear to the court from the evidence that someone not arrayed as an accused appears to have committed offence, but at that stage, court needs not to be satisfied that he has committed an offence. It need only appear to court that someone else has committed offence, to exercise jurisdiction under Section 319 of CrPC. In an unambiguous term, the Hon'ble Apex Court in the aforesaid judgment has held that Section 319 Cr.PC only gives power to the court to ensure that all those apparently involved in the commission of an offence are tried together and none is left out. But as has been taken note herein above, in the case at hand, question is/was not with regard to trial of the accused with other accused together, rather question is/was before the court below whether it can/could entertain application under Section 319 Cr.PC filed by the respondent complainant, seeking

therein summoning of the petitioner as an additional accused in the criminal case pending adjudication against the sole accused, who has died before such application under Section 319 could be entertained and decided.

23. Similarly, in case titled **The State v. Nirmala and others** decided on 13.9.2017 in Criminal Appeal Nos. 1647-1650 of 2017, the Hon'ble Apex Court has held that death of the main accused does not result in abatement of trial. True it is that death of main accused does not result in abatement of trial, but aforesaid finding/observation made by the Hon'ble Apex Court is/was relevant in the background of the case, which was listed before the Apex court, wherein admittedly there were other accused alongwith the main accused. In the aforesaid case, all the accused were discharged by the learned trial Court on account of death of the main accused. High Court also dismissed the revision petition having been filed by the affected party on the ground that death of the main accused has resulted in the abatement of the trial. In the aforesaid background, Hon'ble Apex Court observed/ruled that death of the main accused does not result in the abatement of the trial, however, in the instant case, accused Hem Chand was the sole accused in the trial pending adjudication before the court below and at no point of time, the petitioner, who has been ordered to be summoned as an additional accused was a party and as such, aforesaid judgment has no application to the present case.

24. Careful perusal of judgment rendered by the Hon'ble Apex Court in ***Hardeep Singh's case*** (supra) suggests that power under Section 319 (1) Cr.PC can be exercised at any time after filing of charge sheet and before pronouncement of the judgment. In the present case, summoning order against the petitioner herein has been admittedly passed after abatement of the criminal proceedings, those were initially initiated against the sole accused late Hem Chand. Otherwise also, careful perusal of Section 319 (4) Cr.PC clearly reveals that new person is to be tried together with the accused and definitely, provisions contained under Section 319(1) Cr.PC are to be read alongwith provisions contained under Section 319 (1) CrPC. But in the present case, though application seeking summoning of the petitioner as an additional accused was filed prior to placing on record factum with regard to death of the sole accused late Hem Chand but fact remains that aforesaid application under Section 319 Cr.PC, came to be considered and decided after placing of death certificate of sole accused on record. Recently the Hon'ble Apex Court in case titled ***Sukhpal Singh Khaira v. State of Punjab (2019) 6 SCC 638*** had an occasion to deal with almost similar proposition, wherein the Hon'ble Apex court having noticed that certain aspects not being clear from the decided cases including a five Judge Bench decision in *Hardeep Singh* case, framed following substantial questions of law and referred the same to the larger Bench:-

> "1.Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?
>
> II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?
>
> III. What are the guidelines that the competent court must follow while exercising power under Section 319 Cr.P.C?

25. Precisely, the facts before the Hon'ble Apex court in the aforesaid case were that FIR was lodged against eleven accused for having committed offence punishable under Sections 21, 24, 25, 27, 28, 29 and 30 of the Narcotic Drugs and Psychotropic Substance Act, 1985, Section 25A of the Arms Act and Section 66 of the Information Technology Act, 2000. Initially, under the 1st charge sheet, ten accused were summoned and put to trial in Sessions Case. Even though a second charge sheet was filed by the police, but same did not name the accused-appellant before the Hon'ble Apex Court. Subsequently, prosecution filed an

application under Section 311 Cr.PC, for recalling certain prosecution witnesses and on such recall of the aforesaid witnesses, some of the witnesses named the applicant/accused before the Hon'ble Apex Court, whereafter prosecution filed application under Section 319 CrPC for summoning additional five accused including the appellant accused before the Hon'ble Supreme Court by placing reliance on the statements of some of the prosecution witnesses. Sessions Court pronounced the judgment in Session case as referred in above, convicting the nine other accused put on trial, but on the same day, by way of separate order, allowed the application filed under Section 319 Cr.PC and summoned the appellant-accused. Being aggrieved with the summoning by Sessions Judge, appellant filed criminal revision petition in the High Court, which came to be dismissed. Aggrieved by the aforesaid order of dismissal passed by the Punjab and Haryana High Court, appellant-accused approached the Hon'ble Supreme Court, who formulated two questions for its consideration:-

> "I. Whether the order of the Sessions Judge summoning the appellants herein as additional accused was in breach of Section 319, CrPC?
>
> II. If the answer to the above question is in the affirmative, could the order of the courts below still be sustained under the Code?"

26. Hon'ble Supreme Court having taken note of the provision contained under Section 319 Cr.PC as well as various judgments rendered by it from time to time, held that since certain aspects are not clear from the decided cases, certain substantial questions arise for further consideration and accordingly, after framing of substantial questions of law as have been reproduced herein above, referred the matter to the Hon'ble the Chief Justice for constitution of a Bench for considering the aforesaid questions. it would be apt to take note of following paras of judgment passed in ***Sukhpal Singh Khaira's*** case, which reads as under:

> "19. Subsequently, this Court in the aforesaid matter of Hardeep Singh's Case (supra) laid down the scope and extent of the powers of the Court in the criminal justice system to array any person as an accused during the course of trial as per Section 319 Cr.P.C. The questions which were reformulated by the larger Bench were :
>
> > (i) What is the stage at which power Under Section 319 of the Code of Criminal Procedure, 1973 can be exercised?
> >
> > (ii) Whether the word "evidence" used in Section 319(1) of the Code of Criminal Procedure, 1973 could only mean evidence tested by cross--examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination in chief of the witness concerned?
> >
> > (iii) Whether the word "evidence" used in Section 319(1) of the Code of Criminal Procedure, 1973 has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?
> >
> > (iv) What is the nature of the satisfaction required to invoke the power Under Section 319 of the Code of Criminal Procedure to arraign an accused? Whether the power Under Section 319(1) of the Code of Criminal Procedure, 1973 can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?
> >
> > (v) Does the power Under Section 319 of the Code of Criminal Procedure, 1973 extend to persons not named in the FIR or named in

the FIR but not charged or who have been discharged.?" (emphasis supplied)

20. We note that the difference of formulation in the reference questions and the final order of the Constitution Bench with respect to the Question no. 1, makes a difference with regard to the present case. It is precisely the gap, between the restricted re formulation of the 'Question no. 1' by the Constitution Bench and the 'Question no. 1' in the reference order of the Hardeep Singh Case, which these unique facts fit into. The earlier 'Question no.1' in the reference Order was broader in comparison to the 'Reformulated Question no. 1' by the Constitution Bench. It is this marginal area which is a subsilentio, that needs to be referred to a larger Bench again.

21. In the Hardeep Singh Case (supra), the Constitution Bench set out to answer the questions referred above. In this part we are mostly concerned with the first question. The Court, while assessing the ambit of the term 'trial', was concerned with the stage during which the power under Section 319 of CrPC could be exercised, in this regard, it was held "Since after the filing of the chargesheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Code of Criminal Procedure can be exercised at any time after the chargesheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Code of Criminal Procedure, committal etc., which is only a pretrial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind." (emphasis supplied)

22. It was contended that the question of law herein is unique to the present case, and the earlier judgment of Hardeep Singh (supra) did not have an opportunity to cast any light about the validity of summoning orders pronounced after the passing of the judgment. They further argued that, the Hardeep Singh Case (supra), treats Section 319 in an isolated manner without taking into consideration the spirit and the mandate of the Code.

23. To strengthen the aforesaid submission, the State further contended that Section 465, Cr.P.C was introduced to provide for a balanced mechanism under the Criminal Justice System and to stop the Courts from getting into hyper technicalities and committing serious violations. This Court in Hardeep Singh Case (supra) has not considered the above principles or the issues which could possibly arise before the trial court while dealing with applications under Section 319, Cr.P.C. The State therefore submitted that, Section 319, Cr.P.C. should not be treated as an isolated island and should instead be given a pragmatic interpretation by keeping in view the entire mandate of the Code to render complete justice.

24. Furthermore, it needs to be determined whether the trial is said to be fully concluded even if the bifurcated trial in respect of the absconded accused is still pending consideration.

25. The appellant herein contended that, the observations made in the Hardeep Singh Case (supra), cannot be diluted by a Bench of this strength. We have considered the averments made by the counsel on behalf of both parties, we feel that it would be appropriate to place the same for consideration before a larger Bench. However, we are of the considered opinion that, power under Section 319, Cr.P.C being extraordinary in nature,

the trial courts should be cautious while summoning accused to avoid complexities and to ensure fair trial. We must remind ourselves that, timely disposal of the matters furthers the interest of justice.

26. After pursuing the relevant facts and circumstances, the following substantial questions of law arise for further consideration

26.I. Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

26.II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

26.III. What are the guidelines that the competent court must follow while exercising power under Section 319 Cr.P.C?

27. In light of the same, we direct the Registry to place these matters before Hon'ble the Chief Justice of India for constitution of a Bench of appropriate strength for considering the aforesaid questions."

27. Careful perusal of aforesaid judgment rendered by the Hon'ble Apex Court reveals that Hon'ble Apex Court having taken note of its various judgments, especially judgment rendered in ***Hardeep Singh's case*** arrived at a conclusion that it has not considered the issue, as has been taken note herein above, which could possibly arise before the court below while dealing with the application under Section 319 Cr.PC.

28. In the instant case, this Court is of the view that in terms of provisions contained under Section 394 Cr.PC, criminal proceedings pending against the sole accused late Hem Chand stood abated on account of the death of the sole accused and learned trial court below had no authority /jurisdiction to entertain application, if any, filed on behalf of respondent No.2 under Section 319 Cr.PC, especially when it had become *functus officio*. Careful perusal of latest judgment rendered by the Hon'ble Apex Court in ***Sukhpal Singh Khaira's case*** suggests that trial court in terms of judgment rendered by the Hon'ble Supreme Court in ***Hardeep Singh's case*** could not have entertained application under Section 319 Cr.PC after the death of sole accused.

29. Though this Court is of the definite view that trial court ought not have entertained application under Section 319 Cr.PC after abatement of criminal proceedings on account of death of sole accused Hem Chand, but even otherwise, impugned order summoning petitioner herein as an additional accused cannot be said to be legal, especially when no notice ever came to be issued to the petitioner herein before summoning him as an additional accused in terms of provisions under Section 319 Cr.PC. Though learned counsel for respondent No.2 while placing reliance upon judgment rendered by the Hon'ble Apex Court in **Hardeep Singh's case** made a serious attempt to pursued this Court to agree with his contention that no notice is/was required to be issued to the person sought to be arrayed as an additional accused under Section 3 19 Cr.PC, but careful perusal of judgment rendered by the Apex Court in Hardeep Singh's case nowhere suggests that no notice to the persons sought to be arrayed as an additional accused is required to be issued before summoning him as an additional accused. Constitution Bench in Hardeep Singh's case (supra) has held that the standard of proof employed for summoning a person as an accused under Section 319 Cr.PC is higher than the standard of proof employed for framing a charge against an accused. Therefore, it is necessary for the court to arrive at a satisfaction that the evidence adduced on behalf of the prosecution**,** if unrebutted, may lead to the conviction of a person sought to be added as an accused in the case.

30. The Hon'ble Apex Court in case titled ***Jogendra Pal Yadav and Ors v. State of Bihar and Anr., 2015 (9) SCC 244,*** has held that an accused since inception is not necessarily heard before he is added an accused, however, a person who is added as an accused under Section 319 Cr.PC is necessarily heard before being so added. Though in the aforesaid case, question before the Hon'ble Apex Court was that whether a person, who is added as an accused under Section 319 Cr.PC, can seek discharge under Section 227 Cr.PC or not?, but the Hon'ble Apex Court while discussing various aspects of the matter observed that a person who is added as an accused under Section 319 Cr.PC is necessarily heard before being so added. In the case at hand, it is not in dispute *inter-se* parties, rather quite apparent from the impugned order passed by the court that no opportunity, if any, was afforded to the petitioner herein before summoning him as an accused. Paras 8 and 9 of the aforesaid judgment are reproduced herein below:-

> "8. It is apparent that both these provisions, in essence, have the opposite effect. The power under Section 319 of the Cr.P.C. results in the summoning and consequent commencement of the proceedings against a person who was hitherto not an accused and the power under Section 227 of the Cr.P.C., results in termination of proceedings against the person who is an accused.
>
> 9. It was, however, urged by learned counsel for the appellants that in order to avail of the remedies of discharge under Section 227 of the Cr.P.C., the only qualification necessary is that the person should be accused. Learned counsel submitted that there is no difference between an accused since inception and accused who has been added as such under Section 319 of the Cr.P.C. It is, however, not possible to accept this submission since there is a material difference between the two. An accused since inception is not necessarily heard before he is added as an accused. However, a person who is added as an accused under Section 319 of the Cr.P.C., is necessarily heard before being so added. Often he gets a further hearing if he challenges the summoning order before the High Court and further. It seems incongruous and indeed anomalous if the two sections are construed to mean that a person who is added as an accused by the court after considering the evidence against him can avail remedy of discharge on the ground that there is no sufficient material against him. Moreover, it is settled that the extraordinary power under Section 319 of the Cr.P.C., can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court."

31. Another argument raised by Mr. Khan, learned counsel representing respondent No.2-complainant that present petition filed under Section 482, is not maintainable, especially when alternative remedy under Section 397 Cr.PC is/was available, is not sustainable. Learned counsel contended that order impugned before this Court being not interlocutory ought to have been laid challenge by way of criminal revision under Section 397 Cr.PC., however, his aforesaid plea deserves to be negated in light of judgment rendered by the Hon'ble Apex Court in case titled ***Vijay and Anr v. State of Maharashtra and Anr., (2017) 13 Supreme Court Cases 317***, wherein Hon'ble Apex Court has held that mere availability of alternative remedy cannot be a ground to disentitle relief under Section 482 Cr.PC. The relevant paras of the aforesaid judgment are reproduced herein below:

> "After hearing the counsel and also after perusing the impugned order, we are of the considered opinion that the order of the High Court has no legs to stand in view of the law laid down by this court in Prabhu Chawla. In the above referred case, in view of the divergent opinions of this Court in Dhariwal Tobacco Products Ltd. and Mohit v. State of U.P., the matter was placed before the three-Judge Bench of this Court. The three-Judge Bench took the view that Section 482 CrPC begins with a non obstante clause to state:

> "482. Saving of inherent powers of High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

As Section 397 Cr.PC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.PC only to petty interlocutory orders! A situation which is wholly unwarranted and undesirable. The three-Judge Bench has confirmed the law laid down by this Court in Dhariwal Tobacco Products Ltd.

8. In view of the above settled law, mere availability of alternative remedy cannot be a ground to disentitle the relief under Section 482 Cr.PC and, apart from this, we feel that the learned Judge without appreciating any of the factual and legal position, in a mechanical way, passed the impugned order, which warrants interference by this court. Accordingly, the order of the High Court is set aside and the matter is remanded to the High Court for reconsideration in the light of the settled legal position.

9. The appeal is disposed of accordingly."

Reliance is also placed on cases titled ***Prabhu Chawla v. State of Rajasthan, 2016 (16) SCC 30 and Girish Kumar Suneja v.Central Bureau of Investigation, 2017 (14) SCC 809.***

32. Submission made by learned counsel for respondent No.2 that since suit for recovery qua the transaction, which is subject matter of the present case, stands decreed in favour of respondent No.2 vide judgment dated 27.5.2016, it can be safely concluded that petitioner herein actively participated in the transaction inter-se respondent No.2 and his late father Hem Chand and as such, no fault, if any, can be found in the impugned order summoning petitioner herein as an additional accused, is totally misconceived and irrelevant as far as petition at hand is concerned. In the instant case, this Court is/was to determine whether application under Section 319 Cr.PC, seeking summoning of the petitioner herein as an additional accused could have been entertained by the court below after the abatement of criminal proceedings initiated against the sole accused Hem Chand and as such, decree, if any, passed against the petitioner herein in civil suit filed by respondent No.2 is not of much relevance as far as present proceedings are concerned.

33. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this Court has no hesitation to conclude that court below while allowing application under Section 319 Cr.PC summoning the petitioner as an additional accused has exceeded its jurisdiction and such, present petition is allowed and impugned order dated 7.9.2017, passed by the learned ACJM Nalagarh in Case No. 101/2 of 2011 is quashed and set-aside.

The present petition stands disposed of, so also pending application(s) if any.

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

Rahul Thakur …Petitioner.

Versus

State of Himachal Pradesh& another

.Respondents.

Cr. MMO No. 784 of 2019
Date of Decision: January 3, 2020

Code of Criminal Procedure, 1973- Sections 320 & 482- Inherent powers- Exercise of- Quashing of FIR registered for offence of rape pursuant to compromise inter-se parties- State opposing petition on ground of offence being non-compoundable and serious in nature- Held, power of High Court under Section 482 is not inhibited by provisions of Section 320 of Code-

FIR and criminal proceedings can be quashed by exercising inherent powers if it is so warranted in facts and circumstances of case for securing ends of justice or to prevent of abuse of process of any Court where parties have settled matter between themselves- Petitioner has solemnized marriage with victim and she is residing with him in matrimonial house- Parties admitting correctness of compromise- There is no possibility of victim supporting charge during trial if allowed to continue- Continuation of criminal proceedings would cause untoward torture and harassment of private parties- Welfare of victim lies in her rehabilitation and in closing criminal proceedings- Petition allowed- FIR and all consequential proceedings quashed. (Para 10 to 16 & 20)

Cases referred:

Gian Singh Vs. State of Punjab and Ors. (2012) 10 SCC 303,
Parbatbhai Aahir alias Parbathbhai Bhimsingbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641,.
Narinder Singh and others vs. State of Punjab and others (2014)6 SCC 466'
State of Madhya Pradesh vs. Laxmi Narayan and others (2019) 5 SCC 688
Madan Mohan Abbot vs. State of Punjab, (2008) 4 SCC 582**,**

Whether approved for reporting?[8]*Yes*

For the Petitioner: Mr. Vishwa Bhushan, Advocate.

For the Respondents: Mr.S.C. Sharma, Additional Advocate General, with M/s Kamal Kant, Kuldeep Chand Thakur & Ms.Seema Sharma, Deputy Advocate Generals, for respondent No.1-State.

Mr. Ashok Kumar, Advocate, for respondent No.2.

Vivek Singh Thakur, J. (oral)

This petition has been preferred under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.PC'), by petitioner Rahul Thakur for quashing FIR No. 46 of 2019 dated 02.11.2019, registered in Women Police Station, Mandi, District Mandi, H.P., under Section 376 of the Indian Penal Code (hereinafter referred to as 'IPC' in short) and the consequent criminal proceedings arising thereto.

2. Petitioner Rahul Thakur and respondent No.2 Prem Lata are present in person in the Court today, who have been identified by their respective learned counsel. Their statements, on oath, have also been recorded separately today in the Court.

3. In her statement complainant-respondent No.2 Prem Lata has stated that her first meeting with petitioner was at Bus-Stand Mandi and at that time, she was pursuing her Graduation Course from Government College, Mandi and petitioner was serving as a Probationary Officer in Gramin Bank. She has further stated that after having friendship, they had developed intimacy and decided to marry each other and they had also taken their parents in confidence to materialize their proposal and for assurance of the marriage, they had also developed physical relations, however, thereafter, petitioner had shown his reluctance to marry her, which caused mistrust about relations and lead to lodging of FIR against the petitioner. She has further stated that later on her family as well as family of petitioner had clarified that fluctuation in behaviour of petitioner was temporary and in fact he was in the process of taking decision to solemnize marriage and was thinking about future thereafter and that after lodging of FIR, petitioner was arrested and was released on bail on 03.12.2019 and despite lodging of FIR against petitioner by her, he not only agreed to marry with her but with the consent of parents, they have solemnized marriage on 13.12.2019 in Tarna Mata Temple, Mandi and thereafter, marriage has also been registered at Sl. No.32 in Marriage Register maintained by Gram Panchayat Rakhoh. She has further stated that her

8 Whether reporters of the local papers may be allowed to see the judgment?

name has also been entered in the Family Register of the said Panchayat as a wife of petitioner and since then, she is residing alongwith petitioner in the house of her in-laws and they are living happy married life and because of subsequent conduct of the petitioner, she had developed full faith that he will maintain her properly and will not, in any manner, cause harm to her and her interests and believing him she does not want to continue criminal proceeding against him as it would be actually harming her and her interest and also their family life. She has further stated that she has deposed in this Court, out of her free will, consent and without any external pressure, coercion or threat of any kind.

4. In his statement, petitioner Rahul Thakur has stated that he has heard the statement made by complainant-respondent No.2 Prem Lata and has endorsed the same to be true and correct and had that he married her with his free will, consent and without any pressure, threat or coercion and in fact, he had never intended not to marry her, but there was some fluctuation in his thoughts, which were shared with her and such communication had caused mistrust in their relations leading to lodging of FIR. He has further stated that he has realized his mistake and has taken steps to rectify the mistake and has also undertaken to keep his wife-respondent No.2 Prem Lata happy and to maintain her properly in all respects. He has further stated that he has deposed in this Court, out of his free will, consent and without any external pressure, coercion or threat of any kind.

5. Considering peculiar facts and circumstances of present case, petition has been opposed on behalf of respondent No. 1-State on the ground that it is not maintainable as in investigation a case under Section 376 IPC is made out and on the basis of challan presented in Court trial is pending consideration of Court. It is also contended on behalf of respondent/State that petitioner is not entitled to invoke inherent jurisdiction of this Court to exercise its power, keeping in view the nature of crime, for quashing of FIR with respect to an offence heinous in nature and not compoundable under Section 320 Cr.P.C.

6. It is a case of peculiar nature where complainant/respondent No.2 and accused/petitioner are now residing under one and same roof as husband and wife. In fact it appears from their statements, recorded on oath, that petitioner without taking final decision, had developed intimacy with respondent No.2 with intention to marry her, which had led to physical relations with each other, however, thereafter, there was fluctuation in mind of petitioner which was communicated by him to respondent No.2 whereupon, and rightly so, respondent No.2 had gathered impression that petitioner was not inclined to marry her and had developed physical relations with her in deceitful manner and had cheated her and, consequently, it had resulted into registration of FIR against petitioner. However, thereafter, on removal of misunderstanding, they have solemnized marriage on 13.12.2019 in Tarna Mata Temple, Mandi, H.P., in accordance with Hindu rites and rituals and now respondent No.2 is residing with in-laws along with her husband/petitioner and has prayed for quashing of FIR and criminal proceedings pending against her husband for betterment of her life as well as welfare of her husband and in-laws.

7. Three Judges Bench of the Apex Court in ***Gian Singh Vs. State of Punjab and Ors.*** reported in ***(2012) 10 SCC 303***, explaining that High Court has inherent power under Section 482 of the Code of Criminal Procedure with no statutory limitation including Section 320 Cr.PC, has held that these powers are to be exercised to secure the ends of justice or to prevent abuse of process of any Court and these powers can be exercised to quash criminal proceedings or complaint or FIR in appropriate cases where offender and victim have settled their dispute and for that purpose no definite category of offence can be prescribed. However, it is also observed that Courts must have due regard to nature and gravity of the crime and criminal proceedings in heinous and serious offences or offence like murder, rape and dacoity etc. should not be quashed despite victim or victim family have settled the dispute with offender. Jurisdiction vested in High Court under Section 482 Cr.PC is held to be exercisable for quashing criminal proceedings in cases having overwhelming and predominatingly civil flavour particularly offences arising from commercial, financial, mercantile, civil partnership, or such like transactions, or even offences arising out of matrimony relating to dowry etc., family disputes or other such disputes where wrong is basically private or personal nature where parties mutually resolve their dispute amicably. It was also held that no category or cases for this purpose could be prescribed and each case

has to be dealt with on its own merit but it is also clarified that this power does not extend to crimes against society.

8. The Apex Court ***in Parbatbhai Aahir alias Parbathbhai Bhimsingbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641***, summarizing the broad principles regarding inherent powers of the High Court under Section 482 Cr.P.C., has recognized that these powers are not inhibited by provisions of Section 320 Cr.P.C.

9. The Apex Court in case ***Narinder Singh and others vs. State of Punjab and others*** reported in ***(2014)6 SCC 466*** and also in ***State of Madhya Pradesh vs. Laxmi Narayan and others (2019) 5 SCC 688*** has summed up and laid down principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercise 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 criminal proceedings.

10. No doubt Section 376 IPC is not compoundable under Section 320 Cr. P.C. However, as explained by Hon'ble Supreme Court in *Gian Singh's, Parbatbhai and Narinder Singh's cases supra***,** power of High Court under Section 482 Cr.PC is not inhibited by the provisions of Section 320 Cr.P.C. and FIR as well as criminal proceedings can be quashed by exercising inherent powers under Section 482 Cr.PC, if it is warranted in given facts and circumstances of the case for ends of justice or to prevent abuse of the process of any Court, even in those cases which are not compoundable where parties have settled the matter between themselves.

11. In present case, respondent No.2/complainant also appeared in person in this Court and her statement, as discussed in para 3 supra, has also been recorded in this Court, wherein she has expressed her desire to close the proceedings against the petitioner.

12. It is true that as a matter of principle, quashing of FIR on the basis of compromise should not be permitted in case of heinous crime like Section 376 IPC for the reason that said crime is against the society having adverse impact on it and also that possibility of compromise under any kind of pressure, threat or coercion cannot be ruled out in such cases as victims normally belong to the weaker class. But in given facts and circumstances of the present case, where offence of rape is made out because of the fact that a young girl, apprehending cheating has lodged FIR and now again residing in her matrimonial house with petitioner-accused, it cannot be compared with other cases.

13. Observation of the Coordinate Bench of this Court in similar case decided on 12.01.2017 in Cr.MMO No. 385 of 2016, titled as *Chander Vir Kaundal vs. State of H.P.,* would also be relevant, where it is recorded that looking at the case from another angle, since the petitioner has solemnized marriage with respondent, obviously, there is no possibility of her supporting the charge in case the petitioner is put to trial. Therefore, in such circumstances, the continuation of criminal proceedings would only cause untoward torture or harassment apart from creating undue social and psychological pressure upon the private parties and it will be an extremely sad story in case complainant is called in the witness box to depose against the accused, who is none other than her husband.

14. In present case also, deposition of victim in the Court in consonance with prosecution case would lead to landing her husband in jail and pushing her in pitch dark whereas retracting from her earlier version may put her in unnecessary trouble.

15. Learned counsel for the accused-petitioner has also referred to judgments passed by the Coordinate Benches in Cr.MMO No. 301 of 2018, decided on 24.04.2019, titled as Asha Devi & others vs. State of Himachal Pradesh & another; Cr.MMO No. 399 of 2018, decided on 18.09.2018, titled as Kajal & another vs. State of Himachal Pradesh & another; Cr.MMO No. 244 of 2019, decided on 07.05.2019 titled as X vs. State of H.P. & others; Criminal Miscellaneous (Main) No. 139 of 2018, decided on 26.5.2018, titled Sahil Chaudhary vs. State of H.P. and another; and Cr.MMO No.41 of 2019, titled as *Ravi Goyal and another vs. State of Himachal Pradesh & others,* decided on 24.09.2019 wherein FIRs registered under Section 376 IPC read with provisions of POCSO Act have been quashed in similar circumstances where victims and accused had married to each other.

16. The ratio of law laid down by the Apex Court on the issue of permitting the compromise and quashing of FIR in all cases, the Courts must consider the interest of public at large and the offence offending the Society at large should not be permitted to be

compromised and quashing of FIR or criminal proceedings on the basis of such compromise should not be permitted. Present case is somewhat different from general category, as in present case, it is not on the basis of compromise that quashing of FIR has been sought for, but it is a case where interest of victim is also involved and welfare of victim appears to be in closing criminal proceedings as she has proclaimed herself to be wife of accused. Now in the facts and circumstances of the case, this case cannot be termed as a case subjecting the victim-complainant forcibly to illicit sexual intercourse. Further, it is a peculiar kind of case where there is a conflict between interest of victim and societal interest. Interest of victim is not purely private in nature as rehabilitation and survival of victim is another issue which involves public interest because to ensure rehabilitation and provide resources for survival of victim is also responsibility of society. Considering entire facts and circumstances of the case, in my opinion balance lies in favour of the prayer of the victim.

17. Family is a primary unit of society, which gives protection to all family members. Therefore, there is always endeavour to save the family. By saving a family, we definitely save the fabric of society and thus any endeavour to save the family is also interest of society. Therefore, in present case, there is conflict of interest not only between victim and societal interest but also amongst divergent societal interest i.e. to continue proceedings for commission of an offence having adverse impact on the society and to save the family in larger interest of society.

18. In ***Madan Mohan Abbot vs. State of Punjab, (2008) 4 SCC 582,*** the Hon'ble Supreme Court emphasized and advised that in the matter of compromise in criminal proceedings, keeping in view of nature of this case, to save the time of the Court for utilizing to decide more effective and meaningful litigation, a commonsense approach, based on ground realities and bereft of the the technicalities of law, should be applied.

19. Therefore, in peculiar facts and circumstances of the present case, I am of the considered opinion that interest of justice shall be served in quashing the FIR as well as criminal proceedings pending against accused-petitioner.

20. Keeping in view the ratio of law laid down by the Hon'ble Apex Court and considering peculiar facts and circumstances of the case in its entirety, present petition is allowed and matter is permitted to be compounded. Consequently FIR No. 46 of 2019 dated 02.11.2019, registered in Women Police Station, Mandi, District Mandi, H.P., is quashed. Consequent to quashing of FIR, criminal proceedings initiated against accused-petitioner in pursuance thereto, are also quashed.

Petition stands disposed of in above terms, so also pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Joginder Singh & others ...Petitioners.

Versus

State of H.P. ...Respondent

Cr.MMO No. 86 of 2020
Date of Decision: February 19, 2020.

Code of Criminal Procedure, 1973 – Sections 320 & 482 – Inherent powers – Quashing of FIR in non-compoundable cases – Held, in appropriate cases, High Court in exercise of its inherent jurisdiction may permit quashing of proceedings pursuant to settlement interse parties - Accused and injured related to each other and live in close vicinity – Parties have settled matter and also admitted correctness of compromise – Accused having no criminal history and occurrence was confined between relatives and did not affect public peace – Continuation of proceedings will not yield any fruitful purpose and may result in acquittal – Petition allowed- FIR alongwith consequential proceedings quashed. (Para 4 & 12)

Cases referred'

Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193),
Gian Singh v. State of Punjab, 2012(10) SCC 303,
Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786,
MadhavraoJiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692,
NripendraBhusan Roy v. GobinaBandhu Majumdar, AIR 1924 Cal 1018
ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur and Ors. vs. State of Gujarat &anr.,(2017) 9 SCC 641
Ramanathan Chettiyar v. SivaramaSubramania, ILR 47 Mad 722 : (AIR 1925 Mad 39).

The *Whether approved for reporting?*[9]*Yes.*

Whether reporters of Local Papers may be allowed to see the judgment?

For the petitioner: (Accused). — Mr. Ramakant Sharma, Advocate, for the petitioners 1 & 2

Mr. K.R. Kashyap, Advocate, for the petitioner no. 3 (Complainant)

For the respondent: — Ms. Rita Goswamai and Mr. Nand Lal Thakur, Additional Advocates General, and Mr. Yudhvir Thakur Deputy Advocate General, for respondent /State.

Anoop Chitkara, Vacation Judge.

The accused (petitioners no. 1 & 2 herein), after compromising the entire matter with the complainant (Petitioner no. 3, herein), have come up before this Court under Section 482 CrPC, by invoking inherent powers of this Court, seeking quashing of FIR No. 76 of 2018, dated Jun 10, 2018, under Sections 341, 323, 324, 506 read with 34 of the Indian Penal Code, in the file of Police Station Nadaun, Distt. Hamirpur, Himachal Pradesh, and all subsequent proceedings, given the compromise arrived at between them.

2. The present F.I.R. stands registered based on the information given by the complainant, Bilraj, who stands arraigned as the Petitioner no. 3., and Mr. K.R.Kashyap, Advocate, duly represents him.

FACTS:

3. The gist of the facts apposite to decide the present petition is as follows:

(a) The present FIR (Annexure P-1) was registered based on the information given by complainant Bil Raj. The complainant stated that he is a farmer and on Jun 10, 2018 he was working in his fields. At around 8.30 – 9.00 in the morning he had gone to do agriculture job in his field. Adjoining to his field Joginder Singh and Abhishek Kumar, petitioners No. 1 and 2 herein, had laid down a pipe to discharge water from their field and such discharge fell in the field of the complainant. On this the complainant told accused Joginder Singh and Abhishek Kumar that they had wrongly placed their discharge pipe and it would cause damage to his field. On this accused Abhishek Kumar hit him with a kara/bracelet on his head. Accused Joginder Singh also caught hold of him and after that Abhisket Kumar again him him with kara/bracelet on his nose, head and shoulder. On such information the police registered the aforesaid FIR.

(b) Now the complainant/injured has entered into an out of Court compromise with the accused. A copy of the said compromise has been placed on the record as Annexure P-3.

(c) The injured Dilraj had put in an appearance in Court and made statement on oath that he has compromised the entire matter. The statement has been placed on record.

ANALYSIS AND REASONING:

4. The following aspects would be relevant to conclude this petition: -

a) The injured, who is the Petitioner No. 3, stated that after the registration of FIR, the parties, who are members of an extended family, want to keep good relations. The injured has resolved all his disputes with the accused persons.

b) The injured and the accused have amicably settled the matter between them in terms of the compromise deed (Annexure P/3).

c) The parties do not dispute the compromise deed (Annexure P-3), attached to this petition.

d) On this, the injured and the accused had appeared before this Court, and the statements to such effect on oath were recorded on Feb 18, 2020, which form part of the record.

e) It was the first offence of all the accused, who do not have any criminal history.

f) In the given facts, the occurrence was limited and confined between relatives and does not affect public peace or tranquility.

g) The addresses of the parties reveal that they are residents of the same Tehsil, and it has come in the compromise deed that accused No. 1 to 2 are related to the injured.

h) The accused persons are facing prosecution for the last two years.

i) If this Court shirks in exercising its inherent jurisdiction under section 482 CrPC, then it might lead to bitterness in relations. Every time the accused will be summoned in the Court, they may blame the injured/complainant for the FIR, and the financial and other expenditure incurred, and not getting jobs, due to this case.

j) If these proceedings are continued, the injured is not going to support his allegations also because FIR was not based on his statement.

k) The rejection of compromise may also lead to ill will, and the purpose of criminal jurisprudence is reformatory in nature and to work for bringing peace and happiness in society.

l) The pendency of trial is not only affecting their career, but after the settlement of all disputes with the injured, who is related to them, the prosecution is most likely to end in acquittal.

m) Even if this case is put to trial, the parties are likely to maintain the stand which they have taken in this compromise, which is expected to result in the acquittal of the accused.

n) The present case stands on many different footings than other similarly situated compromises.

o) Given the cumulative effect of all the factors mentioned above, it is one of the exceptional cases, where this Court should exercise its inherent jurisdiction under Section 482 of the Code of Criminal Procedure and intervene, given the age of the accused, three of them being related to the injured, and the fact that the trial is pending for long time and is affecting the entire career of the accused persons.

NON-COMPOUNDABLE OFFENCES CAN BE QUASHED:

5. In the present case, the offence under Section 324 IPC is not compoundable under Section 320 CrPC. In *Y. Suresh Babu v State of A.P.,* 2005 (1) SCC 347, Hon'ble Supreme Court, while dealing with section 326 of IPC, which was non-compoundable offence, permitted the parties to compound the offence.

6. In Ram Prasad v. State of Uttar Pradesh, (1982) 2 SCC 149, Supreme Court holds,

> "The appellants, who are the accused and the complainant, Shri Ram, who was the person injured as a result of firing, have appeared before us and stated that they wish to compound the offence. The offence for which both the appellants have been convicted is one under Section 307 read with Section 34 of the Indian Penal Code, but having regard to the nature of the injury sustained by Shri Ram, we think that the proper offence for which

the appellants should have been convicted was under Section 324 read with Section 34. Shri Ram received only one injury on the shoulder and that was also in the nature of simple hurt. We would, therefore, convert the conviction of the appellants to one under Section 324 read with Section 34. Since the parties belong to the same village and desire to compound the offence, we think, in the larger interest of peace and harmony between the parties and having regard to the nature of the injury, that it would be proper to allow the parties to compound the offence."

JUDICIAL PRECEDENTS ON JURISPRUDENCE OF QUASHING:

7. The law is almost settled by a larger benches judgments of Supreme Court that the offences, those are not listed as compoundable, under Section 320 CrPC, can also be compounded, and the procedure to follow would be by quashing the FIR, and consequent proceedings.

a) In *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866, a three-member Bench of Hon'ble Supreme Court holds,

6. ....It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such case, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A, the High Court would not embark upon an enquiry as to whether the evidence in question is reliable

or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786, Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), NripendraBhusan Roy v. GobinaBandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. SivaramaSubramania, ILR 47 Mad 722 : (AIR 1925 Mad 39).

b) In *MadhavraoJiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre*, 1988 (1) SCC 692, a three judges' bench of the Hon'ble Supreme Court holds: -
7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

c) A three Judges bench of Hon'ble Supreme Court, in *Gian Singh v. State of Punjab*, 2012(10) SCC 303, has settled the law on quashing on account of compromise/compounding, in the following terms:

"53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, 'nothing in this Code' which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e., to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court necessary to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in

Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under Indian Penal Code or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."

d) In *ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur and Ors. vs.* State of Gujarat &anr.,(2017) 9 SCC 641, a Three Judges Bench of Hon'ble Supreme Court, laid down the broad principles for quashing of FIR, which are reproduced as follows:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

16 (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 recognises and preserves powers which inhere in the High Court;

16 (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.

16 (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;

16 (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;

16 (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;

16 (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;

16 (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;

16 (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;

16 (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

16 (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."

8. In the present case, the offences are not compoundable under section 320 CrPC. Be that as it may, in the peculiar facts and circumstances, this Court is inclined to invoke the inherent jurisdiction under section 482 CrPC to quash the FIR and all subsequent proceedings.

9. In Himachal Pradesh Cricket Association v. State of Himachal Pradesh (SC); 2018 (4) Crimes 324, Hon'ble Supreme Court holds as under:-

47. As far as Writ Petition (Criminal) No. 135 of 2017 is concerned, the appellants came to this Court challenging the order of cognizance only because of the reason that matter was already pending as the appellants had filed the Special Leave Petitions against the order of the High Court rejecting their petition for quashing of the FIR/Chargesheet. Having regard to these peculiar facts, writ petition has also been entertained. In any case, once we hold that FIR needs to be quashed, order of cognizance would automatically stands vitiated."

CONSEQUENCES:

10. In Shakuntala Sawhney v. Kaushalya Sawhney, (1979) 3 SCR 639, *Hon'ble* Supreme Court observed,

> The finest hour of Justice arise propitiously when parties, despite falling apart, bury the hatchet and weave a sense of fellowship or reunion.

11. The accused/Petitioners No. 1 and 2 and the injured/petiioner No. 3 are known to each other because the injured is in relations of accused No. 1 and 2. They and their families live in close vicinity, in a small town. The investigation is complete. The accused have learnt a lesson for life, by facing the consequences of FIR and criminal trial till framing of charges.

12. Given the entirety of the facts of the case, as well as judicial precedents, a few of which have been mentioned hereinabove, I am of the considered opinion that continuation of these proceedings will only cause unnecessary burden on the trial Courts but in all likelihood is going to cause distressing hardship on both the victim as well as the accused, without resulting into any fruitful purpose whatsoever. Moreover, our trial Courts are already burdened with so many cases, and it will be a total wastage of the valuable time of the Courts. If these types of proceedings are permitted to be continued, and the accused are prosecuted, it will serve no purpose whatsoever. Therefore, I am of the considered opinion that this is a fit case where the inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure is invoked to quash the FIR mentioned above and all consequent proceedings.

13. Furthermore, this compromise is subject to the petitioners No. 1 and 2/accused paying total compensation of Rs. 30,000/- (Rs. Thirty thousand). Out of this, a sum of Rs 10,000/- (Rs. Ten thousand), shall be paid as compensation to the Himachal Pradesh Legal Services Authority, and a sum of Rs 10,000/- (Rs. Ten thousand), shall be paid as compensation to as compensation to the Police Station Nadaun, District Hamirpur, HP., and a sum of Rs 10,000/- (Rs. Ten thousand), shall be paid as compensation to as compensation to the Office of Ld. Advocate General to the State of Himachal Pradesh. This amount must be deposited in a single installment of Rs. 10,000/- each, on or before Mar 31, 2020, failing which, this petition shall be deemed to have been dismissed, without any further orders from this Court. The reasons for burdening the accused with compensation is that due to their illegal acts, the Police machinery, Office of Ld. Advocate General, as well as the Courts spent their valuable time, and instead of taking the trial to its logical end, where the accused were liable to pay compensation under Section 357 CrPC, apart from fine, accused persons would be saving all that amount. The total amount of Rs. 30,000/-, for both the accused, is kept on the lowest side. The Petitioners to file the receipt of the deposit in the Registry of this Court on or before Apr 3, 2020.

14. It is also made clear that in case any of the accused gets involved in any offence where the sentence prescribed is more than seven years, then they shall not be entitled to get the said matter compromised, subject to exception of cases mentioned in the first part of Section 320 CrPC.

15. Consequently, this petition is allowed, and the FIR No. 76 of 2018, dated Jun 10, 2018, under Sections 341, 323, 324, 506 read with 34 of the Indian Penal Code, in the file of Police Station Nadaun, Distt. Hamirpur, Himachal Pradesh, and all subsequent proceedings, is quashed. Since FIR has been quashed, all the consequential proceedings, including the order of framing charges, is also quashed and set aside. Petition is allowed. All pending application(s), if any, stand closed.

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

Kewal Ram Lothta ...Petitioner.

Versus

The Secretary Panchayati Raj and others ...Respondents.

CWP No. 2811 of 2017
Date of decision: 30.12.2019

Constitution of India, 1950 - Article 226 – **Himachal Pradesh Panchayati Raj Rules, 2002** – Rule 75- Writ petition for seeking directions to state to register FIR against private respondents on account of forgery and embezzlement of public money – Held, reply of official respondents clearly shows that private respondents indulged in forgery and embezzlement of public money while working as Pradhan and Panchayat Secretary of the Gram Panchayat – Department was knowing about misdeeds of the private respondents - Authorities constituted under the Himachal Pradesh Panchayat Raj Act and more particularly, Rule 75 of the Rules, required them to have informed the police when it came to their notice that offences had been committed by them – FIR directed to be registered against private respondents. (Para 8 & 14).

Whether approved for reporting ?[10] Yes

For the Petitioner : Mr. Jagan Nath, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur, Mr. Desh Raj Thakur, Addl. A.Gs.,Mr. Bhupinder Thakur and Mr. Narinder Thakur, Dy. A.Gs., for respondents No.1 to 5 and 8.

None for respondents No.6 and 7.

Tarlok Singh Chauhan, Judge (Oral)

Heard.

2. The Block Development Officer, Chopal had sanctioned an amount of Rs.1,80,900/- to the Gram Panchayat, Pujarli for construction of toilets for 67 families of BPL i.e. Rs.2700/- to each family. Smt. Sunita, the then Ex-Pradhan and Smt. Usha Devi, then then Panchayat Secretary (respondents No.6 and 7 herein), withdrew an amount of .85,000/- through self cheque from the accounts of the Gram Panchayat. This amount was shown to have been spent on the construction of toilets of 24 families belonging to BPL. But out of the said 24 persons, 3/ 4 persons had already died in the year 2008 and it is the allegation of the petitioner that fraud receipts were prepared after withdrawal of the amount in their names.

3. Not only this, on 18.11.2011, respondents No.6 and 7 again withdrew an amount of Rs.41,400/- from the Panchayat General Account against self cheque and the same were disbursed to 7 persons of BPL families for the construction of toilets. Here again one person died and Nikka Ram stated that he has not received any amount nor issued any receipt. An inquiry was conducted on the basis of a complaint and it was found that respondents No.6 and 7 had shown the receipts against dead persons.

4. The District Panchayat Officer i.e. respondent No.4 vide his letter dated 18.5.2016 directed the Block Development Officer, Chopal, i.e. respondent No.5 to take further inquiry and the same was thereafter conducted by the Sub Inspector Block Development, Chopal, who submitted his report dated 27.9.2016. On the basis of the inquiry so conducted, respondent No.4 i.e. District Panchayat Officer, Shimla issued letter of recovery

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of embezzled amount to respondents No.6 and 7 wherein they have admitted their fault and thereafter even deposited the amount in question.

5. However, since no action against them i.e. respondents No.6 and 7 was being taken especially for offence committed by them under the Indian Penal Code, the petitioner has approached this Court by filing the instant petition for the grant of following relief:

> *(a) To pass an appropriate writ, order or directions to respondents No.1 to 5 and 8 to take appropriate action against the respondents No.6 and 7 for committing forgery and mis-utilisation of the Govt. funds and register the FIR.*

6. The respondents No.1 to 5 are Secretary, Panchayati Raj, Director, Panchayati Raj, Deputy Commissioner, Shimla, District Panchayat Officer, Shimla and Block Development Officer, Chopal, who have filed their joint reply wherein they have categorically admitted that in the inquiry conducted against respondents No.6 and 7, an amount of Rs.17,928/- was found to have been misappropriated as is evident from para-3 of the preliminary submissions and para-6 of the reply on merits.

7. However, what surprising is that despite a clear case of offence(s) having been committed under the Indian Penal Code, respondents No.1 to 5 did not even think it appropriate to inform the police about the offence(s) so committed and admitted by respondents No.6 and 7.

8. In terms of the Himachal Pradesh Panchayati Raj Act, 1994 and the Rules framed thereunder, it was incumbent upon respondents No.1 to 5 keeping in view the mandate of the provisions of the Act and the Rules, more particularly, Rule 75 of the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002 arrangement of Rules to have informed the police when it had come to their light that criminal offence(s) had been committed by respondents No.6 and 7.

9. What is more surprising if not shocking is the manner in which respondent No.8 i.e. the Director General of Police (Vigilance) Himachal Pradesh has dealt with the entire matter by filing reply which is available at pages 77-80 of the paper book wherein the said respondent has acknowledged the receipt of the complaint dated 12.12.2014 in which the petitioner had made certain allegations regarding misutilisation of government funds, committing forgery and preparing false records regarding the amount released to the Panchayat. But instead of acting upon the said complaint, which prima-facie disclosed the commission of criminal offence(s), respondent No.8 simply forwarded the complaint to the Deputy Commissioner, Shimla for further inquiry into the matter by referring one notification dated 15.6.1983 wherein certain amendments/ changes have been brought about in the business. However, the fact remains that this letter is prior to promulgation of the Rules and therefore, could have not been made the basis for simply abdicating one's duty and referring the matter to the Deputy Commissioner, Shimla.

10. For it is more than settled that once the cognizable offence come to the notice of the Investigating Agency, it has no option but to proceed with the investigation by lodging an FIR to this effect.

11. Having regard to the entire facts and circumstances, the irresistible conclusion is that fraud has reached its crescendo. Deeds as foul as these are inconceivable much less could be permitted to be perpetrated. Shakespeare aptly described such sordid affairs in the following manner: *thus much of this, will make Black, white; foul, fair; Wrong, right; Base, noble; Ha, you gods: why this?*

12. Even otherwise, the entire scope of the Panchayati Raj Act and the various Rules framed thereunder, leave no manner of doubt that all the authorities constituted under the Act coupled with the various authorities of the Administration i.e. Deputy Commissioner, Superintendent of Police etc. etc. have to work in tandem and act in unison so as to ensure that not only the letter but even the spirit of the Act is implemented.

13. Unfortunately, the official respondents have remained oblivious of the duties and responsibilities cast under the Act.

14. Accordingly, the present petition is allowed and respondents No.1 to 5 and 8 are directed to take appropriate action against respondents No.6 and 7 on the basis of the admitted acts of forgery and mis-utilization of the government funds and after formally registering an FIR, respondent No.8 is directed to proceed in the investigation of the case and take to its logical end promptly and in no event later than **31st March, 2020**.

15. The writ petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Smt. Indira Thakur and another ..... Petitioners.

Versus

State of H.P. and another ...Respondents

CWP No. 3998 of 2019
Date of decision: 31.12.2019

Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Rule 15(1) – Further inquiry, whether can be ordered by the Disciplinary Authority without first setting aside the inquiry report of Inquiring Authority? – Held, once disciplinary proceedings have been initiated, the same must be brought to the logical end - And a finding is to be arrived at as whether the delinquent is guilty of charges or not"? – On facts held, it is not the case of department that Inquiry Officer had not followed correct procedure while conducting inquiry and particularly in taking evidence of witnesses – Therefore, ordering de novo inquiry by the Disciplinary Authority is bad in law– Respondents directed to take inquiry report submitted by Inquiry Officer to its logical ends. (Para 18 to 21).

Cases reffered'
K.R. Deb vs. The Collector of Central Excise, Shillong AIR 1971 SC 1447'
Union of India and others vs. P. Thayagarajan (1999) 1 SCC 733,
Kanailal Bera vs. Union of India and others (2007) 11 SCC 517'
D.N. Sharma vs. H.P. State Electricity Board Latest HLJ 2009 (HP) 652;

Whether approved for reporting ?[11] Yes

For the Petitioners Mr. Onkar Jairath and Mr. Shubham Sood, Advocates.

For the Respondents : Mr. Ajay Vaidya, Senior Additional Advocate General with Mr. Desh Raj, Thakur, Addl. Advocate General and Mr. Narinder Thakur, Deputy Advocate General.

Tarlok Singh Chauhan, Judge (Oral)

The petitioners were appointed as Staff Nurses in the year 1997. One Anil Thakur made a complaint on 4.7.2016 to the Medical Superintendent, Kamla Nehru Hospital for Mother and Child, alleging therein that on 26.5.2016 an incident of baby exchange had taken place in the hospital and requested for a thorough prove into the incident.

2. The complaint in turn was referred to the Committee comprising of the Principal, Indira Gandhi Medical College, Shimla (for short 'IGMC') and other five members, who were the head of different Departments of IGMC. The aforesaid Committee inspected the entire record and also examined about 16 persons and after detailed investigation came to the conclusion that nothing adverse had been proved against the persons involved in the conduct

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of delivery on 26.5.2016. The Expert Committee came to the conclusion that it was proved beyond doubt that the exchange of babies was purely a human error.

3. It was thereafter that Sheetal wife of Anil Thakur approached this Court by way of CWP No. 2214 of 2016, titled Sheetal vs. State of H.P. and others. During the pendency of the writ petition both Sheetal and Anjana whose babies had been swapped alongwith their families arrived at amicable settlement and the writ petition was accordingly disposed of vide order dated 27.10.2016 with a direction to the respondents to conclude the investigation and take the departmental inquiries to its logical end.

4. On 5.12.2016, the petitioners were served with Articles of Charges and statement of imputations of misconduct and mis-behaviour in support of each Article of Charge. The Articles of Charges framed against petitioners No.1 and 2, read as under:

ARTICLE -1

That Smt. Indira Thakur, while working as Staff Nurse at Kamla Nehru State Hospital for Mother and Child Shimla and performing her Night Duty on 26.05.2016 in Labour Room at Kamla Nehru State Hospital for Mother and Child Shimla was found negligent for swapping new born babies as per Duty Roster maintained by Ward Sister. Exchange of babies occurred of Smt. Anjana and baby of Smt. Sheetal born on 26.05.2016 at 11.07 PM and 11.10 PM respectively which was proved by DNA report. As per protocol, the deviation occurred after the birth of babies between 11.07 PM and 11.10 P.M which resulted into the exchange of babies because of the negligence of the staff on duty. She has applied wrong tags and worn wrong clothes to the babies due to error in initial stages. This omission and commission of Smt. Indira Thakur, Staff Nurse amounts to be a misbehaviour/misconduct under the provisions of CCS(Conduct) Rules, 1964 and is liable to face disciplinary action.

ARTICLE-II

That the said Staff Nurse was supposed to help the doctor during delivery process as a team work and should have properly handed over the baby to the TBA/Staff Nurse and should have examined the sex of the baby. As per record in the Labour Room Register Smt. Indira Thakur, Staff Nurse has written male baby of Smt. Anjana and female baby of Smt. Sheetal which was proved wrong after the DNA report which is negligence during duty hours. This omission and commission of Smt. Indira Thakur, Staff Nurse amounts to be misbehaviour/misconduct under the provision of CCS (Conduct) Rules, 1964 and is liable to be disciplinary action."

ARTICLE -1

That Smt. Sundra Devi, while working as Staff Nurse at Kamla Nehru State Hospital for Mother and Child Shimla and performing her Night Duty on 26.05.2016 in Labour Room at Kamla Nehru State Hospital for Mother and Child Shimla was found negligent for swapping new born babies as per Duty Roster maintained by Ward Sister. Exchange of babies occurred of Smt. Anjana and baby of Smt. Sheetal born on 26.05.2016 at 11.07 PM and 11.10 PM respectively which was proved by DNA report. As per protocol, the deviation occurred after the birth of babies between 11.07 PM and 11.10 P.M which resulted into the exchange of babies because of the negligence of the staff on duty. She has applied wrong tags and worn wrong clothes to the babies due to error in initial stages. This omission and commission of Smt. Sundra Devi, Staff Nurse amounts to be a misbehaviour/misconduct under the provisions of CCS(Conduct) Rules, 1964 and is liable to face disciplinary action.

ARTICLE-II.

That the said Staff Nurse was supposed to help the doctor during delivery process as a team work and should have properly handed over the baby to

the TBA/Staff Nurse and should have examined the sex of the baby. As per record in the Labour Room Register Smt. Sundra Devi, Staff Nurse has written male baby of Smt. Anjana and female baby of Smt. Sheetal which was proved wrong after the DNA report which is negligence during duty hours. This omission and commission of Smt. Sundra Devi , Staff Nurse amounts to be misbehaviour/misconduct under the provision of CCS (Conduct) Rules, 1964 and is liable to be disciplinary action."

5. The petitioners submitted their written statement and denied the allegations levelled against them.

6. Initially Dr. Ashok Kumar Gupta, Joint Director Health Services was appointed as Inquiry Officer, but the said Inquiry Officer showed his inability to conduct the inquiry and it was Dr. R.K. Baria, Dy. Director Health Services, who thereafter was appointed as Inquiry Officer vide order dated 14.8.2017. The Inquiry Officer conducted the detailed inquiry and submitted the same to the Disciplinary Authority, i.e. respondent No.2 Director Health Services vide his report dated 28.12.2017.

7. The Disciplinary Authority i.e. respondent No.2 on 14.3.2018 pointed out certain alleged discrepancies in the inquiry report and requested the Inquiry Officer to submit inquiry report keeping in view the observations/issues and points so raised.

8. Accordingly, the Inquiry Officer again conducted inquiry and thereafter submitted his report alongwith conclusions on 9.01.2019 and the final conclusions drawn by the Inquiry officer were annexed as Annexure R-V, and the same read as under:

***"Conclusion**:*

In the detailed deliberations and statements of witnesses which were scrutinized thoroughly and the following conclusion drawn:

1. The incidence of swapping of babies did take place on night of 26.5.2016 which was proved later on by DNA test.

2. The majority of staff on duty was not aware of the incidence and they come to know this episode from the news papers days after the incidence.

3. Even the Complaints Smt. Anjana and Smt. Sheetal was not sure of incidence and this story put forth by Smt. Sheetal who got male child later on by order of the Hon'ble Court is not convincing at all. She only told that she was told in the night about the male child by some female employee whom she did not identify.

4. It is true that the right babies were restored to biological parents.

From the statements of the witnesses it is proved beyond doubt that it is purely a human error especially mentioned by Matrons who were there in the Kamla Nehru Hospital for more than thirty years.

To conclude Article-I does not stand test of inquiry and Article-II does not prove in process of inquiry.

This is for your further necessary action, please."

9. However, the Disciplinary Authority i.e. respondent No.2 again was not satisfied with the conclusion drawn by the Inquiry Officer and accordingly vide letter dated 14.01.2019, directed the Inquiry Officer to submit a fresh report clearly specifying therein whether the charge stands "**proved**" or "**not proved**".

10. In compliance to the aforesaid order, the Inquiry Officer again submitted his report to respondent No.2 on 19.1.2019 wherein he observed as under:

"*1. The incidence of swapping of babies did take place on night of 26.5.2016 which was proved later on by DNA test.*

2. The majority of staff on duty was not aware of the incidence and they come to know this episode from the news papers days after the incidence.

3. Even the Complaints Smt. Anjana and Smt. Sheetal was not sure of incidence and this story put forth by Smt. Sheetal who got male child later on by order of the Hon'ble Court is not convincing at all. She only told that she was told in the night about the male child by some female employee whom she did not identify.

4. It is true that the right babies were restored to biological parents.

***5. From the statements of the witnesses it is proved beyond doubt that it is purely a human error** especially mentioned by Matrons who were there in the Kamla Nehru Hospital for more than thirty years.*

Article-I NOT PROVED.

Article -II NOT PROVED."

11. It is thereafter that respondent No.2 without setting aside the inquiry report as submitted by Dr. R.K. Baria, ordered a denovo inquiry by appointing Dr. Sanjay Pathak, Medical Superintendent, HHMH&R, Shimla as Inquiry Officer to inquire into the charges framed against the petitioners.

12. Aggrieved by the order of denovo inquiry, the petitioners have filed the instant petition for the grant of following reliefs:

(I) That the writ in the nature of certiorari or any other appropriate writ, order or directions may kindly be issued, quashing the order dated 30.4.2019 (Annexure P-8), whereby de-novo inquiry has been initiated against the petitioners, being illegal, arbitrary, discriminatory and unconstitutional and against the settled law of service jurisprudence.

(ii) That the writ in the nature of mandamus or any other appropriate writ, order or directions may kindly be issued, directing the respondents to bring the departmental inquiry initiated against the petitioners to its logical end as early as possible making basis the Inquiry Report submitted by the Inquiry Officer on 28.12.2017 (Annexure P-7).

(iii) That the writ in the nature of Mandamus or any other appropriate writ, order or directions may kindly be issued, directing the respondents not to convene fresh DPC proceedings for promotion to the post of Ward Sister till the conclusion of departmental inquiry on the basis of the Inquiry Report dated 28.12.2017."

13. In the aforesaid background, the moot question is whether the respondents could have resorted to a de-novo inquiry without first setting aside the earlier inquiry report submitted by Dr. R.K. Baria.

14. Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 needs to be noticed and the same reads as follows:

"15(1). The Disciplinary Authority, if it is not itself the Inquiring Authority may, for reasons to be recorded by it in writing, remit the case to the Inquiring Authority for further inquiry and report and the Inquiring Authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 14, as far as may be."

15. The aforesaid Rule clearly contemplates the power of the Disciplinary Authority and the action that is required to be taken on the basis of the Inquiry Report. Nowhere does the Rule empower the disciplinary authority to set-aside the whole inquiry and get the Article of charges re-inquired from any other Inquiry Officer for no substantial reasons.

16. It is well settled that disciplinary proceedings against employees conducted under the provisions of CCS (CCA), Rules, 1965 or under any corresponding Rules are quasi judicial in nature and as such, it is necessary that orders in such proceedings are issued by the competent authorities in accordance with the Rules as the order issued by such authorities attribute to a judicial order. Further any decision arrived at by the disciplinary authority or appellate authority under the said Rules, is in the capacity of quasi judicial authority. Thus, it is obligatory for the authority to record reasons as this will insure that the decision so arrived at is in accordance with law and not a result of caprice, whim and fancy of the officer concerned.

17. The issue otherwise is no longer *res integra* in view of the judgment of the Constitution Bench of the Hon'ble Supreme Court in ***K.R. Deb vs. The Collector of Central Excise, Shillong AIR 1971 SC 1447*** wherein it was held as under:

> "13. *It seems to us that Rule 15, on the face of it, really provides for one inquiry but it may be possible if in a particular case there has been no proper inquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. But there is no provision in rule 15 for completely setting aside previous inquiries on the ground that the report- of, the Inquiring Officer or Officers does not appeal to the disciplinary, Authority-. The Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under rule 9."*

18. It needs to be noted here that it is not the case of the respondents that the Inquiry Officer had not followed the correct procedure while conducting inquiry, more particularly, in taking evidence of the witnesses. Therefore, the judgment of the Hon'ble Supreme Court in ***Union of India and others vs. P. Thayagarajan (1999) 1 SCC 733*** upon which strong reliance has been placed by Mr. Ajay Vaidya, learned Senior Additional Advocate General, is totally misplaced as therein the Hon'ble Supreme Court had on the peculiar facts of the case held that it was upon the disciplinary authority to order de-novo inquiry when it was found that the Inquiry Officer had not followed the correct procedure in taking evidence of the witnesses.

19. As a matter of fact, an identical question came up before the Hon'ble Supreme Court in ***Kanailal Bera vs. Union of India and others (2007) 11 SCC 517*** wherein while dealing with a similar provision contained in Rule 27 of the Central Reserve Police Force Rules, 1955 the Hon'ble Supreme Court held that once a disciplinary proceedings have been initiated, the same must be brought to its logical end. Meaning thereby, a finding is required to be arrived at as to whether the delinquent officer is guilty of charges levelled against him or not. In a given situation further evidence may be directed to be adduced but the same would not mean that despite holding a delinquent officer to be partially guilty of the charges levelled against him another inquiry would be directed to be initiated on the same charges which could not be proved in the first inquiry.

20. An identical question came up for consideration before a co-ordinate bench (Coram: Hon'ble Mr. Justice Surinder Singh,J, as his Lordship then was) in ***D.N. Sharma vs. H.P. State Electricity Board Latest HLJ 2009 (HP) 652*** wherein after placing reliance on the judgment of the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***K.R. Deb*** (supra) it was held that the disciplinary authority cannot order re-inquiry by some other Inquiry Officer on receipt of the inquiry report as the powers have to be exercised strictly in accordance with Rule 15 of the CCS (CCA) Rules, 1965.

21. In view of the aforesaid discussion, I find merit in the instant petition and the same is accordingly allowed and the impugned order dated 30.04.2019 (Annexure P-8) whereby de-novo inquiry has been ordered to be initiated against the petitioners is quashed and set-aside and the respondents are directed to take the inquiry report submitted by the Inquiry Officer on 28.12.2017 (Annexure P-7) to its logical end as expeditiously as possible and in no event later than **31.01.2020**.

22. In sofar as the other reliefs as claimed by the petitioners are concerned, the Court is not expressing any opinion on the same. In case the petitioners are still aggrieved, they are at liberty to approach this Court for redressal thereof. The mere fact that the instant petition was decided will not be a bar for entertaining such petition.

23. The petition is disposed of in the aforesaid terms, so also the pending application(s) if any.

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

Suman Aggarwal .....petitioner

Versus

Municipal Council & Anr. .....Respondents.

CWP No. 915 of 2016
Reserved on: 23.12.2019
Date of decision: 27.12.2019.

Constitution of India, 1950 – Articles 14 & 226 – Allotment of shop(s) by Municipal Council – Challenge thereto by petitioner – Held, power or discretion of Government in matter of grant of largesses including award for jobs, contracts, quotas, licences must be confined and structured by rational, relevant and non-discriminatory standard or norm – If Government departs from such standard or norm in any particular case, its action would be struck down unless it can be shown by it that departure was not arbitrary and it was based on some valid principle – Petitioner cannot claim possession of shop of Municipal Council contrary to Rules framed by the Government – Petition dismissed with costs. (Para 1,15, 29 & 30)

Cases reffered:

Bharti Airtel Limited v. Union Of India, (2015) 12 SCC 1,
Centre for Public Interest Litigation v. Union of India, 2012 3 SCC 1 (popularly known as the "2G case"), Manohar Lal Sharma v. Principal Secy., (2014) 9 SCC 516,
Erusian Equipment and Chemicals Ltd. vs. State of West Bengal, AIR 1975 SC 26)'
Goa Foundation v. Sesa Sterlite Ltd., (2018) 4 SCC 218
J. S. Luthra Academy and another vs. State of Jammu and Kashimir and others, AIR 2018 SC 5367,
M & T Consultants v. S.Y. Nawab, (2003) 8 SCC 100,
Netai Bag & Ors. v. State of W.B. & Ors., (2000) 8 SCC 262, 5
New India Public School vs.Huda (1996) 5 SCC 510'
Villianur Iyarkkai Padukappu Maiyam v. Union of 11 India, (2009) 7 SCC 561

Whether approved for reporting?[12] *Yes.*

For the Petitioner: Mr. Rahul Verma, Advocate.

For the Respondents: Mr. Ajay Kumar Dhiman, Advocate, for respondent No. 1.

Ms. Shalini Thakur, Advocate, for respondent No. 2.

Tarlok Singh Chauhan, Judge

12 *Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

It was more than four decades back that the Hon'ble Supreme Court had observed that "it must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesses, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesses including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory (Refer: ***Erusian Equipment and Chemicals Ltd. vs. State of West Bengal, AIR 1975 SC 26***).

2. The instant case depicts sordid, despotic and nepotic functioning of respondent No.1. Despite there being no advertisement or even proposal on behalf of respondent No.1, the petitioner approached respondent No. 1 with the proposal for constructing a shop under self-financing scheme. What is more surprisingly is that respondent No. 1 entertained such request and asked the petitioner to deposit a sum of Rs.10,000/- as earnest money for construction of shop in near future and the balance amount was to be paid at the time of possession of the shop, as per the endorsement made by respondent No. 1 on the application. The petitioner deposited a sum of Rs.10,000/- on 27.01.2009. Thereafter petitioner repeatedly visited the office of respondent No. 1 to deposit the balance amount towards the cost of construction of the shop but the request of the petitioner was delayed on one pretext or the other.

3. In July 2013, petitioner came to know that respondent No. 1 was again planning to construct the shop for renting out to some third person. Therefore, she again approached the Chairman of respondent No. 1 seeking clarification and requested the authorities to permit her to deposit the balance amount towards the cost of the construction of shop, in addition to the amount of Rs.10,000/-already deposited. However, the said request was declined and petitioner was asked to take back the earnest money. Despite having no right much less legal right the petitioner, thereafter got served legal notice on respondent No. 1 seeking therein direction to respondent No. 1 to take immediate steps for construction of the shop for allotting the same in favour of the petitioner on lease basis. Respondent No. 1 did not pay any heed to the said notice and, therefore, the petitioner made a complaint to the SDM, Paonta Sahib to take necessary action. The petitioner thereafter on 14.10.2013 filed a civil suit in the court of learned Civil Judge (Jr. Division) Paonta Sahib against the respondents/defendants for permanent prohibitory injunction and filed an application seeking interim relief for restraining defendants for renting out or delivering possession of the shop. The learned Court vide order dated 18.10.2013, restrained the defendant/respondent No. 1 for renting out or delivering the possession of the shop till the next date of hearing.

4. It was averred that despite interim order, respondent No. 1 permitted respondent No. 2 to raise construction of the shop in question, constraining the petitioner to lodge a complaint before the Police Station, Paonta Sahib on 20.10.2013. The police officials visited the spot and recorded the statement of the parties.

5. Respondent No. 1 filed written statement to the plaint and admitted to the receipt of earnest money of Rs.10,000/- from the petitioner as also the notice dated 22.08.2013. However, it was pointed out that respondent No. 2 had filed a suit, which was compromised in Loak Adalat by respondent No. 1 by giving a statement that respondent No. 1 is ready to give a shop to respondent No. 2 in M. C. Complex, Paonta Sahib within three months and the shop was allotted to respondent No. 2 vide a Resolution No. 2 on 30.08.2013 on monthly rent of Rs. 1650/-. It was further averred that respondent No. 2 had also deposited a sum of Rs.75,000/- with respondent No. 1 and had also installed the shutters and put the floor on the said shop.

6. The petitioner thereafter withdrew the suit with liberty to file the same afresh, as reflected in order dated 19.06.2014. However, the petitioner did not file a suit and rather filed the instant petition for grant of following substantive reliefs:-

> (i) The resolution No. 12 dated 30.08.2013, Annexure P-15, passed by respondent No. 1 may kindly be held wrong, illegal and arbitrary and may kindly be set aside.
>
> (ii) That respondent No. 1 may kindly be directed to take back the possession of the shop in question from respondent No. 2 and thereafter allot the same to the petitioner in terms of acceptance of proposal of petitioner by respondent No. 1 on 27.01.2009.

7. Respondent No. 1 contested the petition raising various preliminary objections. It was averred that the petitioner has no indefeasible right to get the shop in the premises of the Municipal Council, Paonta Sahib. The shop No. 15 has already been given on rent basis to respondent No. 2 vide Resolution No. 2 on monthly rental of Rs.1650/-.

8. As regards respondent No. 2, he too, has contested the petition by filing a separate reply. The sum and substance of the reply is that since the petitioner had not been allotted the shop in question, therefore, she is not entitled to file and maintain the present petition, more particularly, after having withdrawn the civil suit that had been filed by her.

9. On 11.12.2017, this court passed the following order:-

> " It has been represented by Mr. Ajay Kumar Dhiman, learned counsel for respondent No. 1 that the shop in question has been allotted to respondent No. 2 after holding a public auction wherein he was the successful bidder. He prays for and is granted two weeks' time to file supplementary affidavit to this effect."

10. In the affidavit filed by respondent No. 1 in compliance to the aforesaid order it was stated that on 20.08.2008 an auction notice was published by respondent No. 1 under the self financing scheme and date of auction was fixed for 04.09.2008. Earlier to that respondent No. 2 had already applied for the shop on 23.07.2008 and later on he participated in the auction after depositing the advance amount of Rs.10,000/- with the respondent No.1-department. Two other persons, namely, Om Parkash and Shri Satish Kumar Sharma also participated in the auction, however, since the amount offered by respondent No. 2 was higher, therefore, the shop in question was allotted to him.

11. Respondent No. 2 has filed response to the affidavit filed by respondent No. 1, wherein it has been clarified that at the time of auction, the auctioned shop was actually a space meant for shop bearing No. 13 in the M. C. record and it could be in the Indira Market or whatsoever and wheresoever be the place available in municipal area under self employment scheme as a running number. It has been averred that despite being successful in the bid, neither any shop in the Indira Market was allotted nor the space/shop was handed over to respondent No. 2. Resultantly, he was constrained to file civil suit No. 58/1 of 2012 in the Court of learned Civil Judge (Sr. Division) Paonta Sahib, District Sirmour, wherein following prayers was made:-

> "…. It is therefore prayed that a decree of mandatory injunction directing the defendant to construct the shop near Mela Ground/Indira Market in Ward No. 8 at Paonta Sahib and allot the same to plaintiff or in the alternative provide the plaintiff with any other shop on rent basis and adjust the already deposited advance rent of Rs.60,000/- deposited with the defendant in the monthly rent of said shop be passed in favour of the plaintiff and against the

defendant with the cost of the suit or any other relief which this Hon'ble Court deems fit may also be granted."

12. Respondent No. 1 in its written statement admitted the factual position but pleaded that there is no sufficient and suitable space near the Mela Ground Indira Market in ward No. 8 for construction of shop as there was existing public toilet which was in poor condition and for providing toilet facility to the public at large the defendant had constructed new public toilet over there and after the construction of the said public toilet there was no sufficient or suitable land available for construction of shop in the Indira Market/Mela Ground.

13. The civil suit was then referred to the Lok Adalat where on 27.07.2013, respondent No. 1 offered to give respondent No. 2 another shop in place of shop in Indira Market and the proposal was accepted by respondent No. 2. In view of the compromise, resolution was passed by respondent No. 1 on 30.07.2013 wherein it was resolved vide resolution No. 12 to hand over the vacant space sandwiched between two staircases in Municipal complex, Paonta Sahib to respondent No. 2 at a monthly rent of Rs.1650/- as against the bid amount of Rs.10,000/- of respondent No. 2. As against the earlier deposited earnest money of Rs.60,000/-, respondent No. 2 was directed to deposit a further sum of Rs.15,000/-, which was duly deposited by him. It was thereafter the space was allotted to respondent No. 2 and was given No. 13. After getting the possession of the shop, respondent No. 2 raised construction and built the shop (constructed the floor base, shutter work, main door, electricity work and whitewash) by investing more than Rs.50,000/- at that time and ever since thereafter running the shop and has generated the goodwill with the passage of time.

14. The petitioner has also filed his response to the response filed by respondent No. 2 wherein it has been averred that the petitioner had applied in the same and similar manner as respondent No. 2 who had been allotted a shop, which clearly shows that step-motherly treatment has been meted out to the petitioner and undue favour has been shown in favour of respondent No. 2.

I have heard learned counsel for the parties and have gone through the record of the case.

15. At the outset, it needs to be noticed that the State Government has framed Rules for the purpose of leasing out of stalls/shops constructed by Municipalities in Himachal Pradesh. In terms of these rules, the stalls/shops constructed by the Municipalities are to be leased out on the conditions laid down in the rules. As per Rule 4, lease amount of stalls/shops shall be determined by the Municipality on the basis of competitive bids. The minimum lease amount has to be worked out by the Municipalities on the market value of the land and cost of construction of stall/shop and other relevant factor such as location of stall/shop etc. The stall/shop has to be leased out to highest bidder of each category. In case, the amount of open auction bid is found less then the reserved price, then in that case, the shop/stall has to be put to fresh auction in order to fetch minimum reserve price so determined by the Municipality. Rules 5 provides for terms of the lease, which clearly stipulates that Municipality has to lease out the stalls/shop constructed by it for a period not exceeding 25 years with the stipulation of 10% increase in the rent after every five years. As regards the procedure for auction, the same is prescribed in Rule 6, which clearly stipulates that auction is to be made by giving wide publicity through newspaper of the region. The auction in terms of Rule 8 is required to be conducted by the Executive Officer or the Secretary of Municipality and the same, in turn, then has to be confirmed by Municipal Council through a proper resolution.

16. It is clearly evident from the aforesaid narration of facts that the mode and manner in which the petitioner applied for the shop is not even contemplated under the Rules. Even the allotment made in favour of respondent No. 2 is not in accordance with the Rules. Therefore, respondent No. 1 had no authority whatsoever to accept the application for

allotment of shop submitted by the petitioner. The same is equally true in case of the allotment made in favour of respondent No. 2, as the same could have been made only after complying with the provisions of the rules.

17. Record reveals that no publicity of the auction as was required under Rule 6 was made by respondent No. 1 prior to putting the shop to auction to respondent No. 2. No reserve price was fixed. Even as per the admitted case of respondent No. 2 only a simple notice of auction was placed on the Notice Board and this Court has no hesitation to conclude that this entire exercise was undertaken simply to oblige respondent No. 2, who in addition to himself, arranged two other persons, who eventually after bidding for a sum of Rs. 680/- and Rs.850/-, respective, did not choose to bid any further and since respondent No. 2 had offered Rs.1000/- per month, the shop was allotted in his favour.

18. The respondents being creation of a statute are not free to act like an ordinary individual, in dealing with the public property, as it cannot act arbitrarily at its, sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The action of the respondent must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. After all, it is the principle of reasonableness and non - arbitrariness in governmental action that lies at the core of our entire constitutional scheme and structure.

19. It was observed by Wades Administrative Laws, 5th Edition at page 347 that "The first requirement is the recognition that all powers have legal limits, the next requirement, no less vital, is that the Court should draw this limit in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament consistently confers upon public authorities powers which on their face seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the Courts refuse to countenance. They have woven a net-work of restrictive principles which require statutory powers to be reasonable and in good faith and in accordance with the spirit and letter of the empowering Act." At page 359, it was also observed that "Discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That amounts at least to this that the statutory body must be guided by relevant consideration and not irrelevant. If its decision is influenced by extraneous consideration which ought not have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless, the decision will be set-aside."

20. Here, it shall be apposite to make a reference to the judgment of the Hon'ble Supreme Court in ***New India Public School vs.Huda (1996) 5 SCC 510***, wherein it was observed that when public authority discharges its public duty, it has to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and the same cannot be acted at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration.

21. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution. Thus, Article 14 read with Article 16(1) of the Constitution accords right to an equality or an equal treatment consistent with principles of natural justice. Therefore, any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly and reasonably. Right to fair treatment is an essential inbuilt of natural justice.

22. This Court can take judicial notice that it is a case of the wanton and unauthorised act on behalf of the officials of the respondent No.1-Municipal Corporation/local urban authorities like Nagar Panchayat, Municipal Council, Municipal Corporation that there is rampant illegal/unauthorised construction. This fact has been duly noticed by this Court in CWP No. 10237 of 2012, titled as *Anil Aggarwal vs. H. P. Housing and Urban Development*

Authority, Shimla and another, relating to unauthorised construction in the adjoining area of Nahan within the same District of Sirmour.

23. The entire scenario shocks the conscious of this Court to come across such a systematic fraud committed by those at the helm of affairs of the Municipal Council in dealing with property as it was its personal property. It has to be remembered that respondent No. 1 like anybody corporate has power to hold property and is capable to entering into contract strictly in accordance with the Rules that too in a fair and transparent manner without indulging in any favourtism or nepotism.

24. How the State largesses are to be distributed has been the subject matter of various decision of the Hon'ble Supreme Court. In this regard, I need only refer to the one of the latest judgments of the Hon'ble Supreme Court in ***J. S. Luthra Academy and another vs. State of Jammu and Kashimir and others, AIR 2018 SC 5367,*** wherein it was categorically held that the process of allotting public largesses must be just, non-arbitrary and transparent. It would be relevant to reproduce relevant observations as contained in para-6, which reads as under:-

> *"6. This Court in a series of cases including Centre for Public Interest Litigation v. Union of India, 2012 3 SCC 1 (popularly known as the "2G case"), in Natural Resources Allocation, In Re. Special Reference No. of 1/2012, (2012) 10 SCC 1, Manohar Lal Sharma v. Principal Secy., (2014) 9 SCC 516, Bharti Airtel Limited v. Union Of India, (2015) 12 SCC 1, and Goa Foundation v. Sesa Sterlite Ltd., (2018) 4 SCC 218 has formulated the guidelines for allocation of natural resources by the State. In Bharti Airtel Ltd. v. Union of India, (2015) 12 SCC 1, this Court summed up the principles governing the allocation of natural resources by the State laid down in Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 ("the 2G case") as follows:*
>
> > *"41. The licensor/Union of India does not have the freedom to act whimsically. As pointed out by this Court in 2G Case [Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1] in the aboveextracted paragraph, the authority of the Union is fettered by two constitutional limitations: firstly, that any decision of the State to grant access to natural resources, which belong to the people, must ensure that the people are adequately compensated and, secondly, the process by which such access is granted must be just, nonarbitrary and transparent, visÃ vis private parties seeking such access."*
> > *(emphasis supplied)*
>
> *Referring to the observations in the 2G case, the Court also highlighted that the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest, and that it must always adopt a rational method for disposal of public property, and ensure that a nondiscriminatory method is adopted for distribution and alienation, which would necessarily result in national/public interest.*
>
> *The principles governing the distribution of natural resources by the State were also discussed in the decision of the constitutional bench of this Court in Natural Resources Allocation, In Re, Special Reference No. 1 of 2012, (2012) 10 SCC 1. In para 149 thereof, the Court observed as follows:*
>
> > *"149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However,*

when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than 10 those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution." This decision emphasised that the ultimate goal to be served was that of the public good, and all methods of distribution of natural resources that ultimately served the public good would be valid, as reflected in the following observations:

"120. ...There is no constitutional imperative in the matter of economic policies-Article 14 does not predefine any economic policy as a constitutional mandate. Even the mandate of Article 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term "distribution", suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate."

It would be useful to note at this juncture that in this decision, the Court assessed the position of law developed through a catena of decisions, including Netai Bag & Ors. v. State of W.B. & Ors., (2000) 8 SCC 262, 5 M & T Consultants v. S.Y. Nawab, (2003) 8 SCC 100, and Villianur Iyarkkai Padukappu Maiyam v. Union of 11 India, (2009) 7 SCC 561, wherein it has been held that nonfloating of tenders or holding of auction by itself is not sufficient to hold that the exercise of power was arbitrary. It would be useful to reproduce the following observations from Netai Bag (supra), which were also relied upon by the Court in Natural Resources Allocation, In Re (supra) to highlight that the ultimate test is only that of fairness of the decision making process and compliance with Article 14 of the Constitution:

"19. ... There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor can the courts substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decisionmaking process."

The above principles were also reiterated in Manohar Lal Sharma (supra), wherein this Court observed at para 110:

"It is not the domain of the Court to evaluate the advantages of competitive bidding visÃ vis other methods of distribution/disposal of natural resources. However, if the allocation of subject coal blocks is inconsistent with Article 14 of the Constitution and the procedure that

has been followed in such allocation is found to be unfair, unreasonable, discriminatory, nontransparent, capricious or suffers from favouritism or nepotism and violative of the mandate of Article 14 of the Constitution, the consequences of such unconstitutional or illegal allocation must follow."

In Ajar Enterprises (P) Ltd. v. Satyanarayan Somani, (2018) 12 SCC 756, this Court affirmed the above principles in the following terms:

"49. ...Where a public authority exercises an executive prerogative, it must nonetheless act in a manner which would subserve public interest and facilitate the distribution of scarce natural resources in a manner that would achieve public good. Where a public authority implements a policy, which is backed by a constitutionally recognised social purpose intended to achieve the welfare of the community, the considerations which would govern would be different from those when it alienates natural resources for commercial exploitation. When a public body is actuated by a constitutional purpose embodied in the Directive 13 Principles, the considerations which weigh with it in determining the mode of alienation should be such as would achieve the underlying object."

The position of law developed through these decisions was summed up in the following manner by this Court in Goa Foundation v. Sesa Sterlite Ltd., (2018) 4 SCC 218, after adverting to the various decisions referred to above:

"80.1. It is not obligatory, constitutionally or otherwise, that a natural resource (other than spectrum) must be disposed of or alienated or allocated only through an auction or through competitive bidding;

80.2. Where the distribution, allocation, alienation or disposal of a natural resource is to a private party for a commercial pursuit of maximising profits, then an auction is a more preferable method of such allotment;

80.3. A decision to not auction a natural resource is liable to challenge and subject to restricted and limited judicial review under Article 14 of the Constitution;

80.4. A decision to not auction a natural resource and sacrifice maximisation of revenues might be justifiable if the decision is taken, inter alia, for the social good or the public good or the common good;

80.5. Unless the alienation or disposal of a natural resource is for the common good or a social or welfare purpose, it cannot be dissipated in favour of a private entrepreneur virtually free of cost or for a 14 consideration not commensurate with its worth without attracting Article 14 and Article 39(b) of the Constitution." (emphasis supplied)

From the above decisions, the following principles may be culled out:

(i) Generally, when any land is intended to be transferred by the state, or any state largesse is to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. The state must ensure that it receives adequate compensation for the allotted resource. However, nonfloating of tender or nonconducting of public auction would not

be deemed in all cases to be an arbitrary exercise of executive power. The ultimate decision of the executive must be the result of a fair decisionmaking process.

(ii) The allocation must be guided by the consideration of the common good as per Article 39(b), and must not be violative of Article 14. This does not necessarily entail auction of the resource; however, allocation of natural resources to private persons for commercial exploitation solely for private benefit, with no social or welfare purpose, attracts higher judicial scrutiny and may be held to be violative of Article 14 if done by noncompetitive and nonrevenue maximizing means.

15 Keeping in mind the aforementioned principles formulated by this Court in the aforementioned judgments, we have considered the entire material on record. It must be determined as to whether the allocation made in favour of the Academy fell foul of the above principles. In the instant case, the allocation has evidently been done to a private educational institution by nonrevenue maximizing means. Assuming that the Academy is engaged in commercial activities while engaging in its main activity of imparting education to students, two questions remain to be seen: first, whether there was any social or welfare purpose underlying the allocation, i.e., if the furtherance of the public good was the ultimate goal of the allocation so as to justify the nonauctioning of the land, and second, if the allocation is bad for lack of adequate compensation."

25. Having regard to the entire facts and circumstances, the irresistible conclusion is that fraud has reached its cresendo. Deeds as foul as these are inconceivable much less could be permitted to be perpetrated. Shakespeare aptly described such sordid affairs in the following manners: *thus much of this, will make Black, white; foul, fair; Wrong, right; Base, noble; Ha, you gods: why this?* This is clearly evident from the fact that both the President and Vice President of respondent No. 1 have recently resigned from the office purportedly because of a video widely circulated showing them accepting bribe from the Contractor.

26. As observed earlier, it is highly regrettable that the holders of the office of respondent No. 1 Municipal Council have been completely oblivious to the fact that the office entrusted to them are sacred trust and were meant for use and not for abuse.

27. The office bearers of any local authorities be it Gram Panchayat, Municipal council cannot act as despots or monarchs

and are obliged to act in accordance with the principles of democracy, equity, equality and solidarity.

28. Now once it is established that there is no credible mechanism in place to have even entertained the application of the petitioner as also respondent No. 2, respondent No. 1 could not have whimsically, arbitrarily and contrary to the rules allotted the shop in favour of respondent No. 2 as the same was required to be allotted strictly in accordance with the rules that too after giving wide publicity in newspapers having circulation in the area.

29. As regards the petitioner, she has simply jumped into bandwagon expecting illegal and undue favour as probably this was the order of the day.

30. Therefore, in the given facts and circumstances, this Court deems it fit to pass the following orders:-

i) The petition filed by the petitioner without any right is gross abuse of the process of law and is accordingly dismissed with costs of Rs.50,000/-.

ii) As regards the allotment made in favour of respondent No. 2, since the same was allotted to respondent No. 2 pursuant to the resolution passed by the Municipal Council of respondent No. 1 on 30.08.2013 ever since he has been in occupation thereof, I really see no reason to quash the said allotment. However, since the procedure for allotment as envisaged under the Rules has not been followed, therefore, respondent No. 2 is liable to pay the average auction price prevailing at the time of allocation, which shall be determined by the Superintending Engineer, HPPWD, Nahan. In addition thereto respondent No. 2 shall also liable to pay interest at the rate of 6% per annum from the date of allotment till the date of payment and such payment shall be made within a period of three months from today.

(iii) In case respondent No. 2 is not ready to pay the price as aforesaid then the shop in question be auctioned in accordance with rules.

iv) Since respondent No. 1 has indulged in rampant violation and allotted State largesses contrary to law, therefore, in the given facts and circumstances, Mrs. Priyanka Verma, IAS, ADC, Sirmour is directed to look into the affairs particularly with grant of largesses etc. of respondent No. 1 for the last one decade commencing from 01.01.2009 till date and submit her report before this Court within a period of three months from today.

31. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Kedar Singh Negi …Petitioner

Versus

H.P. High Court and others ..Respondents

CWP No. 537 of 2018.
Decided on: 07.01.2020.

Central Civil Services (Pension) Rules, 1972- Rules 13 - Ad-hoc service - Computation towards pensionary benefits – Held, if ad-hoc service is followed by regular service in the same post, then said service is to be counted for purpose of increments and pension. (Para 11 & 12).

Cases referred'

Kesar Chand vs. State of Punjab through the Secretary PWD (B&R) Chandigarh and others (1988) 94 (2) PLR 223,
Punjab State Electricity Board vs. Narata Singh AIR 2010 SC 1467,
Habib Khan vs. The State of Uttarakhand (Civil Appeal No. 10806 of 2017),
Prem Singh vs. State of Uttar Pradesh and others AIR 2019 SC 4390
Paras Ram vs. State of Himachal Pradesh and others, Latest HLJ 2009 (HP) 887
Sita Ram vs. State of H.P. and others,
Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No. 2019 @ SLP (C) No.5775 of 2018)
Ram Krishan Sharma vs. The Accountant General (A&E), HP and Ors., decided on 01.01.2020.

Whether approved for reporting ?[13] Yes

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[13] *Whether reporters of Local Papers may be allowed to see the Judgment ? Yes*

For the Petitioner :	**Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rajesh Kumar, Advocate.**
For the Respondents :	Ms. Shalini Thakur, Advocate, for respondent No.1. Mr. Shashi Shirshoo, Central Government Standing Counsel, for respondent No.2. Mr. Ashok Sharma, Advocate General with Mr. Desh Raj Thakur, Addl. A.G., and Mr. Narinder Singh Thakur, Dy. A.G., for respondent No.3.

Tarlok Singh Chauhan, Judge (oral)

The moot question in this petition is whether the services of an employee appointed on adhoc basis followed by regular appointment is to be counted for the purpose of pensionary benefits.

2. The issue in fact is no longer res integra in view of the judgment rendered by learned Division Bench of this Court in CWPOA No. 195 of 2019, titled Sheela Devi vs. State of H.P. and others, decided on 26.12.2019.

However, before adverting to the said judgment, certain minimal facts need to be noticed.

3. The respondents advertised the post of Peon in the year 2001 and the petitioner being eligible applied for the said post. After undergoing selection and being successful therein, the petitioner was offered appointment vide order dated 5.12.2002 and accordingly he was ordered to be appointed as Peon on adhoc basis. Subsequently, vide order dated 29.9.2005, the petitioner was ordered to be regularised alongwith two other persons namely Sh. Anil Kumar and Heera Lal, who are working as Chowkidars.

4. It is not in dispute that as regards these two persons i.e. Anil Kumar and Heera Lal, they have already been allotted GPF Account Number and it is only the petitioner, who has been kept out of GPF account and is continuing with the Contributory Pension Scheme. Thus, a case of invidious discrimination is clearly made out.

5. That apart, even the Registrar General of this Court had requested the State to count the services rendered by the petitioner on adhoc basis till his regular appointment for the purpose of pensionary benefits under the CCS (Pension) Rules, 1972, but the said request was not acceded to by respondent No.2, constraining the petitioner to file the instant writ petition for the grant of following substantive reliefs:

> *(i) That an appropriate writ, order or direction may very kindly be issued and the impugned rejection dated 15.12.2015 (Annexure P-8) may very kindly be quashed and set-aside and further directions may very kindly be issued to the respondents to allot GPF account number to the petitioner by governing the petitioner with old Pension Scheme instead of new Pension Scheme i.e. Contributory Pension Scheme, 2006.*
>
> *(ii) That directions may very kindly be issued to count the adhoc service of the petitioner for all purposes including the pension with effect from 05.12.2002 with all consequential benefits in the interest of law and justice."*

6. It has been specifically averred by respondent No.1 in its reply that even though respondent No.2 i.e. Accountant General of Himachal Pradesh had informed the High Court regarding the New Contributory Pension Scheme that has been introduced by the H.P. Government for its employees, who joined service on or after 15.05.2003 and would

therefore, not cover under the GPF Rules. But the High Court, in turn, after examining the matter informed the Assistant Accounts Officer of respondent No.2 that since the petitioner was appointed on adhoc basis w.e.f. 5.12.2002 and thereafter on regular basis w.e.f. 29.9.2005 without any break in service, therefore, the services rendered by the petitioner on adhoc basis w.e.f. 5.12.2002 till his regular appointment on 29.9.2005 was to be counted for the pensionary benefits as per CCS (Pension) Rules, 1972 and hence, the petitioner was in service before coming into force the New Contributory Pension Scheme, 2006 w.e.f. 15.5.2003 and requested the respondent No.2 to allot the GPF Account Number in favour of the petitioner. However, the office of the respondent No.2 vide endorsement dated 23.11.2006 returned the application form of the petitioner to respondent No.1 i.e. High Court to issue specific order that the adhoc period of the petitioner from 5.12.2002 to 28.9.2005 shall be counted for all pensionary benefits.

7. The respondent No.1, in turn, vide its letter dated 3.2.2007 after complying with the request of respondent No.2 again recommended the case of the petitioner. However, it appears that respondent No.2 thereafter sought guidance/clarification from the State Government to the effect that since there was no provision of counting adhoc services rendered by any official in the CCS(Pension) Rules, 1972 and that in the absence of any specific order in this regard.

8. The respondent No.3 in its reply has averred that the period of adhoc services does not qualify for pensionary benefits under the provisions of Rule 13 of the CCS (Pension) Rules, 1972 and, therefore, the services rendered by the petitioner on adhoc basis at initial stage w.e.f. 5.12.2002 to 28.9.2005 cannot be counted towards pensionary benefits.

9. I have heard learned counsel for the parties and have gone through the records of the case carefully.

10. As observed above, similar issue came up before the learned Division Bench of this Court in **Sheela Devi's** case (supra) wherein the moot question was whether the services rendered by a person employed on a contract basis followed by regular appointment can be counted towards qualifying service for the purpose of pension. The Court after referring to Rule 17 of the CCS (Pension) Rules, 1972 and number of judgments rendered by this Court, Full Bench judgment of Punjab and Haryana High Court in ***Kesar Chand vs. State of Punjab through the Secretary PWD (B&R) Chandigarh and others (1988) 94 (2) PLR 223,*** judgment of the Hon'ble Supreme Court in ***Punjab State Electricity Board vs. Narata Singh AIR 2010 SC 1467, Habib Khan vs. The State of Uttarakhand (Civil Appeal No. 10806 of 2017),*** decided on 23.8.2017 and recent decision rendered by three Judges of the Hon'ble Supreme Court in ***Prem Singh vs. State of Uttar Pradesh and others AIR 2019 SC 4390*** held that the services rendered on contract basis followed by regular appointment have to be counted towards qualifying service for the purpose of pension.

11. In fact, the issue is no longer res integra in view of the decision rendered by learned Single Judge of this Court in ***Paras Ram vs. State of Himachal Pradesh and others, Latest HLJ 2009 (HP) 887*** wherein it was laid down that if adhoc service is followed by regular service in the same post, the said service can be counted for the purpose of increments.

12. Further a Division Bench of this Court in LPA No. 36 of 2010 titled ***Sita Ram*** vs***. State of H.P. and others,*** decided on 15.7.2010 after placing reliance upon ***Paras Ram***'s case (supra) held that "*It is also settled principle of law that any service that is counted for the purpose of increment, will count for pension also. To that extent the appellant is justified in making submission that period may be treated as qualifying service for the purpose of pension also.*"

13. Adverting to the facts of the case, I have no difficulty in concluding that even though the appointment of the petitioner was adhoc basis but that was in no manner qualitatively different from the regular employees and once there was a vacancy and need for the services of the petitioner he was ultimately regularized. Once that be so, then obviously it

was unfair on the part of the respondents to take work from the petitioner on adhoc basis and they ought to have resorted to an appointment on regular basis.

14. The taking of work on adhoc basis for long amounts to adopting the exploitative device. Later on, though the services of the petitioner have been regularized, however, the period spent by him on adhoc basis, has not been counted towards the qualifying service. Thus, the respondents have not only deprived the petitioner from the due emoluments during the period he served on less salary on adhoc basis but he was also deprived of counting of the period for pensionary benefits.

15. The respondents have been benefitted by the services rendered by the petitioner in the heydays of his life on less salary on adhoc basis. Therefore, there is no rhyme or reason not to count the adhoc period in case it has been rendered before regularization. If the same is denied, it would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service.

16. The classification cannot be done on the irrational basis and when the respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. As it would rather be unjust, illegal, impermissible to make the aforesaid classification under the Pension Rules and to make Rule valid and non-discriminatory, the same will have to be read down and it has to be held that services rendered even prior to regularisation in the capacity of adhoc shall have to be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

17. In taking this view, I am fortified by the judgment rendered in ***Prem Singh's*** case (supra), more particularly observations made in paras 28 to 34 of the judgment, which read as under:

> *"**28.** The submission has been urged on behalf of the State of Uttar Pradesh to differentiate the case between work-charged employees and regular employees on the ground that due procedure is not followed for appointment of work charged employees, they do not have that much work pressure, they are unequal and cannot be treated equally, work- charged employees form a totally different class, their work is materially and qualitatively different, there cannot be any clubbing of the services of the work-charged employees with the regular service and vice versa, if a work-charged employee is treated as in the regular service it will dilute the basic concept of giving incentive and reward to a permanent and responsible regular employee.*
>
> ***29.** We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No. 2019 @ SLP (C) No.5775 of 2018) the appellants were allowed to cross efficiency bar, after '8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak w.e.f 15.9.1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200- 320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the*

benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

***30**. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work- charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.*

***31**. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.*

***32.** The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.*

***33**. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and <u>hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted</u>*

> *towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.*
>
> ***34**. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook."*

18. It would be clearly evident from the aforesaid judgment of the Hon'ble Supreme Court that the services rendered prior to regularisation in any capacity be it work-charged employees, contingency paid fund employees or non-pensionable establishment or adhoc has to be counted towards qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

19. Once that be so, obviously no discrimination can be made qua the employees, who rendered services prior to regularisation in the capacity of adhoc employees.

20. Similar reiteration of law can be found in a very recent judgment of co-ordinate Bench of this Court in CWP No.3267 of 2019, titled ***Ram Krishan Sharma vs. The Accountant General (A&E), HP and Ors.***, decided on 01.01.2020.

21. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed and the impugned rejection dated 15.12.2015 (Annexure P-8) is quashed and set-aside. The respondents are directed to count the services rendered by the petitioner on adhoc basis prior to his regularisation towards qualifying service for the grant of pension and thereafter allot GPF Account Number to the petitioner, who shall now be governed under the old pension scheme i.e. the scheme prevalent prior to the Contributory Pension Scheme, 2006.

22. The petition is disposed of in the aforesaid terms, so also the pending application(s) if any, leaving the parties to bear their own costs.

BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Sh. Joginder Rao ….Petitioner

Versus

State of Himachal Pradesh & another ...Respondents

CWP No. 2587 of 2019-I
Reserved on: 28.11.2019.
Date of Decision: January 03 , 2020

Constitution of India, 1950- Article 226 – Transfer of government employee – Role of State Commission for Women – Held, State Commission for Women is an outsider to the affairs of administration and has no business to recommend transfers or other measures concerning employees of the State Government otherwise it will amount to interference in the working of executive. (Para 7).

Constitution of India, 1950 - Article 226 – Transfer of government employee – Parameters – Held, government employee cannot be transferred simply on ground of a complaint – Inquiry needs to be conducted to verify the veracity of the allegations made in complaint. (Para 11).

Constitution of India, 1950 – Article 226 – Transfer of government employee on basis of complaint of female colleague alleging harassment – Held, transfer of employee on complaint of female teacher of same school on allegations of harassment could not have been ordered without holding some fact finding inquiry – Ordering transfer on mere complaint was harsh and humiliating for the petitioner. (Para 12).

Cases referred:

Somesh Tiwari vs. Union of India & others, (2009) 2 SCC 592).
Sanjay Kumar vs. State of Himachal Pradesh and others, 2013(3) Shimla Law Cases 1373
Amir Chand vs. State of Himachal Pradesh 2013(2) Him. L.R. 648
Dalip Singh versus State of H.P. & Others

Whether approved for reporting?[14] Yes.

For the petitioner	:	Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate, for the petitioner.
For the respondents	:	Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Mr. Narender Guleria & Mr. Himanshu Mishra, Addl. AGs and Mr. Manoj Bagga, Asstt. A.G. for respondent No. 1/State.

Anoop Chitkara, Judge

Challenging the notification dated Sep 13, 2019 (Annexure P-3), passed by the Principal Secretary (Education) to the Government of Himachal Pradesh, the 1st respondent herein, transferring the petitioner to the post of Principal at Government Senior Secondary School Bhalar Bhalona, District Sirmour, Himachal Pradesh, within three years from his previous transfer made in January 2017, the petitioner has come up before this Court, under Article 226 of the Constitution of India, seeking quashing of his transfer, and in the alternative to direct the 1st respondent to transfer him to Government Senior Secondary School, Jaddu Kuljiar, District Bilaspur, H.P.

2. The State has filed a response to this petition. It clarifies that the reason for the transfer was to maintain harmonious working conditions in school. It further explains that one female teacher posted in the same school had filed a complaint (Annexure R-1 colly.), dated Aug 28, 2019, against the petitioner before the State Woman Commission and also the Superintendent of Police, Bilaspur District at Bilaspur. The inquiry report with respect to inquiry conducted by the Additional Superintendent of Police Bilaspur, is Annexure P-6 to the supplementary affidavit filed by the petitioner. The recommendation of the State Commission for Women to transfer the petitioner out of the District till completion of the inquiry against him is Annexure R-1 to reply filed by the respondent-State.

3. We have heard Mr. Sanjeev Bhushan, learned Senior Counsel for the petitioner, and Mr. Ashok Sharma learned Advocate General for the State. We have also waded through the entire record, including the file leading to the transfer of the petitioner.

4. In January 2017, the petitioner was transferred and posted as Principal in Government Senior Secondary School (Boys) Ghumarwin, District Bilaspur, H.P. The petitioner contends that during his posting at Ghumarwin the strength of the students in the School increased from 398 to 510. He further alleges that one female, posted as a Language Teacher in the school has political links. On the issue of assigning duties to teach students and also on account of allocation of periods, the said Language Teacher took it to her heart, and threw venom on him, by filing a false and concocted complaint leveling allegation of her harassment at the hands of the petitioner.

5. The respondent/State, in its reply though confirms that it issued the orders for transfer, based upon a request received from the HP State Commission for Women, the record, however, depicts altogether a different picture as the Office of the Hon'ble Chief Minister has issued D.O. Note No. Secy/CM-E0315/2017-DEP-C-163090, dated Sep 3, 2019

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and accorded approval thereby to transfer the petitioner from Government Senior Secondary School (Boys) Ghumarwin, District Bilaspur to out of station in relaxation of ban on transfers.

6. Consequently, the petitioner has been transferred to Government Sr. Secondary School Bhalar Bhalona in District Sirmaur vide impugned order Annexure P-3. When the recommendation (Annexure R-1 colly.) of the State Commission for Women is dated Sep 9, 2019, it is difficult to believe that the petitioner was transferred out of the District pursuant to Annexure R-1 and rather on the basis of D.O. note dated Sep 3, 2019 (supra) issued prior in time. Even the D.O. note has been dealt with on Sep 6, 2019 vide notes 104 to 106 and ultimately it is on the basis of the D.O. note the petitioner was transferred from Government Senior Secondary School (Boys), Ghumarwin to Government Senior Secondary School Bhalar Bhalona, District Sirmour, as is apparent from note No. 107 in the record. The State further explained that the Director of Higher Education had recommended the transfer of the petitioner to maintain a congenial atmosphere in the school.

7. Otherwise also, the H.P. State Commission for Women is an outsider to the affairs of Administration, and has no business to request the transfers or other measures, because this amounts to an interference in the working of the Executive. It is better for the H.P. State Commission for Women to confine to its own job.

8. Mr. Sanjeev Bhushan, learned Senior Counsel, for the petitioner contends that the First respondent had transferred the petitioner, on the basis of UO/DO note.

9. The record about the transfer reveals that the 1st respondent had transferred the petitioner based on DO/UO Note No. Secy/CM-E0315/2017-DEP-C-163090, dated Sep 3, 2019.

10. The first respondent did not dispute the position, and preferably very categorically contended in Para 1 of its reply that the reason for transfer was to maintain congenial atmosphere in the Educational Institution. This Court is in agreement with the stand so taken by the respondent-State. Even this Court while finding that the allegations in the complaint are not much serious and rather confined only to the internal matter of the school has further observed that one i.e. out of the petitioner and the lady teacher is required to be transferred to maintain congenial atmosphere in the school vide order dated Oct. 3, 2019. It is in this backdrop the respondent-Department was directed to explore the possibility of the adjustment of the petitioner in Government Senior Secondary School Jaddu Kuljiar, District Bilaspur from where his substitute was transferred to Government Senior Secondary School (Boys) Ghumarwin, Distt. Bilaspur in the event of the lady teacher was to be retained in the same school. This order reads as follows:

> "We have perused the record produced by the respondent-State, which reveal that the petitioner has been transferred on the complaint of a female teacher posted in that very school. The allegations in the complaint are not much serious and it seems to be internal matter of the school. We are in agreement with the submissions made by learned Advocate General that one i.e. out of the petitioner and the lady teacher is required to be transferred to maintain congenial atmosphere in the school. In case the lady teacher is to be retained, the possibility of the adjustment of the petitioner in Government Senior Secondary School, Jaddu Kuljiar (Bilaspur) from where his substitute has been transferred should have been explored. Even this is also the relief sought in alternative by the petitioner. Let the matter be examined in the light of this order and the instructions placed on the record on the next date. List on 18.10.2019."

11. Otherwise also, on the basis of the complaint, a Government servant cannot be transferred without holding inquiry as per the Rules and in order to find out as to whether the allegations leveled against him are correct or false and fabricated. A Division Bench of this Court has held so in CWP No. 8590 of 2014, titled as *Raj Kumar vs. State of Himachal Pradesh & others,* decided on 31.12.2014, [2014 Law Suit (HP) 1331]. This judgment reads as follows:

> "23. We are afraid that this submission cannot be countenanced because it only leads to one inference that order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and

based on irrelevant ground i.e. on the allegations made against the petitioner in the complaints. It is one thing to say that employer is entitled to pass an order of transfer in administrative exigency but it is another thing to say that order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set-aside being wholly illegal. (Ref: *Somesh Tiwari vs. Union of India & others*, (2009) 2 SCC 592).

24. There is yet another reason why the aforesaid submission of the respondents cannot be accepted. In terms of the judgment passed by this Court in *Amir Chand's* case (supra) [2013 (2) Him.L.R.(DB) 648], the complaints as alleged to have been received against the petitioner by the respondents from various representatives were required to be sent to the head of the administrative department, who in turn was required to verify the same and if after associating the petitioner, the complaints were found to be true then alone could the petitioner have been ordered to be transferred. Admittedly, this exercise has not been undertaken by the administrative department i.e. the respondents herein. Therefore also the order of transfer cannot be sustained having been passed capriciously and arbitrarily.

25. If the petitioner has been indulging in any conduct not befitting his office and contrary to public interest, the respondents authority should have conducted an inquiry and imposed appropriate penalty as would be permissible under the rules. But then the transfer at the behest of the members of the public without any inquiry is not only against the interest of the concerned government servant but is also against public interest. It tends to destroy the morale of government servant and the same is otherwise illegal. Such a transfer cannot get the seal of approval from this Court."

12. Although Mr. Sanjeev Bhushan, learned Senior Advocate has canvassed that the transfer of the petitioner having been made on the basis of D.O. note is not legally sustainable and as such, according to him the impugned order Annexure P-3 should be quashed and set aside and as this Court has held in **Sanjay Kumar vs. State of Himachal Pradesh and others,** 2013(3) Shimla Law Cases 1373 and also **Amir Chand vs. State of Himachal Pradesh** 2013(2) Him. L.R. 648 and in its recent judgment rendered in CWP No.2490 of 2019, titled **Dalip Singh versus State of H.P. & Others** that the Chief Minister and Ministers/elected representatives cannot order the transfer of an employee from one place to other and may recommend the transfer of an employee, however, the transfer order has ultimately to be issued by the Administrative Head on application of mind and uninfluenced by the recommendations so made by the elected representative. We find the present a fit case where it may not be in the interest of the teaching atmosphere in the school to again allow the petitioner to continue in the same school as we have already observed in our order dated Oct. 3, 2019, referred to hereinabove. Still we feel that his transfer to Government Senior Secondary School Bhalar Bhalona, District Sirmour is punitive in nature which without holding inquiry against him could have not been ordered. Such an action is even harsh and humiliating also to the petitioner who, to our considered opinion has been transferred out of District Bilaspur on the basis of the complaint made by the lady teacher, that too when in the fact finding inquiry conducted by the Addl. Superintendent of Police, District Sirmour at Nahan, the allegations leveled by her were not established.

13. Anyhow, the alternative prayer of the petitioner is that he may be transferred to Government Senior Secondary School Jaddu Kuljiar, District Bilaspur from where his substitute has been transferred to Government Senior Secondary School (Boys) Ghumarwin.

14. Be that as it may, the petitioner himself offers a solution to the problem, in its alternative prayer.

15. This Court has already directed the respondents vide its order dated Oct 3, 2019, to explore the possibility of adjustment of the petitioner in this school in the event of the lady teacher was to be retained there. Vide order dated Nov. 28, 2019, this Court taking into consideration that the post of Principal was lying vacant in Government Senior Secondary School, Jaddu Kuljiar, District Bilaspur as on Oct. 3, 2019, has issued the direction not to fill up the same till judgment is pronounced. This order reads as follows:

> "Arguments heard. Judgment reserved.
>
> The post of Principal, which as per the order dated 3.10.2019, is lying vacant in Government Senior Secondary School, Jaddu Kuljiar, District Bilaspur and as a direction to the respondent to adjust the petitioner against the said vacancy is one of the reliefs sought in this writ petition, the same shall not be filled up till the judgment is pronounced."

16. It is an unfortunate case where a female teacher, *prima facie,* has exploited the laws made to protect the vulnerable females. Be that as it may, because the inquiry is still pending, as such, this Court refrains itself to express any opinion qua that. Needless to say, that it is the petitioner who is ready to sacrifice by clearly mentioning in his second prayer that he be posted at some other school in case this Court does not quash his transfer order.

17. Resultantly, this petition is allowed and disposed of in terms of the second prayer clause. Consequently, the impugned order Annexure P-3 qua the transfer of the petitioner to Government Senior Secondary School Bhalar Bhalona, District Sirmour is quashed and he is ordered to be adjusted in Government Senior Secondary School Jaddu Kuljiar, District Bilaspur. This Court further directs the first respondent to consider the transfer and posting of the petitioner against the post of the Principal at Government Senior Secondary School, Jaddu Kuljiar, District Bilaspur, HP, at the earliest, but not later than Jan 10, 2020.

18. The Writ Petition is allowed in the terms mentioned above. Application(s), if pending stand closed.

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

Ram Krishan Sharma ……….Petitioner

Versus

The Accountant General (A&E) HP and Ors. ……….Respondents

CWP No. 3267 of 2019
Decided on: 1.1.2020

Central Civil Services (Pension) Rules, 1972 (Rules) – Himachal Pradesh Finance (Pension) Department vide notification No. Fin.(Pen)A(3)-1/96 dated 17.8.2006- Notification of State Government not entitling employees appointed after 15.5.2003 on regular basis to pension under the Rules – Grant of pension to employee appointed on ad-hoc basis prior to said notification but regularized subsequent thereto, whether such an employee is entitled for pension? - State contending that petitioner though appointed on 23.1.1999 on adhoc basis but he was regularized on 25.1.2006 and he is not entitled for pension under Rules – Held, service rendered in any capacity be it in work-charged, contingency paid or in non-pensionable establishment prior to regularization is to be counted towards qualifying service for pension even if such service is not preceded by temporary or regular appointment in a pensionable establishment. (Para 2, 3, 7 & 8).

Constitution of India, 1950- Article 226 – Regularization of service- Effect - Held, regularization is not a form or mode of appointment – Regularization would mean conferring

quality of permanence on appointment which was initially made on temporary, ad-hoc or contract basis – Regularization would relate back to initial date of appointment – Petition allowed- Petitioner is held entitled for pension as per Rules. (Para 11, 12, 14 & 16).

Cases referred;

Habib Khan vs. The State of Uttarakhand (Civil Appeal No. 10806 of 2017) decided on 23.8.2017
Harbans Lal v. State of Punjab and Ors in CWP No. 2371/2010,
Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No. 2019 @ SLP (C) No.5775 of 2018),
Prem Singh vs. State of Uttar Pradesh and others AIR 2019 SC 4390.
Punjab State Electricity Board vs. Narata Singh AIR 2010 SC 1467,
R. N. Nanjundappa v. T. Thimmiah and Anr, 1972 (1) SCC 409
Ramesh Singh and others Vs. State of Punjab (CWP No.5092 of 2010 decided on 22.3.2010).
Smt. Sheela Devi v. State of HP and Ors in CWPOA No. 195 of 2019,
Smt.Ramesh Tuli Vs. State of Punjab and others, 2007(3) SCT, 791
Vansant Gangaramsa Chandan v. State of Maharashtra, 1996(4) SCT 403:

Whether approved for reporting? [15]	Yes.
For the Petitioner :	Mr. B.S. Chauhan, Senior Advocate, with Mr. Munish Datwalia, Advocate.
For the Respondents :	Mr. Rajender Thakur, CGC, for respondent No.1. Mr. Sudhir Bhatnagar and Anil Jaswal, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for the State.

Sandeep Sharma, Judge (oral):

By way of present petition filed under Section 226 of the Constitution of India, prayer has been made on behalf of the petitioner to quash the communication dated 11.10.2019 (Annexure A-3), whereby request has been made to respondent No.1 to stop the pension of the petitioner as sanctioned against PPO No. 111165707.

2. For having bird's eye view, certain undisputed facts, which may be relevant for proper adjudication of the case are that the petitioner was appointed as Ayurveda Medical Officer on ad-hoc basis vide communication dated 23.1.1999 (Annexure P-1). Perusal of aforesaid communication itself suggests that 50 Ayurvedic doctors including petitioner were ordered to be appointed as Ayurvedic Medical Officer Grade-II on ad-hoc basis in the scale of Rs. 7,000-10,980/- on the recommendation of departmental selection committee of the Government. It is not in dispute that subsequently, petitioner, who is named at Sr. No. 45 of the notification referred herein above, was posted as Ayurvedic Medical Officer at Ayurveda Dispensary Kanda in Tehsil Kumarsain, District Shimla. It is also not in dispute that services of the petitioner were regularized on 25.11.2006 as is evident from the perusal of Annexure P-3. Petitioner after having successfully completed his normal tenure of service superannuated on 31.12.2011, whereafter respondent No.1 issued pension payment order in favour of the petitioner authorizing him to have benefits of pension after his superannuation from the directorate of Ayurveda.

3. It is not in dispute that since 31.12.2011, petitioner was in receipt of pension till the issuance of communication dated 11.10.2019 (Annexure P-3), whereby District Ayurvedic Officer, Bilaspur, requested the Accountant General (respondent No.1) to stop the pension of the petitioner. In the aforesaid communication, District Ayurvedic Officer has

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stated that as per Government of Himachal Pradesh Finance (Pension) Department vide notification No. Fin.(Pen)A(3)-1/96 dated 17.8.2006, employees appointed on regular basis after 15.5.2003, are entitled only to Contributory Pension Scheme and not entitled to pension under CCS Pension Rules, 1972. In the aforesaid communication, District Ayurvedic Officer, Bilaspur further apprised respondent No.1 that service of the petitioner, who stood retired on 31.12.2011, was regularized on 25.11.2006 vide government notification No. Ayur Kha(2)-4/90-Loose dated 25.11.2006 and as such, petitioner is not entitled to pension under CCS Rules, 1972. District Ayurvedic Officer further stated in the aforesaid communication that pension case of the above officer was sent by mistake. Taking cognizance of aforesaid communication sent by the District Ayurvedic Officer, respondent No.1 stopped the pension of the petitioner. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for quashing of communication dated 11.10.2019.

4. Respondents No. 2 and 3 by way of composite reply have though virtually admitted the facts of the case as have been narrated herein above, but they have stated that since service of the petitioner was regularized vide notification dated 25.11.2006, he is estopped from claiming pension, especially when he is not covered under the CCS Pension Rules. They have further stated that incumbents/employees, who are appointed on regular basis on or after 15.5.2003 are not covered under CCS (Pension) Rules 1972, rather there cases are covered directly under Contributory Pension Scheme known as new pension scheme. In para-5 of the reply, it has been stated by the aforesaid respondents that case of the petitioner as well as other similarly situate AMOs, was wrongly sent by the medical officer for pension purpose and when the matter came to the knowledge of the replying respondent, direction came to be issued to the District Ayurvedic Officers to take up the matter with Accountant General so that illegality committed is not permitted to be perpetuated.

5. In the aforesaid facts and circumstances, question which needs to be decided by this Court in the instant proceedings is that "*whether service of an employee appointed on contractual basis in temporary/adhoc capacity can be subsequently counted towards the qualifying service for grant of pension or not*?

6. Similar question, as has been formulated by this Court for determination, has already been gone into and decided by coordinate bench of this Court on 26.12.2019 in case titled ***Smt. Sheela Devi v. State of HP and Ors*** *in* ***CWPOA No. 195 of 2019***, wherein it has been held that service of an employee appointed on contractual basis in temporary capacity prior to his regularization shall be treated as qualifying service for grant of pension. Aforesaid judgment rendered by the coordinate Bench, if read in its entirety, reveals that husband of the petitioner in that case was also appointed as Ayurveda Doctor on contract basis in temporary capacity in the year, 1999 and his services were thereafter regularized in the year, 2009. Since husband of the petitioner expired on 23.1.2011, petitioner being his wife made a request for release of pension which was turned down by the respondents vide order dated 18.6.2018, on the ground that services rendered by the husband of the petitioner on contract basis cannot be counted for pensionery benefits under CCS Pension Rules, 1972 as the same were applicable only to regular employees appointed in the government department on or before 4.5.2003. However, as has been taken note herein above, coordinate Bench of this court while placing reliance upon various judgments rendered by the Hon'ble Apex Court as well as this Court rejected the aforesaid claim put forth by the department that since services of the husband of the petitioner were regularized after 14.5.2003, he cannot be held entitled for pension. Since issue in the present case is similar to the issue which stands already decided vide aforesaid judgment rendered by coordinate Bench of this court, it would be apt to take note of the following paras of the aforesaid judgment rendered by co-ordinate Bench:-

> ***"2. The late husband of the petitioner was appointed as Ayurvedic doctor on contract basis in temporary capacity in the year 1999, however, his services were thereafter regularised in the year 2009 and he shortly thereafter expired on 23.01.2011. The request made by the applicant for release of pension has been turned down by the respondents vide order dated 18.6.2018 on the ground that the services rendered by the husband of the applicant on contract basis cannot be counted for pensionary benefits under CCS (Pension) Rules,***

1972 (for short 'Pension Rules') as the same are applicable only to regular government employees appointed in the pensionable establishments in the Government departments on or before 14.05.2003. The Government employees appointed in non-pensionable establishments are covered under the Contributory Provident Fund Rules, 1962. In terms of rule 2 of the Pension Rules, these rules are applicable to the Government employees appointed substantively to civil services and posts in Government departments which are borne on pensionable establishments appointed on or before 14.05.2003. Further, as per rule 2 (g) of the Pension Rules, these Rules are not applicable to the persons employed on contract except when the contract provides otherwise.

3. We have heard learned counsel for the parties and have gone through the records of the case carefully.

4. Rule 17 of the Central Civil Services (Pension)Rules, 1972 reads as under:

> *17. Counting of service on contract – "(1) A person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either:-*
>
> > *(a) to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service ; or*
> >
> > *(b) to agree to refund to the Government the monetary benefits referred to in Clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.*
>
> *(2) The option under sub-rule (1) shall be communicated to the Head of Office under intimation to the Accounts Officer within a period of three months from the date of issue of the order of permanent transfer to pensionable service, or if the Government servant is on leave on that day, within three months of his return from leave, whichever is later.*
>
> *(3). If no communication is received by the Head of Office within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."*

5. It is clear from the plain language employed in rule 17 of the Central Civil Services (Pension) Rules, 1972 that if a person is initially engaged by the Government on contract for a specified period and is subsequently appointed to the same or another post in a substantiative capacity in a pensionable establishment without interruption of duty, he may opt either to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service or to agree to refund to the Government the monetary benefit referred to in clause or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.

6. We may at this stage refer to a decision rendered by learned Single Judge of this Court in Paras Ram vs. State of Himachal Pradesh and another, Latest HLJ 2009 (HP) 887, wherein it was laid down that if adhoc service is followed by regular service in the same post, the said service can be counted for the purpose of increments.

7. Further a Division Bench of this Court in LPA No. 36 of 2010 titled Sita Ram vs. State of H.P. and others, decided on 15.7.2010 after placing reliance in Paras Ram's case (supra) held that "It is also settled principle of law that any service that is counted for the purpose of increment, will count for pension also. To that extent the appellant is justified in making submission that period may be treated as qualifying service for the purpose of pension also."

8. A co-ordinate Bench of this Court (Coram: Mr. Justice Rajiv Sharma, J. and Mr. Justice Sureshwar Thakur, J.) while dealing with an identical issue in CWP No. 5400 of 2014 titled Veena Devi Vs. Himachal Pradesh State Electricity Board and another, decided on 21.11.2014 and after interpreting the provisions of Rule 17, directed the respondents therein to count the services of the petitioner therein on contract basis as Clerk/Typist with effect from 16.11.1988 to 21.3.2009 for the purpose of qualifying service for pensionary benefits.

9. Likewise, the same Bench issued similar directions in CWP No. 8953 of 2013 titled Joga Singh and others vs. State of H.P. and others and connected matter, decided on 15.6.2015 by directing the period of service rendered on contract basis as qualifying service for the purpose of pension under the Pension Rules.

10. Another Co-ordinate Bench of this Court {Coram: Hon'ble Mr. Justice Surya Kant, Chief Justice (as his Lordship then was) and Hon'ble Mr. Justice Ajay Mohan Goel, J.} in CWP No. 2384 of 2018 titled State of Himachal Pradesh and others vs. Matwar Singh and another, decided on 18.12.2018, held that work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Therefore, the executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/ struck down, in light of the decisions rendered in CWP No. 6167 of 2012, titled Sukru Ram vs. State of H.P. and others, decided on 6th March, 2013 and a Full Bench of Punjab and Haryana High Court in Kesar Chand vs. State of Punjab through the Secretary PWD (B&R) Chandigarh and others, (1988) 94 (2) PLR 223, the relevant para-3 of the judgment reads as under:

> ***"3. It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/ struck down, in light of view taken by this Court in CWP No. 6167 of 2012, titled Sukru Ram vs. State of H.P. and others, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in Kesar Chand vs. State of Punjab through the Secretary PWD (B&R) Chandigarh and others, (1988) 94 (2) PLR 223, also dealt with an identical issue where Rule 3.17 (ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the***

> ***Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."***

11. As regards the counting of work period rendered on work charged basis followed by regular appointment, the issue is otherwise no longer res integra in view of the judgment of the Hon'ble Supreme Court in Punjab State Electricity Board vs. Narata Singh AIR 2010 SC 1467, Habib Khan vs. The State of Uttarakhand (Civil Appeal No. 10806 of 2017) decided on 23.8.2017 and recent decision rendered by three Judges of the Hon'ble Supreme Court in Prem Singh vs. State of Uttar Pradesh and others AIR 2019 SC 4390.

12. It is by now settled law that the work-charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits and even adhoc service in terms of Paras Ram's case (supra) followed by regular service in the same post has to be counted for the purpose of increments and in turn for pension as held by the Division Bench of this Court in LPA No. 36 of 2010 titled Sita Ram's case (supra), can the benefit be denied to the employees appointed on contract basis followed by regular appointment.

12. Even though the issue in question is squarely covered by the judgments rendered by this Court in Veena Devi and Joga Singh cases (supra). However, we may at this stage make note of an unreported decision of the Division Bench of the Punjab and Haryana High Court in Rai Singh and another vs. Kurukshetra University, Kurukshetra, C.W.P. No.2246 of 2008, decided on August 18, 2008 wherein the Court after taking into consideration the Full Bench judgment in Kesar Chand case (supra) held that once the employees have been regularised and are now held entitled to pension by counting adhoc service, exclusion of service "on contract basis" will be discriminatory. It was further held that appointment on contract basis is a type of adhoc service. Mere fact that nominal breaks are given or lesser pay is given or increments are not given, is no ground to treat the said service differently. Beneficial provision for pension having been extended to adhoc employees, denial of the said benefit to employees working on contract basis, who also stand on same footing as employees appointed on adhoc basis cannot be held to be having any rational basis and the judgment in Kesar Chand (supra) is fully applicable. It shall be apposite to refer to the necessary observations as contained in paras 4 to 8 of the judgment, which read as under:

> ***"4. Learned counsel for the petitioners relies upon a Full Bench judgment of this Court in Kesar Chand v. State of Punjab and others, 1988 (2) PLR 223, wherein validity of Rule 3.17 (ii) of the Punjab Civil Services Rules, Volume II was considered, which provided for temporary or officiating service followed by regularization to be counted as qualifying service but excluded period of service in work charge establishment. It was held that if temporary or officiating service was to be counted towards qualifying service, it was illogical that period of service in a work charge establishment was not counted.***

> ***6. As held in Kesar Chand (supra), pension is not a bounty and is for the service rendered. It is a social welfare measure to meet hardship in the old age. The employees can certainly be classified on rational basis for the purpose of grant or denial of pension. A cut off date can also be fixed unless the same is arbitrary or discriminatory. In absence of valid classification, discriminatory treatment is not permissible.***
>
> ***7. Once the employees have been regularised and are held entitled to pension by counting adhoc service, exclusion of service "on contract basis" will be discriminatory. Appointment on contract basis is a type of adhoc service. Mere fact that nominal breaks are given or lesser pay is given or increments are not given, is no ground to treat the said service differently. Beneficial provision for pension having been extended to adhoc employees, denial of the said benefit to employees working on contract basis, who also stand on same footing as employees appointed on adhoc basis cannot be held to be having any rational basis. Judgment of this Court in Kesar Chand (supra) is fully applicable.***
>
> ***8. Accordingly, we allow this writ petition and declare that the contractual employees who have rendered continuous service (ignoring nominal breaks) followed by regularization in a pensionable establishment, will be entitled to be treated at par with adhoc employees in such establishment, for counting their qualifying service for pension."***

13. Adverting to the facts of the case, we have no difficulty in concluding that even though the appointment of the husband of the petitioner was contractual but that was in no manner qualitative different from the regular employees and once there was need for doctors in the State as is evident from the fact that the services of the husband of the petitioner ultimately stood regularised, then it was unfair on the part of the State Government to take work from the employee on contract basis. They ought to have resorted to an appointment on regular basis.

14. The taking of work on contractual basis for long amounts to adopting the exploitative device. Later on, though the services of the husband of the petitioner as observed above, were regularised. However, the period spent by him on contractual basis, has not been counted towards the qualifying service. Thus, the respondents have not only deprived the deceased husband of the petitioner from the due emoluments during the period he served on less salary on contractual basis but he was also deprived of counting of the period for pensionary benefits.

15. The State has been benefitted by the services rendered by the deceased husband of the petitioner in the heydays of his life on less salary on contractual basis. Therefore, there is no rhyme or reason not to count the contract period in case it has been rendered before regularization. If same is denied, it would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service.

16. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it

would be highly discriminatory not to count the service on the basis of flimsy classification. As it would rather be unjust, illegal, impermissible to make the aforesaid classification under the Pension Rules and to make Rule valid and non-discriminatory, the same will have to be read down and it has to be held that services rendered even prior to regularisation in the capacity of work-charged employees, contract employees, contingency paid fund employees or nonpensionable establishment shall be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

17. In taking this view, we are fortified by the judgment rendered in Prem Singh's case (supra), more particularly observations made in paras 28 to 34 of the judgment, which read as under:

> ***"28. The submission has been urged on behalf of the State of Uttar Pradesh to differentiate the case between workcharged employees and regular employees on the ground that due procedure is not followed for appointment of work charged employees, they do not have that much work pressure, they are unequal and cannot be treated equally, work- charged employees form a totally different class, their work is materially and qualitatively different, there cannot be any clubbing of the services of the work-charged employees with the regular service and vice versa, if a work-charged employee is treated as in the regular service it will dilute the basic concept of giving incentive and reward to a permanent and responsible regular employee.***
>
> ***29. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work charged employees. Rather, the very concept of workcharged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees 13 had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No. 2019 @ SLP (C) No.5775 of 2018) the appellants were allowed to cross efficiency bar, after '8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak w.e.f 15.9.1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200- 320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for***

several decades and ultimately reached the age of superannuation.

30. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work- charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the 14 period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.

31. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

32. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of workcharged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

> ***33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.***
>
> ***34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook."***

18. It would be clearly evident from the aforesaid judgment of the Hon'ble Supreme Court that the services rendered prior to regularisation in any capacity be it work-charged employees, contingency paid fund employees or non-pensionable establishment has to be counted towards qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

19. Once that be so, obviously no discrimination can be made qua the employees, who rendered services prior to regularisation in the capacity of contractual employees and were regularised only because they had put in the requisite number of years of service on contractual basis like their counterparts who had rendered services in the capacity of work charged employees, contingency paid fund employees or non-pensionable establishment, of course, for that matter even on adhoc basis."

7. It is quite apparent from the aforesaid exposition of law laid down by the coordinate Bench of this Court that service rendered prior to regularization in any capacity be it work charged employees, contingency paid fund employees or non-pensionable establishment is to be counted towards qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

8. Though in the aforesaid case, husband of the petitioner was appointed as Ayurveda Officer in temporary capacity in the year, 1999 on contract basis, but careful perusal of judgment rendered by the Hon'ble Apex court in ***Prem Singh v. State of Uttar Pradesh and Ors, AIR 2019 SC4390,*** which has been otherwise taken note of by the coordinate Bench while passing the judgment in ***Sheela Devi's*** *case* (supra) suggests that service rendered prior to regularization in any capacity is to be counted towards qualifying service even if such service is not proceeded by temporary or regular appointment in a pensionable establishment..

9. In view of the aforesaid law laid down by the Hon'ble Apex Court, admittedly no discrimination can be made inter-se the employees, who renders/rendered services prior to regularization in the capacity of contractual employees and were subsequently regularized. Needless to say, employees, who render services on ad-hoc basis are definitely on better footing than persons, who render/rendered services in the temporary capacity or on contractual basis.

10. Leaving everything aside, in the case at hand, services of the petitioner were regularized in the year, 2006 i.e. after completion of seven years that too on batch wise basis. If documents available on record are read/scanned in its totality, it clearly emerges that even out of 50 officers as detailed in notification dated 23.1.1999, 25 incumbents were regularized after three years of issuance of aforesaid notification dated 23.1.1999 whereas remaining including petitioner were regularized subsequently on batch wise basis in the years 2006 and

2009 respectively. Once 50 Ayurveda doctors were appointed as Ayurvedic Medical Officer, Grade-II in the same pay scale of Rs. 7,000-10,980/- by way of one notification dated 23.1.1999, it is not understood that how only 25 doctors out of 50 could be regularized in the year, 2003 and remaining 25 in the year, 2006 and 2009 respectively. Careful perusal of notification dated 29.6.1992 available at page 57 of the paper book reveals that at the time of promulgation of recruitment and Promotion Rules for appointment to the post of Ayurveda Officer, 563 posts were available in the department i.e. 50 percent by way of direct recruitment and 50 percent on batch wise basis, but in the instant case, department by only regularizing 25 doctors out of 50 as detailed in notification dated 23.1.1999 though enabled 25 doctors to avail benefit of CCS (Pension) Rules, 1972, whereas remaining 25 were left in lurch without any fault of them.

11. Otherwise also, it is none of the case of the respondent that petitioner herein was not appointed in the year, 1999 rather there specific case is that since his services were regularized in the year, 2006 and as such, his date of appointment to the regular post is to commence from the date of his regularization, which argument/submission is not legally tenable and deserves outright rejection. By no stretch of imagination, regularization can be said to be form of appointment. Rather, regularization would mean conferring the quality of permanence on the appointment which was initially made on temporary, ad-hoc or contract basis.

12. Hon'ble Apex Court in case titled ***R. N. Nanjundappa v. T. Thimmiah and Anr, 1972 (1) SCC 409*** has held that regularization cannot be said to be mode of recruitment and to accede to such proposition, would mean to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules. Relevant para of the aforesaid judgment is reproduced herein below:

> ***"The contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from 15 February, 1958 notwithstanding any rules cannot be said to be in exercise of power under Article 162. First, Article 162 does not speak of rules whereas Article 309 speaks of rules. Therefore, the present case touches the power of the State, to make rules under Article 309 of the nature impeached here. Secondly, when the Government acted (1) [1966] 1 S.C.R. 994.***
>
> ***under Article 309 the Government cannot be said to have acted also under Article 162 in the same breath. The two Articles operate in different areas. Regularisation cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."***

13. Though in the case at hand, respondents No. 1 and 2 have stated that order authorizing pension in favour of the petitioner was issued by mistake, but such submission is fallacious on its face because admittedly, petitioner kept on enjoying the benefit of pension for almost eight years. In fact as has been noticed herein above, services of the petitioner and other similarly situate persons after completion of seven years service on contract/ad-hoc were not regularized under some policy of regularization issued by the government, rather same was strictly in terms of recruitment and promotion rules formulated for appointment to the post of Ayurveda Officer (Annexure A-1), perusal whereof clearly reveals that at the time of promulgation of aforesaid rules, 563 posts of Ayurvedic Medical Officers were available in the State of Himachal Pradesh. R&P Rules as referred herein above nowhere suggest that same were made/promulgated for appointment to the post of Ayurvedic Medical Officer on temporary, contract or adhoc basis, meaning thereby, all 563 posts as referred herein above were actually to be filled up on regular basis i.e. 50 percent by way of direct recruitment and 50 by way of promotion.

14. Mr. Sudhir Bhatnagar, learned Additional Advocate General contended that initial date of appointment after regularization would be the date on which the petitioner or other similarly situate persons took charge of the post and petitioner can be said to have taken charge of the post after his regularization, but this court is not inclined to accede to the aforesaid submission having been made by the learned Additional Advocate General. Once entire service of the petitioner or other similarly situate persons rendered in any capacity is to be counted as qualifying service, then admittedly his date of appointment is to relate back to his initial date of appointment. Such persons cannot be estopped from pension scheme by applying the date of regularization. In this regard, reliance is placed on the judgment dated 31.8.2010 rendered by the Punjab and Haryana High Court in Case titled ***Harbans Lal v. State of Punjab and Ors in CWP No. 2371/2010***, relevant paras whereof are as under:

> "***The consistent view of the judgment is that work charge service rendered before regularization, is liable to be counted as qualifying service for the purpose of pension. A Division Bench of this Court was seized of a case in which vires of Rule 3.17 A was challenged whereby half of the service paid out of contingency fund was to be counted as qualifying service. This rule has been struck down in a judgment of this Court in case of Joginder Singh v. State of Haryana , 1998 Vol.1, SCT 795. Once the entire service paid out of contingency, is liable to be counted for the purpose of qualifying service, a causal/daily rated service is also bound to be counted as qualifying service. A Division Bench judgment in case of Smt.Ramesh Tuli Vs. State of Punjab and others, 2007(3) SCT, 791 examined the proposition as to what would be the qualifying service for pension as per Clause 6(6) of the 1992 Pension Scheme applicable to the Punjab Privately Management Recognized Schools Employees. In paragraph 6 of the judgment, the following observation has been made :- "There is another aspect of the matter. Hon'ble the Supreme Court in the case of Vansant Gangaramsa Chandan v. State of Maharashtra, 1996(4) SCT 403:***
>
> ***JT 1996 (Supp.) SC 544, has considered clause 23 of Chapter VI of a Pension Scheme of the Hyderabad Agricultural Committee, which is as under:- "4.Clause 23 of Chapter VI in the scheme reads as under: "Qualifying service of a Market Committee employee shall commence from the date he takes charge of the post to which he is first appointed or from the date the employer started deducting the P.F. contribution for the employee which ever later." It was held that the clauses of the Scheme have to be read by keeping in view the fact that pension is not a bounty of the State and it is earned by employees after rendering long service to fall back upon after their retirement. The same cannot be arbitrarily denied. The clause was subjected to the principle of 'reading down' a well known tool of interpretation to sustain the constitutionality of a statutory provision and accordingly it was read***

down to mean that the qualifying service could commence either from the date of taking charge of the post to which the employee was first appointed or from the date he started contributing to the Contributory Provident Fund whichever was earlier. The ratio of the above mentioned judgment would apply to the facts of the instant case, inasmuch as, the provision made in clause 6(6) of the 1992 Scheme has to be read down to mean that qualifying service would commence from the date of continuous appointment, which is 17.8.1965 in the present case, or from an earlier date if the employer had started contributing to the Contributory Provident Fund whichever is earlier. Therefore, the petitioner would be entitled to count her service with effect from the date of her appointment and approval i.e. 17.8.1965." The writ petition was allowed and the petitioners were held entitled to count their entire service w.e.f. 17.8.1965 to 30.9.2001 as qualifying service for the purposes of pension. However, the Contributory Provident Fund was required to be adjusted and deducted from the arrears of her pension. We come to the conclusion that the petitioners' initial date of appointment after regularization will be the date on which employee takes charge of the post. Once the entire service of a daily wager is to be counted as qualifying service then his date of appointment will relegate back to his initial date of appointment i.e. 1988 and he cannot be ousted from pension scheme by applying the date of regularization i.e. 28.3.2005 which is evidently after the new scheme or new restructured defined Contribution Pension Scheme came into force w.e.f. 1.1.2004. Reliance has been placed by the respondents on a Single Bench judgment in case of Ramesh Singh and others Vs. State of Punjab (CWP No.5092 of 2010 decided on 22.3.2010). No benefit can be derived by the State on behalf of the judgment because Rule 3.17 of the Punjab Civil Service Rules Vol.II has not been discussed in the judgment. A request for extension of pension scheme has been repelled in the judgment on the ground that petitioners who were working in the Board on work charge basis were regularized by the Board. Since, there was no scheme of pension in the Board, their claim of pension was rejected. On the other hand, the employees who had come from the department of Health on deputation to the Board, and who on repatriation to the parent department were held entitled to a pension by virtue of pension scheme applicable in the parent department. This judgment is not applicable on the facts in the present case."

15. Learned Additional Advocate General was unable to dispute that aforesaid judgment rendered by the Punjab and Haryana High Court in ***Harbans Lal's case*** supra was laid challenge before the Hon'ble Apex court by way of SLP No. CC17901/2011 titled *State of Punjab and Ors v. Harbans Lal*, but same was dismissed, as a consequence of which, aforesaid judgment has attained finality.

16. Consequently, in view of the detailed discussion made herein above as well as law taken into consideration, present petition is allowed and notification dated 11.10.2019 is quashed and set-aside and petitioner is deemed to be in regular service of respondent No.2-department in the capacity of Ayurvedic Medical Officer since date of his initial engagement i.e. 23.1.1999 and as such, he is held to be entitled to pension as fixed by the competent authority. In view of the above, present petition is disposed of so also pending applications if any.

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

Smt. Urmila Devi …… Petitioner

versus

State of H.P.& others ……. Respondents

CWP No.1700 of 2012
Date of Decision: 11.12.2019

Constitution of India, 1950 - Article 226 – Income certificate – Challenge to order of Sub-Divisional Collector upholding report of Tehsildar regarding income of petitioner – Held, Tehsildar had conducted inquiry pursuant to orders of Additional District Magistrate – Petitioner though had separated from family of her father-in-law but income of no other person other than her husband was included while ascertaining her income – Her husband was paying Rs.15,348/- P.A. towards insurance policies – Income of family of petitioner therefore was more than Rs. 20,000/- P.A. – No infirmity in order of SDO (C) – Petition dismissed. (Para 4 to 6).

Whether approved for report? Yes.

For the Petitioner :Mr. G.R.Palsra, Advocate.
For the Respondents :Mr. Anil Jaswal and Mr. Arvind Sharma, Additional Advocates General.

Sandeep Sharma, Judge *(oral)*

Petitioner, by the medium of this petition, has mainly prayed for following relief:-

> "***That the impugned order/ inquiry dated 11.4.2011 passed by respondent No.3 contained in Annexure P-1 as well as the order dated 24.11.2011 contained in Annexure P-2 passed by respondent No.2 may kindly be quashed by issuing a writ of certiorari.***"

2. Precisely, the facts as emerge from the record are that the petitioner Smt. Urmila Devi was appointed as Anganwadi worker in Anganwadi Centre, Upper Alsu, Tehsil Sundernagar, District Mandi, HP on 1st October, 2010. However, respondent No.5, Smt. Sunita Devi, being aggrieved and dissatisfied with the selection of the petitioner filed an appeal in the Court of learned Deputy Commissioner, Mandi, District Mandi, H.P., under Clause 12 of the guidelines for the selection of Anganwadi worker. Aforesaid appeal filed by respondent No.5 ultimately came to be dealt and decided by Additional District Magistrate (ADM), Mandi, H.P., who vide order dated 7.1.2011, directed the Tehsildar, Sundernagar to conduct inquiry qua the income certificate issued in favour of the petitioner. Tehsildar, Sundernagar after having conducted inquiry submitted his report vide communication dated 11.4.2011 ***(Annexure P-1),*** wherein he concluded that annual income of the petitioner is more than Rs. 20,000/- per annum. Vide aforesaid report Tehsildar, Sundernagar also held that income of respondent No.5 is Rs.14000/- per annum, which is less then prescribed limit of Rs.20,000/-.

3. Being aggrieved and dissatisfied with the aforesaid report submitted by the Tehsildar, Sundernagar, petitioner herein preferred an appeal bearing case No.5 of 2011 in the Court of Sub Divisional Officer (Civil) Sundernagar, District Mandi, H.P., however aforesaid appeal having been filed by the petitioner, came to be rejected vide order dated 24.11.2011. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for the relief, as has been reproduced hereinabove.

4. Having heard learned counsel representing the parties and perused the record vis-a-vis impugned order dated 24.11.2011 passed by Sub Divisional Officer (Civil) Sundernagar, District Mandi, H.P., this Court finds no force in the argument advanced by Mr. G.R.Palsra, learned counsel representing the petitioner that Tehsildar, Sundernagar while computing the income of the petitioner wrongly took into consideration income of the other family members. Bare perusal of the report submitted by the Tehsildar, Sundernagar ***(Annexure P-1),*** nowhere

suggests that he while assessing income of the petitioner took into consideration the income of other family members, rather Tehsildar Sundernagar having taken note of the fact that husband of the petitioner pays sum of Rs.15,348/-Per annum on account of the premium of insurance policies, proceeded to hold that income of the petitioner is more than Rs.20,000/- per annum. There is no mention, if any, with regard to income, if any, of the other family members of the petitioner in the report submitted by the Tehsildar, Sundernagar. Otherwise also, there was no occasion for the Tehsildar, Sundernagar to take into consideration the income of other family members of the petitioner, when she herself took a stance before the authority concerned that she alongwith her husband separated from the family of her father-in-law in the year, 2006. Similarly, there is no force in the arguments of learned counsel representing the petitioner that court below wrongly decided the case of the petitioner in terms of the policy of the year, 2007, whereas it ought to have decided the case of the petitioner in terms of policy of the year, 2010. As per policy of the year, 2010, question with regard to status of the family is to be ascertained on the basis of the notice displayed by the Gram Panchayat concerned on 1st January of the recruitment year.

5. In the case at hand, no doubt selection to the post of Anganwadi worker, against which petitioner was selected was initiated in the year, 2010 and as such, learned counsel representing the petitioner may be right in contending that policy of the year, 2010 was applicable. If it is presumed and accepted that the policy of year, 2010 was applicable in the case of the petitioner, even in that eventuality no fault can be found with the report submitted by the Tehsildar, Sundernagar, District Mandi, H.P., who admittedly pursuant to the directions issued by the Additional District Magistrate,Mandi, H.P., conducted inquiry and took into consideration the income of the husband of the petitioner only and not of other family members, from whom petitioner allegedly separated in the year, 2006.

6. Consequently, in view of the above, this Court finds no illegality and infirmity in the impugned order dated 24.11.2011 passed by the Sub Divisional Officer (Civil) Sundernagar, District Mandi, H.P. and as such, same is upheld.

Accordingly, the present petition is dismissed being devoid of any merit alongwith pending application(s), if any.

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

Dharam Parkash …Petitioner

Versus

State of H.P. and another ..Respondents

CWPOA No. 2527 of 2019.
Reserved on: 28.12.2019.
Decided on: 02.01.2020.

Constitution of India, 1950 - Articles 14 & 226 – Appointments in the establishment of His Excellencey, the Governor of State of H.P. – Challenge thereto by way of writ petition – Maintainability – Held, while making appointments or regularizing other service conditions in the establishment, His Excellency, the Governor, exercises an administrative power and such exercise can be interfered with on grounds of discrimination, malafide or the like(s). (Para 5).

Constitution of India, 1950 - Articles 14 & 226 – Appointments in the establishment of His Excellencey, the Governor of State of H.P. – Writ petition- Scope of interference – Held, in order to enable judicial intervention in such matters, it would require very strong and convincing argument to show that this power has been abused – If Authority has exercised his discretion in good faith and not in violation of any law, such exercise of discretion would

normally not to be interfered with by the Court merely on ground that it could have been exercised differently. (Para 5)

Constitution of India, 1950 – Articles 14 & 226 – Discretionary powers- Exercise of – Held, discretion means sound discretion guided by law or governed by known principles of rules, not by whims or fancy or caprice of the Authority. (Para 6).

Cases referred;

Erusian Equipment and Chemicals Ltd. vs. State of West Bengal, AIR 1975, SC 26).
In Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and others 1991 Supp (1) SCC 600,
Ramana Dayaram Shetty vs. International Airport Authority of India and others (1979) 3 SCC 489'

Whether approved for reporting ?[16] Yes

For the Petitioner :	**Mr. Manohar Lal Sharma, Advocate.**
For the Respondents :	Mr. Desh Raj Thakur, Addl. A.G., with Mr. Yudhbir Singh Thakur and Mr. Narender Singh Thakur, Deputy Advocate Generals, for respondent No.1. Mr. Dalip K. Sharma, Advocate, for respondent No.2.

Tarlok Singh Chauhan, Judge

The instant petition has been filed for the grant of following substantive reliefs:

i) *That the impugned office order No.3-29/71-GS, dated 23.01.2015, Annexure A-5, issued by respondent No.1 may kindly be quashed and set-aside.*

ii) *That the respondent No. 1 may kindly be directed to consider the case of the applicant for his placement as Peon from the date i.e. 23.01.2015, when the junior of the applicant, i.e. respondent No.2 has been placed against the post of Peon, with all consequential benefits @ 12% per annum from the due date."*

2. This Court need not to delve into the facts in detail as the same stands duly noted in the order that was passed at the time of hearing of the petition on 21.12.2019 which reads as under:

> *"The petitioner was appointed as Beldar on daily wage basis in the month of November, 1993 and his services were regularized after 10 years on 1.10.2003, whereas respondent No.2 was appointed as Beldar on daily wage basis on compassionate ground on 1.12.2009 and shortly thereafter was ordered to be regularized vide order dated 2.12.2010 i.e. within one year.*
>
> *What is more surprising is that when respondent No.1 got down to making placement to the post of Peon, respondent No.2, who was junior most Beldar in the office of Governor's Secretariat, was ordered to be placed as Peon.*

16 *Whether reporters of Local Papers may be allowed to see the Judgment ? Yes*

Obviously, such a course could not have been adopted by respondent No.1 and prima facie it is a clear case of favouritism, where all rules and regulations were thrown to the winds.

The Court is not oblivious to the provisions of the rules that have been annexed alongwith reply, which gave His Excellency, The Governor, full discretion in the matter of selection of household staff, but these rules nowhere give unfettered right to any person, to act contrary to law and the recruitment and promotion rules.

It is by now well settled that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. Nothing should be done which may give the impression of favouritism or nepotism.

Therefore, let respondent No.1 file supplementary affidavit justifying its action in first regularizing respondent No.2 within one year of the joining and thereafter promoting her despite being junior most Beldar vide office order dated 23.1.2015 (Annexure A-5) before the next date of hearing.

List on 28.12.2019."

3. In compliance to the aforesaid order, the respondent No.1 has filed supplementary affidavit, the relevant portion whereof reads as under:

"3(a). Since His Excellency the Governor is the authority to select the staff which can be appointed on contract, by direct recruitment or on promotion or on deputation, the respondent No. 2 was appointed as Beldar on contract on compassionate ground on 1.12.2009 with the approval of the then Governor, Himachal Pradesh. Her husband Shri Dalwinder Kumar was working as Sweeper in Raj Bhawan and died on 5.10.2009. The copy of the noting portion of the file is attached as Annexure-1.

(b) Subsequently, His Excellency the then Governor ordered on 16.12.2010 that "Smt. Rekha working as Beldar be appointed on regular basis against the post(s) she is presently

working on contract basis". Copy of the order is attached as Annexure-2.

(c) Therefore, the respondent No.2 was appointed as Peon with the approval of the then Hon'ble Governor on 23.01.2015. The copy of the noting portion is attached as Annexure-3.

4. That the office record shows that the respondent No.2 was appointed first as contractual Beldar and then as regular Beldar with the approval of H.E. the Governor. Subsequently, she was appointed as Peon, which was fresh appointment, and not a promotion. Therefore, the petitioner's claim that he was not considered for the post of Peon despite being senior to respondent No.1 in the category of Beldar is not tenable since appointment of respondent No.2 as Peon was made afresh with the order/approval of the Governor, therefore, her position in the seniority list in the category of Beldar was not relevant at that point of time."

4. I have heard learned counsel for the parties and have also gone through the material placed on record carefully.

5. In making the appointments or regulating the other service conditions of the staff of the house-hold establishment of the Governor, his Excellency the Governor exercises an administrative power and while exercising such power can definitely be interfered with on well-known grounds like discrimination, mala fide or the like(s). Therefore, in order to enable

a judicial intervention, it would require only a very strong and convincing argument to show that this power has been abused. If an authority has exercised his discretion in good faith and not in violation of any law, such exercise of discretion would normally not be interfered with by the Courts merely on the ground that it could have been exercised differently or even that the Court would have exercised it differently.

6. It appears that respondent No.1 has failed to take into consideration the fact that this discretion can only be exercised if there is a power to do so and the same in the given circumstances cannot be contrary to law. The absence of arbitrary power is the first postulate of rule of law upon our whole constitutional edifice is based. In a system governed by law, discretion when conferred upon an executive authority must be

confined within clearly defined limits. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority

7. It was more than four decades back that the Hon'ble Supreme Court had observed that "it must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesses, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesses including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory (Refer: ***Erusian Equipment and Chemicals Ltd***. vs. ***State of West Bengal, AIR 1975, SC 26***).

8. In ***Delhi Transport Corporation*** vs**. *D.T.C. Mazdoor Congress and others 1991 Supp (1) SCC 600,*** the Hon'ble Supreme Court in its majority decision held that there was need to minimise the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however, high placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power and good sense, circumspection and fairness does not go with the posts, however high they may be. There is only a complacent presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society, pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law."

9. Earlier to that, the Hon'ble Supreme Court in ***Ramana Dayaram Shetty vs. International Airport Authority of India and others (1979) 3 SCC 489****i* held as under:-

> *"It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc. must be confined and structured by national, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down."*

10. Thus, what can be taken to be well settled is that an unfettered discretion is a sworn enemy of the constitutional guarantee against discrimination. No authority, be it administrative or judicial has any power to exercise the discretion vested in it unless the same is based on justifiable grounds supported by acceptable materials and reasons thereof.

11. The concept of equality before law means that among equals the law should be equal and should be equally administered, and that like should be treated alike. There must not be discrimination among equals unless there is reasonable classification. When something is to be done within the discretion of the authorities, it must be done according to the whims of the authorities. Article 14 of the Constitution is violated by powers and procedures which in themselves result in unfairness and arbitrariness. It must be remembered that our entire constitutional system is founded in the rule of law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason.

12. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and it therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

13. Bearing in mind the aforesaid exposition of law, it would be noticed that the petitioner was appointed on daily wage basis in the month of November, 1993 and his services were regularized only after he had completed 10 years of services on 1.10.2003, however, an undue favour was shown by respondent No.1 in regularising the services of respondent No.2, who came to be appointed only on 1.12.2009 and was ordered to be regularized on 2.12.2010 i.e. within one year. Not only this, even while making placement to the post of Peon, despite respondent No.2, who was junior most Beldar was ordered to be placed as Peon ignoring the legitimate claim of the petitioner. The mere fact that there was a discretion vested with the authority would not clothe it with the power to relax the rules, regulations or guidelines and above all, violate the Constitutional provision more particularly Article 14 thereof.

14. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed and consequently the impugned order dated 23.1.2015 (Annexure A-5) whereby the respondent No.2 was placed against the post of Peon is quashed and set-aside and the petitioner, who is senior most Beldar is directed to be considered and if found fit and eligible be appointed as Peon from the date i.e. 23.1.2015 with all consequential benefits.

15. The petition is disposed of in the aforesaid terms, so also the pending application(s) if any.

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

Ajay Kumar Kapoor …… Petitioner

versus

State of H.P.& others ……. Respondents

CWPOA No.2059 of 2019

Date of Decision: 12.12.2019

Constitution of India, 1950- Article 226– Claim of higher pay band from back date – Entitlement – Police department advertised recruitment notice dated 17.7.2012 for posts of constables – Petitioner though qualified written examination but finally not selected after

interview – In previous writ, his exclusion from selection list was held malafide and actuated with **vice** – Thereafter, Police department gave appointment to petitioner against vacancy of home District but from 20.8.2015 – Petitioner claiming pay benefits from back date on ground that he ought to have been offered appointment from recruitment notice dated 17/7/2012 – Respondents contending that as per Rules, he can be granted higher pay scale of Rs.10300–34800 plus Rs.3200 grade pay after completion of eight years of service from date of actual joining – Held, in previous judgment, High Court had recorded finding that grant of less marks in interview to petitioner was actuated with malice to exclude him from selection– He was given appointment pursuant to recruitment notice dated 17/7/2012 for all intents and purposes - He is to be treated like other candidates recruited pursuant to notice dated 17/7/2012 – Persons recruited vide recruitment notice dated 17/7/2012 got higher pay band from their initial appointment and not after eight years of service – Petitioner entitled for higher pay as if appointed vide recruitment notice dated 17/7/2012 – Petition allowed. (Para 12 to 14, 17 & 19)

Cases referred;
Bishnu Biswas and others versus Union of India and others, (2014) 5 SCC 774'
Hawa Singh and others vs. The Haryana State Electricity Board. Chattar Singh vs. State of H.P. & others, CWP No. 188 of 2012-I:-
Hawa Singh Sangwan vs. Union of India & others and 1996 (6) Vol. 116, Services Law Reporter, 335,
Hem Chand versus State of Himachal Pradesh & others, 2014(3) Him. L.R.1962,
Pilla sitaram Patrudu & others vs. Union of India and others, 2000 (8) SCC 182
Sanjay Dhar vs. J&K Public Service Commission & another, 1991 (6) Vol. 76, Services Law Reporter 753,
Shri Balak Ram versus State of Himachal Pradesh, Latest HLJ 2014(HP) Suppl.231
Whether approved for report? Yes.

For the Petitioner :Mr. J.L.Bhardwaj, Advocate.

For the Respondents :Mr. Anil Jaswal and Mr. Arvind Sharma, Additional Advocates General.

Sandeep Sharma, Judge *(oral)*

By way of Original Application No.3025 of 2017, which now stands transferred to this Court after abolition of the Erstwhile H.P. Administrate Tribunal, petitioner has mainly prayed for the following relief:-

> " ***That the impugned order dated 11.94.2017 passed by the respondent No.5 vide Annexure A-5 to the extent of grant of pay scale of Rs.10300-34800+3200 Grade Pay to the applicant only after completion of eight years regular service may kindly be quashed and set-aside and the respondents may kindly be directed to consider the applicant as an appointee on the post of constable w.e.f. September, 2013, when the private respondents No.6 and 7 reflected in Annexure A-1, have been appointed as constable with pay scale of Rs. 10300-34800+3200 Grade Pay as granted to them as per the recruitment process initiated vide advertisement notice issued on 17.07.2012 alongwith seniority, arrears, increments and other consequential benefits as well as interest @ 12% per annum on the arrears from the date the same fell due till its realization and justice be done."***

2. For having bird's eye view, certain undisputed facts as emerge from the record are that the petitioner, who hails from Schedule Tribe community, appeared in the written examination conducted by the police Department for the appointment to the post of Constable. Petitioner secured 43 marks in the written test amongst 197 candidates and accordingly, he was invited for interview. However, fact remains that in the interview, petitioner was only awarded three marks out of 12, as such he could not make in the final merit list.

3. Being aggrieved and dissatisfied on account of non-selection, petitioner approached this Court by way of CWP No. 7978 of 2013 precisely on the ground that interview Board ought not have awarded him three marks out of 12 marks, especially when he had secured 43 marks in the written examination. This Court after having carefully perused the replies filed on behalf of the respective respondents, held that action of interview Board in awarding only three marks to the petitioner was actuated by mala-fides. Aforesaid judgment passed by this Court reveals that this Court having carefully examined the record of the result prepared by the interview Board, observed that had interview Board awarded 3.10 marks to the petitioner, he would have been selected and appointed, but non awarding of .10 per centum to the petitioner by the interview board has de-facilitated his selection or consequent appointment which deficiency of minimum marks for the reasons aforesaid is generated by mala-fides.

4. The learned Single Judge of this Court returned categoric finding that the factual scenario as encapsulated, compels this Court to infer that the petitioner has been denied his legitimate right to be selected by a predetermined mind of the interview board for the sole reason to oust him from the selection. While concluding mala-fides on behalf of the members of the interview board, learned Single Judge also took into consideration the law laid down by the Hon'ble Apex Court in ***Bishnu Biswas and others versus Union of India and others,*** (2014) 5 SCC 774 and observed that awarding of deficient marks in the viva voce to the petitioner despite his having obtained higher marks than the other candidates or aspirants has also singled him out for being awarded negligible marks in the viva voce, though other aspirants, who obtained lesser marks in the written test, were awarded higher marks in the viva voce as such, theirs constituting mala-fides as also lending intransparency to the viva voce conducted by the interview board.

5. It is also not in dispute that before issuance of positive directions, if any, by this Court while passing the judgment dated 16.12.2014, to offer appointment to the petitioner on account of aforesaid violation, statement came to be made on behalf of the department that the petitioner shall be considered for appointment or appointed to the post of Constable in the category of Schedule Tribe as and when a vacancy arises and as such, petition having been filed by the petitioner came to be disposed of with the direction to the respondents-State to consider the petitioner for being appointed to the post of Constable in the category of Scheduled Tribe as and when a vacancy arises.

6. After passing of aforesaid judgment, respondent No.5 issued appointment letter dated 20.08.2015 ***(Annexure A-2***) to the petitioner, appointing him as temporary constable in H.P. Police Department against the existing vacancy of 1st HPAP Bn. Junga, District Shimla, H.P., w.e.f. 20.8.2015 in the pay band of Rs.5910-20200+Grade Pay of Rs.1900/- plus other usual allowances as admissible under the rules in terms of judgment dated 16.12.2014 passed by this Court in CWP No.7978 of 2013.

7. Though, aforesaid offer of appointment made by the respondents was accepted by the petitioner, but he filed representation ***(Annexure A-3),*** dated 14.3.2017, addressed to the Superintendent of Police, Shimla, District Shimla, H.P., claiming therein that he ought to have been offered appointment as per recruitment notice dated 17.07.2012 ***(Annexure A-4).*** However, fact remains that aforesaid representation was turned down by the authority concerned vide order dated 11.4.2017 ***(Annexure A-5)***. In the aforesaid communication/order, respondent No.5 conveyed that since you have been appointed as Constable against the vacancy of District i.e. Home District, benefit of enhanced pay Band and Grade Pay i.e. Rs.

10300-34800 Plus 3200 Grade Pay, which is otherwise payable to other selected candidates pursuant to the recruitment notice dated 17.7.2012, cannot be granted to you. Respondent No.5 vide aforesaid communication further clarified that as per the H.P. Govt. Notification No. Fin (PR)B(7)-64/2010, dated 17.6.2016, Constables appointed on or after 01.01.2015 will be entitled for the pay structure of Rs. 10300-34800+3200 GP on completion of eight years of regular service. In the aforesaid backdrop, petitioner herein approached Erstwhile H.P. Administrative Tribunal, seeking therein relief, as has been reproduced hereinabove, but as has been noticed hereinabove, petition initially filed before the Tribunal has landed up before this Court for adjudication on account of abolition of the Tribunal.

8. In reply to the present petition, facts as have been taken note hereinabove, have been not disputed by the respondents. The plea which has been taken to justify the claim of respondents is that since petitioner came to be appointed against the vacancy of District i.e. Home District, he can only be given enhanced pay Band and Grade Pay i.e. Rs.10300-34800+3200/- on completion of eight years of regular service in the department in view of the notification dated 17.6.2016, which has been otherwise taken note hereinabove.

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

10. Precisely, the grouse of the petitioner is that since he was offered appointment in the year, 2015 pursuant to the direction issued by this Court vide judgment dated 16.12.2014 passed in CWP No.7978/2013, wherein this Court had categorically held that non selection of the petitioner is bad and actuated with mala-fides, respondents while offering him appointment letter (Annexure A-2) ought to have granted him benefits i.e. seniority as well as consequential benefits from the date it has been granted to the persons appointed pursuant to recruitment notice dated 17.7.2012. As has been taken note hereinabove, though this Court did not quash the selection process conducted by the respondents pursuant to notice dated 17.7.2012, but in so many words ruled/held action of the respondents in not offering appointment to the petitioner to be bad and actuated with mala-fides. If the judgment ***(Annexure A-1)*** is read in its entirety, it clearly reveals that this Court was convinced and satisfied that interview board could not have awarded three marks to the petitioner, especially when other persons, who had actually secured less marks in the written examination were granted more than marks in the interview. In para Nos. 3 and 4 of the aforesaid judgment, this Court has not only directed the interview Board, rather has rendered categoric findings that legitimate right of the petitioner to be selected has been scuttled by the Board solely with a view to oust him from the selection. However, as has been taken note hereinabove, that before this Court could proceed to quash the entire selection process, it having taken note of undertaking given by the representative of the respondents-department that the petitioner would be given appointment for the post of constable in the category of Schedule Tribe as and when a vacancy arises purposely did not quash the appointments of other candidates. It is not in dispute that aforesaid judgment rendered by this Court has attained finality as at no point of time appeal, if any, ever came to be filed, laying therein challenge to aforesaid judgment.

11. It is not in dispute that persons selected pursuant to recruitment notice dated 17.07.2012 ***(Annexure A-4)*** have been given benefits of enhanced pay Band and Grade Pay i.e. 10300-34800 plus 3200 Grade Pay from the date of their initial appointment, whereas in the case of the petitioner, who had no fault though was given appointment on 20.08.2015 against the post of constable, but in the pay Band of **5**910-20200+ 1900 GP plus other allowance, as admissible under the Rules.

12. Having noticed aforesaid factual aspects of the matter, there cannot be any dispute that in the whole process there is no fault, if any, on the part of the petitioner, who despite having secured 43 marks in the interview was granted three marks by the interview Board with an intention to oust him so as to facilitate the appointment of other candidates, who had admittedly secured less marks than the petitioner in the written examination. Findings

recorded by the Court with regard to mala-fides and predetermined mind of the interviewing Board to oust the petitioner herein have already attained finality. It appears that this Court solely with a view to protect the selection/ appointment of other candidates,who did not have any role in awarding the marks as far as viva voce is concerned, proceeded not to quash the entire proceedings, rather having taken note of the statement made by authorized representatives of the respondent-Department disposed of the petition with the direction to the respondents to offer appointment to the petitioner in the category of Schedule Tribe as and when a vacancy is available. But definitely aforesaid direction issued by this Court cannot be construed/interpreted in the way as is being interpreted by the respondents. True, it is that vacancy against which the petitioner came to be appointed became available in the year, 2015, but this Court cannot loose sight of the fact that appointment offered to the petitioner herein is in pursuant to the recruitment notice dated 17.7.2012, meaning thereby the petitioner for all intents and purpose is to be treated like other candidates, who got selected pursuant to the aforesaid recruitment notice. Otherwise also, there is no material, worth the name, available on record suggestive of the fact that appointment order dated 20.08.2015 ***(Annexure A-2),*** whereby the petitioner was appointed as Constable was issued/given pursuant to some fresh process of recruitment initiated by the respondents, rather appointment letter itself suggests that same is in terms of the directions issued by this Court while passing judgment dated 16.12.2019 in CWP No.7978 of 2013. If the version put forth by the respondents is accepted that since petitioner has been appointed against the vacancy of District i.e. Home District and he is eligible for enhanced pay Band and Grade Pay i.e. Rs.10300-34800 Plus Rs.3200 Grade Pay on completion of eight years of regular service in the department, same would cause grave prejudice and injustice to the petitioner, who has already suffered for years together for no fault of him. 13. Had this Court having taken note of glaring mistake committed by the interviewing Board at the time of carrying out selection process in terms of recruitment notice dated 17.7.2012, proceeded either to quash the entire selection process or issued direction to offer appointment to the petitioner among other selection candidates in his category, petitioner would have definitely got the benefits as are now being enjoyed by other persons selected in terms of recruitment notice dated 17.7.2012.

14. Appointment of the petitioner got delayed on account of no fault of him, rather fault, if any, is of the department, as has been taken note hereinabove, and as such, petitioner cannot be allowed to suffer further on account of denial of seniority to him by the respondent-department.

15. Reliance is placed upon the judgment rendered by this Court in case, titled ***Hem Chand versus State of Himachal Pradesh & others,*** 2014(3) Him. L.R.1962, wherein it has been held as under:-

> "3.Admittedly, the appointment of the petitioner was delayed for no fault of his and came to be appointed only in the year 2009, that too after the intervention of this Court. The result of delayed appointment of the petitioner is that he has been paid less salary and denied the seniority over a long period of time. It has been consistently opined that in case a candidate is wrongly denied appointment for no fault on his part, he cannot be denied appointment from due date and consequential seniority. Reference in this regard can conveniently be made to ***1996 (8) SCC 637,Pilla sitaram Patrudu & others vs. Union of India and others, 2000 (8) SCC 182 Sanjay Dhar vs. J&K Public Service Commission & another, 1991 (6) Vol. 76, Services Law Reporter 753, Hawa Singh Sangwan vs. Union of India & others and 1996 (6) Vol. 116, Services Law Reporter, 335, Hawa Singh and others vs. The Haryana State Electricity Board***.Moreover, it is not the case of the respondents that the petitioner was not recommended to be appointed on 26.6.2004 but the only ground taken is that it was the Pradhan, Gram Panchayat Sawindhar, Tehsil Karsog, who delayed the appointment of the petitioner. This is the precise reason that the petitioner is entitled for the seniority from the date of offer of appoin tment, as held by the Division Bench

of this Court in similar circumstances, in case titled as ***Chattar Singh vs. State of H.P. & others, CWP No. 188 of 2012-I:-***

> "***3. No doubt, the petitioner joined duty only on 13.5.2003. But in his favour admittedly there is an order by the Appointing Authority on 8.8.2002 to give appointment, as has been noted by the Tribunal in Annexure P-1, order. It is that order, which has been upheld by the Tribunal and the direction issued by the Tribunal is for implementing the said order. Therefore, for all purposes, the petitioner shall be deemed to be appointed on 8.8.2002, on the date admittedly the petitioner was directed to be appointed by the Sub Divisional Magistrate. However, taking note of the fact that the petitioner has joined duly on 13.5.2003 after the order was issued to him, the entitlement of the petitioner for actual monetary benefit shall be only from 13.5.2003. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed in the post of Gramin Vidya Upasak on 8.8.2002 for all purposes; but from 8.8.2002 to 13.5.2003, the benefits shall only be notional and from 13.5.2003, the petitioner shall be entitled to all monetary benefits."***

4. In view of the exposition of the law referred to above, the petitioner is entitled to be treated as having been appointed as a Part Time Water Carrier at Government Primary School Alyas, Gram Panchayat, Sawindhar, Karsog-II, District Mandi from 30.6.2004, pursuant to the recommendation of the Government of H.P., as per order dated 26.6.2004 for the purpose of seniority. However, the entitlement of the petitioner for actual monetary benefits shall be only from 9.6.2009. In order to avoid any ambiguity,it is made clear that the petitioner shall be deemed to be appointed as Part Time Water Carrier from 30.6.2004 for all purposes, but from 30.6.2004 to 9.6.2009, the benefits shall only be notional and w.e.f. 9.6.2009,the petitioner shall be entitled to all monetary benefits."

16. Reliance is also placed upon the judgment rendered by Division Bench of this Court in ***Shri Balak Ram versus State of Himachal Pradesh,*** Latest HLJ 2014(HP) Suppl.231, wherein it has been held as under:

8. The Apex Court in a case titled as Sanjay Dhar versus J & K Public Service Commission and another, reported in (2000) 8 Supreme Court Cases 182, has dealt with the issue and held that when a candidate is deprived of appointment illegally, he is deemed to have been appointed right from the same date. It is apt to reproduce paras 14 to 16 of the judgment herein:

> "14. ....As the appellant participated in the process of selection protected by the interim orders of the High Court and was also successful having secured third position in the select list, he could not have been denied appointment. The appellant is, therefore, fully entitled to the relief of his appointment being calculated w.e.f. the same date from which the candidates finding their place in the order of appointments issued pursuant to the select list prepared by the J&K PSC for 1992-93 were appointed and deserves to be assigned notionally a place in seniority consistently with the order of merit assigned by the J&K PSC.

15. We have already noticed the learned Single Judge having directed the appellant to be appointed on the post of Munsif in the event of his name finding place in the select list subject to the outcome of the writ petition

which order was modified by the Division Bench in LPA staying the order of the learned Single Judge but at the same time directing one vacancy to be kept reserved. The High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available

vacancies. The right of the appellant, if otherwise sustainable,cannot be allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.

16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of the merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned senior counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6-3-1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs. 5,000/-."

17. It is quite apparent from the aforesaid exposition of law laid down by this Court that seniority as well as consequential benefits to which otherwise person entitled cannot be denied to him/her on account of fault of department. In the present case, fault, if any, was not of the petitioner, rather it is quite apparent from the record that his selection got delayed on account of arbitrariness of the interview Board and as such, he is entitled to be treated at par with the candidates, who were selected pursuant to recruitment notice dated 17.7.2012.

18. There is no force in the argument of learned Additional Advocate General that in terms of notification dated 17.6.2016, issued by the Finance Department, Government of Himachal Pradesh, constable appointed on or after 01.01.2015 would only be entitled for the pay structure of Rs.10300-34800+3200 GP on completion of eight years of regular service because in the case at hand though the petitioner came to be appointed as Constable on 20.8.2015 vide Annexure A-2, but as has been observed hereinabove, his selection for all intents and purposes is deemed to be in terms of recruitment notice dated 17.07.2012 and as such, notification as referred above, cannot be made applicable in the case of the petitioner.

19. Consequently, in view of the above, the present petition is allowed and order dated 11.4.2017 ***(Annexure A-5)*** is quashed and set-aside. Respondents are directed to grant all benefits to the petitioner including seniority, as has been granted to the other persons selected pursuant to recruitment dated 17.07.2012 in the category of Constable. However, petitioner would be entitled to actual monetary benefits from the date of his joining pursuant to Annexure A-2, but after fixation of his pay. Arrears in terms of instant judgment shall be positively paid by the department to the petitioner within a period of three months.

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

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

Naresh Thakur and others .....Petitioners.

Versus

State of Himachal Pradesh and another

......Respondents.

CWPOA No. 4597 of 2019.
Date of decision: 06.01.2020.

Constitution of India, 1950 – Article 226 –Dispute regarding regularization of services from back date – Repeated representations by employees concerned and rejection thereof – Effect – Held, subsequent rejection of representations will not furnish a new cause of action or revive a dead issue or time barred dispute – Petitioners filing writ only in 2010 for regularization of their services in accordance with regularization policy of 1997 –Direction by the Court in previous writ to State was only to the effect to reconsider their representations- And rejection thereof will not give fresh cause of action to petitioners to file present petition – Petition dismissed. (Para 3, 7 & 11)

Cases referred:
C. Jacob vs. Director of Geology and Mining and another (2008) 10 SCC 115'
Union of India and others vs. M.K. Sarkar (2010) 2 SCC 59,

Whether approved for reporting?[17] ***Yes***

For the Petitioners: **Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates.**

For the Respondents: **Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals, Mr. Bhupinder Thakur, Mr. Narender Singh Thakur and Ms. Divya Sood, Deputy Advocate Generals.**

Tarlok Singh Chauhan, Judge (Oral)

The present petition has been filed for the following reliefs:

"(i) That the impugned rejection dated 3.12.2014 at Annexure A-14 and dated 20.9.2016 at Annexure A-25, may kindly be quashed and set-aside.

(ii) That the respondents may kindly be directed to regularize the services of the applicants with effect from due date i.e. the date of completion of 10 years of their daily wage services i.e. 1996/1997 with all consequential benefits in the interest of justice."

2. The applicants/petitioners were initially appointed as Clerks on daily wages in the year 1986-87 without any sanctioned posts for limited period for various studies/research work in the Projects funded by the Government of India in the Himachal Pradesh Institute of Public Administration (HIPA). In the year 1992, all the petitioners (except petitioner No.4) applied for the posts of Investigators in the Projects and were taken as such. Whereas, petitioner No.4 remained as Clerk upto 30.09.1992. In the year 2003, four posts of Investigators were created by abolishing existing four posts i.e. Deputy Director (Research), Programmer, Research Assistant and Junior Scale Stenographer of the Institute. The petitioners were offered these appointments and they accepted the same unconditionally.

3. It was in the year 2010 when the petitioners woke up from deep slumber and filed CWP No. 4758 of 2010 seeking regularization of their services in accordance with the policy framed by the Government on 11.12.1997.

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17 *Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

4. Even this writ petition was not decided on merits and rather the same was disposed of with a direction to respondent No.2 to consider and decide the petitioners' claim in terms of the policy. The said representation was rejected by the respondents on 03.12.2014. The petitioners thereafter filed O.A. No. 260/2015 which was decided by the learned Tribunal vide its order dated 30th June, 2016 with a direction to the respondents to re-consider the case of the petitioners for regularization on completion of 10 years service with all consequential benefits.

5. In compliance to the aforesaid direction the respondents again considered the case of the petitioners and rejected the same vide order dated 20.09.2016 that has been impugned herein.

6. The aforesaid narration of facts clearly goes to show that the petitioners unconditionally accepted their appointment as Investigators in the year 2003 and having accepted the same are estopped from filing the present petition.

7. No doubt, a direction was issued by this Court as also by the learned Tribunal to consider the case of the petitioners, but the repeated rejections thereafter would also not furnish a cause of action to the petitioners to file present petition.

8. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***C. Jacob*** *vs.* ***Director of Geology and Mining and another (2008) 10 SCC 115*** which reads as under:

> "9. *The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any `decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to `consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to `consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."*

9. Further, the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***M.K. Sarkar (2010) 2 SCC 59*** reiterated the legal position as under:

> *"The order of the Tribunal allowing the first application of the respondent without examining the merits, and directing the appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches. Moreover, a court to tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is*

with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court to tribunal deciding to direct "consideration" without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect."

10. Similar, reiteration of law can be found in a judgment rendered by the Division Bench of this Court in ***LPA No. 89 of 2012*** titled ***Sainik Schools Society and another*** *vs.* ***R.C. Sharma***, decided on 17.06.2014.

11. The ratio decidendi of all the aforesaid judgments is that the subsequent rejection of representation will not furnish a cause of action or revive a dead issue or time barred dispute.

12. In view of the aforesaid discussion, I find no merit in this petition and accordingly the same is dismissed. Pending application, if any, also stands disposed of.

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

The North Face Apparel Corp. ....Non-applicant/Plaintiff.

Versus

Pranay Kant Sharma ...Applicant/defendant

OMP No. 352 of 2019 in
COMS No. 17 of 2018
Reserved on 8.1.2020
Date of decision: 10.1.2020

Trade Marks Act, 1999 (Act)- Section 12- **Code of Civil Procedure, 1908-** Order XXXIX Rule 4 - Temporary injunction against use of similar trade mark – Alteration of order– Grounds – Held, trade mark styled as 'North Face' was allocated to the plaintiff by the Competent Authority under the Act – Defendant was assigned trade name "North Face Adventure Tours" though prior to allocation of trade mark to plaintiff but it was by the Tourism Department of State of H.P. and not by Competent Authority under the Act – Application of defendant for allocation of said trade mark to it already pending before Competent Authority for consideration – And said Authority is authorized to grant concurrent use of similar trade mark by more than one proprietors subject to appropriate conditions- Trade mark 'North Face Adventure Tours' thus is legally assignable to defendant also – Case of undue hardship being faced by defendant on account of temporary injunction restraining it from using its aforesaid trade mark is made out – Injunction order granted in favour of plaintiff is ordered to be vacated. (Para 5).

Trade Marks Act, 1999 – Section 93 – Bar of jurisdiction of Civil Court – Held, against order of Registrar of Trade Marks, aggrieved party has a remedy to file appeal before the Appellate Authority – Civil Court has no jurisdiction to entertain suit against such decision or order. (Para 5).

Cases referred:
Corn Products Refining Co. Vs. Shangrila Food Products Ltd, AIR 1960 SC, 142,
Shree Nath Heritage Liquor Vs. Allied Blender & Distillers 2015 (63) PTC 551 (Del), (c)

Whether approved for reporting? Yes

For the non-applicant: Mr. Anand Sharma, Sr. dvocate with Mr. Karan Sharma, Advocate.

For the applicant: Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Maan Singh, Advocate.

Sureshwar Thakur, J

Through OMP No. 352 of 2019, the applicant/ defendant hence strives, to, seek modification, of, the order pronounced by this Court, on 1.1.2020, upon, OMP Nos. 211 & 323 of 2018, wherethrough, an interim order of injunction, became pronounced by this Court, on 26.5.2018, hence restraining the defendant, from, infringing, the, registered trade mark, as, assigned by the competent authority, vis-a-vis, the plaintiff.

2. Visibly, the afore orders, became rendered, by this Court, during the pendency of COMS No. 17 of 2018, (i) and, the legal strife, which emerges, inter-se, the contesting litigants, appertains to, the, registered trade mark, bearing the nomenclature 'North Face', and, has become assigned, to the plaintiff, rather purportedly also becoming used by the defendant, (ii) and, thereupon the apposite infringement arising, (iii) besides, for, ensuring qua the afore trade mark, becoming hence not used by the defendant, or, for, precluding, through, its passing off rather the mind(s) of, the, consumers concerned, hence being beset with confusion, arising from, occurrence, of, similarity(ies), inter-se the afore assigned trade mark, and, vis-a-vis, the trade mark used, by the defendant, hence bearing the nomenclature "North Face Adventure Tours" (iv) besides obviously, for, blunting the abuse thereof, hence the plaintiff claimed rendition of, a, decree, of, mandatory/ prohibitory injunction, against, the defendant, inasmuch as, against, any user, by him, of, the afore assigned trade mark, as become granted qua the plaintiff, by the competent authority, as, constituted, under, the Trade Marks Act, 1999.

3. The defendant, in his written statement, as, became furnished, to the plaint, and, also in the reply meted by him, to the application, cast, under Order 39 Rules 1 and 2 CPC, hence by the plaintiff, during, the pendency, of, the extant COMS, had, rather contended, (a) that, the defendant was the prior user, of, trade mark hence bearing, the, nomenclature 'North Face Adventure Tours', rather, since the year 1994, (b) and, also contended qua the afore assigned qua him trade mark, though, rather became assigned, not by the contemplated competent authority, under, the Trade Marks Act, and, contrarily, it, hence became assigned to him, by the Department of Tourism, Government of H.P., (c) yet, given, the trade mark bearing, the, nomenclature 'North Face Adventure Tours', as became assigned, vis-a-vis, the defendant, rather becoming visibly assigned visibly prior, to, the assignment, of, the infringed trade mark, vis-a-vis, the plaintiff, thereupon there being no merit, in, the plaintiff's claim. It also become contended, that, the contested trade mark, 'North Face' rather not bearing any similarity, vis-a-vis, the mercantile class, qua wherewith, a, prior assigned trade mark, rather became granted to the defendant, by, the Department of Tourism, Government of H.P., and, whereupon also, no infringement, vis-a-vis, the defendant, qua, the contested trade mark, hence making any emergence.

4. At the outset, this Court would proceed, to, either make absolute the afore order, of, injunction, or, may become constrained, to, modify the afore order, (a) rather only, upon, the afore respective contentions, as, reared before this Court, by, the counsels, for, the contesting litigants concerned, also becoming succored, by, cogent material, (b) and, also this Court may become constrained, to, modify, or, vacate the afore made order, of, temporary injunction, only upon, satisfactory material surging-forth, and, it hence, making unfoldings qua the continuance, of, the afore order, of, injunction, bringing undue hardship, upon, the applicant/defendant.

5. Be that as it may, the contemplated competent authority, under, the Trade Marks Act, had, assigned hence trade mark, nomenclarured as, 'North Face', vis-a-vis, the plaintiff, (a) and, the afore assigned trade mark, vis-a-vis, the plaintiff, does visibly, appertain to a mercantile class, rather graphically contradistinctive, vis-a-vis, the commercial

enterprise(s), engaged into, by, the defendant. Even though, the afore inter-se, contradistinctivity, inter-se, mercantile class, qua wherewith, the afore assigned trade mark, become granted qua the plaintiff, and, vis-a-vis, the, prior thereto, hence, user of trade name, hence bearing, the, nomenclature, 'North Face Adventure Tours', rather by, the defendant, hence, under an apposite grant, as, made by the Department of Tourism, Government of H.P., (b) yet, may also bring application(s) thereon, vis-a-vis, verdicts, of, the Hon'ble Supreme Court, as pronounced, in, Corn Products Refining Co. Vs. Shangrila Food Products Ltd, AIR 1960 SC, 142, and, also the verdict rendered by the Delhi High Court, in, Shree Nath Heritage Liquor Vs. Allied Blender & Distillers 2015 (63) PTC 551 (Del), (c) emphatically with, the, afore verdicts carrying expostulation(s) law, vis-a-vis, the apposite similarity(ies), in, the trade mark name, dehors any distinctivity, inter-se, the, mercantile class(s) qua, wherewith, the, apposite trade mark name, hence become granted, to, the plaintiff, vis-a-vis, the mercantile class or enterprise engaged, into hence, by the errant litigant, rather constraining Courts, of, law, to, prohibit user thereof. Needless, to, say, the, plaintiffs' contention, does beget, succor therefrom, (d) yet, the test for determination, vis-a-vis, theres' hecoming hence sparked, any valid infringement thereof, becomes rather expostulated therein, to, become comprised, in, the apposite infringing contradistinct businesses', or enterprises', hence using(s) therein, hence the similar thereto assigned trade mark name, rather by contemplated statutory authority, (e) and, thereupons' hence therethrough(s), there occurring beguiling confusion, in, the minds, of, the consumers concerned, (f) conspicuously, rather though, the misuser of, the statutorily validly made trade mark name, hence by the errant litigant, hence bringing unjust commercial gains, upon, the errant litigants, which, otherwise, he would not beget. Moreover, also the prior user, of, trade mark name, inasmuch as, of 'North Face Adventure', rather by the defendant, and, though it became assigned, qua him, not by the competent authority, rather, by the Department of Tourism, Government of H.P., hence prima facie, thereupon, the, afore evident factum, of, apposite prior user, does dispel, the afore efficacy, of, the afore expostulations, as, made in the judgment supra, rendered, by, the Hon'ble Apex Court. Importantly, when prima facie, prior user of trade mark name, 'North Face Adventure', by the defendant, is, dehors, the subsequent thereto assignment, of, the contested trade mark name, hence vis-a-vis, the plaintiff, rather by the competent authority, is rather concludable, to, prima facie, hence not engender, any, beguiling confusion(s), becoming beset, upon, the minds, of, the consumers concerned, (f) given theirs' becoming familiarized therewith, nor any, purported, inter-se similarity, inter-se, the contested trade mark name, and, vis-a-vis, the trade mark name, as, used by the defendant, hence would beget any firm inferences, vis-a-vis, the defendant, passing off, the contested trade name, especially when, through earlier, therewith user, he has rather generated hence goodwill, amongst, the, consumers' concerned. However, for, the hereinafter assigned reasons, prima facie, at this stage, it becomes neither necessary, to, firmly rest any conclusion qua the user, by, the defendant, of, the purportedly similar trade mark name, as, became statutorily assigned, vis-a-vis, the plaintiff, hence engendering any highlighted infringement, becoming visited, vis-a-vis, the afore assigned trade mark name, qua the plaintiff, by the competent authority. (h) Emphatically, when, uncontrovertedly, with the, defendant rather instituting, an, application bearing application No. 2041186, for, assigning qua him, the trade mark name, 'North Face Adventure Tours', hence before the Registrar, of, Trade Marks, and, also with the afore application being yet sub-judice therefore, (i) besides with the plaintiff filing, an apposite opposition application, before, the competent authority, under, the Trade Marks Act. Significantly, also when, in, the afore application(s), the imperative factum, which may hence engage the mind(s), of, the apposite authority, is, vis-a-vis, the mandate, embodied in Section 12, of, the Trade Marks Act, provisions whereof, are, extracted hereinafter:-

> "Registration in the case of honest concurrent use, etc.
>
> In the case of honest concurrent use or of other special circumstances which in the opinion of the Registrar, make it proper so to do, he may permit the registration by more than one proprietor of the trade marks which are identical or similar (whether any such trade mark is already registered or not) in respect of the same or similar goods or services, subject

to such conditions and limitations, if any, as the Registrar may think fit to impose"

(a) wherethrough, a, statutory leverage becomes conferred, upon, the authority concerned, to, assign identical, or, similar trade mark(s) hence, qua, the claimant(s) concerned, yet, on such condition(s) or limitation(s), as the, Registrar concerned, thinks fit to impose, upon, the claimant concerned. In aftermath, hence, the afore mandate, dehors, the afore expostulation of law, as borne, in, the verdict supra, rendered, by the Apex Court, does rather, to, a minimal extent, hence prima facie at this stage, erode the efficacy, of, the verdict supra, (i) inasmuch as, with, the verdict supra, as, relied upon, by the counsel for the plaintiff, becoming rendered, without therebefore, there being, any subjudice lis, pending before the competent authority concerned, (j) and its rather containing, any, res controversia, as, appertaining, to, the validity, of, any assignment, of, any common trade mark(s) name, rather by the competent authority concerned, vis-a-vis, the affirmatively hence contesting litigant, (k) wherein, as aforestated, the prior user of trade name, "North Face Adventures', by the defendant, is, claimed, by the latter to hence become validly statutorily also assignable, vis-a-vis, him, (l) thereupon till the competent authority, under the Trade Marks Act, conclusively decides, the, sub-judice lis, as, appertaining, to, the rival claim(s), of, the litigants concerned, vis-a-vis, the valid user(s), even of a similar trade mark name, hence by each, (m) hence thereupto, this Court deems it fit, and, proper, to conclude, that, undue hardship rather would become encumbered, upon, the defendant, if, the, afore order of interim injunction, is not, vacated. Moreover, even if, the, afore lis becomes finally determined, hence, by the Registrar concerned, vis-a-vis, plaintiff, yet, thereafter vis-a-vis, the aggrieved therefrom, hence, the apposite statutorily recoursable remedy, is, comprised, in, the aggrieved concerned, rather, instituting thereagainst, an appeal, before the Appellate Court, (n) and, when Section 93, of, the Trade Marks Act, completely ousts the jurisdiction, of, the Civil Courts, to, entertain any challenge thereagainst, (p) thereupon prima facie, at this stage, also this Court, is, of firm view, that, till the afore lis, becomes finally determined, hence thereupto the plaintiff, hence not holding, any firm leverage, to validly claim, that, there occurs any infringement or violation, of, the afore trade mark, by the defendant, (q) nor this Court is fully abled, to, pronounce with any formability, vis-a-vis, the apposite lis, hence at this stage, becoming prima facie, fully succored, vis-a-vis, the plaintiff. Preeminently, also when, in, the verdict, rendered by the Apex Court, and, as relied upon, by, the counsel for the plaintiff, rather its rendition emanating, upon, a, factual scenario, rather completely contradistinct, vis-a-vis, the factual scenario hereat, (r) hence, it, becomes obviously inapplicable hereat, whereas only upon, the, apposite completest adjudication being made, vis-a-vis, the plaintiff, thereupon alone, the, infringing user, of, the, purportedly similar trade name, by the defendant rather would, invite hence rendition(s), of, any decree, of, prohibitory injunction hence against the defendant.

6. Nowat, with, the afore imperative factum probandem, being amiss, rather hence in the interest, of, justice, and, for also ensuring, that, till the afore completest determination, is, made by the competent authority, vis-a-vis, the sub-judice therebefore, hence contesting claim(s), of, the litigants, hence, no prejudice, or, mercantile harm, becomes encumbered, upon, the defendant, (a) hence, this Court, is, constrained, to, vacate the order pronounced by this Court, on 1.1.2020, upon, OMP No. Nos. 211 & 323 of 2018, (b) wherethrough, an interim order, of, injunction, become pronounced, by this Court, on 26.5.2018, hence, restraining the defendant, from, infringing the registered trade mark name, assigned, by, the competent authority, vis-a-vis, the plaintiff.

7. In view of the above observations, the, instant application, is, disposed of. Any observation made herein above shall not be taken as any expression, of, opinion, on, the merits, of, the main case.

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Dr. Rachna Gupta .....Applicant/plaintiff

Versus

Dev Ashish Bhattacharya ……Non-applicant/respondent

OMP No. 574 of 2019 in
COMS No. 20 of 2019
Reserved on: 02.01.2020
Decided on: 03.01.2020

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2 – Temporary injunction restraining defendant from publishing and posting defamatory material in print and social media concerning plaintiff and her family during pendency of suit for damages caused by defamation – Entitlement – Held, plaintiff has filed a suit for damages – Even after filing suit, defendant posting comments on Facebook qua plaintiff and her husband – If he is not temporarily restrained from so doing against the plaintiff, it may give rise to multiplicity of litigation – She will suffer irreparable loss as her reputation may be lowered in estimation of others by such posts- Mere filing suit for damages will not give a licence in perpetuity to defendant to post comments during pendency of suit - Defendant would not suffer any loss in case he is restrained during pendency of suit from publishing and posting any statement, comment of any nature qua plaintiff and her family members on Facebook or any other social media platform including print and electronic media – Factors of prima facie case, balance of convenience and irreparable loss exist in her favour - Application allowed – Defendant restrained from posting or publishing statement of any nature against plaintiff, her husband or family members on Facebook or any other social media during pendency of suit. (Para 11,12 & 19)

Cases referred;

A Raja and M.A. Parameswari vs. P. Srinivasan Publisher
Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. The State of Gujarat, 1975 1 SCC
Bata India Ltd. v. A.M. Turaz & Ors., 2013 53 PTC 536;
D.F.Marion vs. Davis, 55 ALR 171 (1927)
Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others, 1991 Supp1 SCC 600'
Editor, Divya Himachal and others vs. Dr. Sukhdev Sharma and another (RSA No. 311 of 2018, decided on 25.07.2019)
J. in Scott v. Sampson, (1882) LR 8 QBD 491(DC)'
Kiran Bedi vs. Committee of Inquiry, (1989) 1 SCC 494,
Manisha Koirala v. Shashi Lal Nair, 2002 SCC Online Bom. 827 : (2003) 2 Bom.CR 136),
McCardie, J in Myroft v. Sleight (1921)90 LJ KB 883: 37 TLR 646'
Mehmood Nayyar Azam vs. State of Chhattisgarh, (2012) 8 SCC 11,
Pandey Surindra Nath Sinha v. Bageshwari Pd.., 1961 AIR (Pat) 164,
Parmiter v. Coupland(1840) 6 M&W 105: 151 ER 340,
Printer of Junior Vikatan Vasan Publications Private Limited, K. Ashokan editor, Vasan Publications Private Limited, Saroj Ganpath, chief Reporter and Prakash Jawadekar, (2010) AIR (Madras) 77.
St. Stephen s College v. University of Delhi, 1992 1 SCC 558
Subramanian Swamy vs. Union of India, Ministry of Law and Others, (2016) 7 SCC 221. Chintaman Rao v. State of M. P., 1951 AIR(SC) 118 this Court, opined as under:- (AIR P 119, Para 7)'
Sunil Kakrania vs. Saltee Infrastructure Ltd., 2009 AIR (Cal) 260,
Swatanter Kumar vs. The Indian Express Ltd. & others, (2016) 1 AD (Delhi) 288,
Swatanter Kumar vs. The Indian Express Ltd. & others, (2016) 1AD(Delhi) 288;
Umesh Kumar vs. State of A.P., (2013) 10 SCC 591,

Vishwanath Agrawal vs. Sarla Vishwanath Agrawal, (2012) 7 SCC 288,

[18] *Whether approved for reporting? Yes.*

For the applicant: Mr. Ajay Vaidya, Advocate, with Mr. Surinder Saklani, Advocate.

For the non-applicant: Mr. Sanjeev Bhushan, Sr. Advocate, with Mr. Rajesh Kumar, Advocate.

Chander Bhusan Barowalia, Judge. *(oral)*

The present application has been maintained by the applicant/plaintiff (hereinafter referred to as "the applicant") under Order 39, Rules 1 and 2 read with Section 151 CPC seeking interim direction.

2. As per the applicant, she has maintained a suit before this High Court seeking damages from the non-applicant/defendant (hereinafter referred to as "the non-applicant") for defamation and slander and for the recovery of Rs.1,00,00,000/- (rupees one crore) alongwith interest @ 18% per annum. The applicant contends that after filing of the instant suit, the non-applicant started leveling false and baseless allegations on the applicant and her family members, which are defamatory in nature. The non-applicant, through his acts, damaged the reputation, prestige and dignity of the applicant and her family, including her husband. The applicant further contends that the non-applicant, through his false and baseless allegations depicted a negative image of the applicant and her husband. The applicant prayed that the non-applicant be restrained from posting or publishing any statement of any nature on *facebook* or on any other social media, including print or electronic media, till the disposal of the instant suit. As per the applicant, there exists *prima facie* case in her favour and the *balance of convenience* also exists in her favour. In the above backdrop, the applicant prays that an *ad interim* injunction be granted in favour of the applicant by allowing the present application.

3. The non-applicant, by filing reply to the application, refuted the allegations made in the application. The non-applicant averred that the present application is not maintainable and it is a complete mis-use of the process of law. As per the non-applicant, the applicant has already obtained *ad interim* injunction, which cannot be granted under the law and the present application deserves dismissal. It is further averred that the non-applicant has fundamental right under the right of freedom of speech and this right cannot be throttled. In addition to that, the non-applicant has taken objection that the applicant has not come to the Court with clean hands. On merits, it is contended that no *prima facie* case exists in favour of the applicant and the pleadings made by the applicant do not show that the post made by the non-applicant is scandalous/libelous and defamatory in nature. The non-applicant emphatically denied that he has posted any material on *facebook* and other social media platforms against the applicant or her family members, which is false, baseless or scandalous. As per the non-applicant, he has not posted any material on social media, which can be termed as baseless or differently coloured. Rest of the contentions of the application have been denied, being false and incorrect. Lastly, the non-applicant has prayed for dismissal of the application.

4. The applicant filed rejoinder wherein contentions of the non-applicant have been denied and the contents of the application have been reiterated. The applicant contends that fundamental right of freedom of speech does not confer on citizens right to speak or publish irresponsibly. No allegation can be leveled harming the reputation of others, thus

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[18] *Whether reporters of Local Papers may be allowed to see the judgment? Yes.*

constituting defamation. It is further averred that fundamental right of freedom of speech comes with reasonable restrictions. In an organized society, the rights have to be recognized with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The applicant averred that the non-applicant is continuously posting the posts which are irresponsible, unsubstantiated and libelous in nature, which constitute defamation. Lastly, the applicant prays that the application be allowed.

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

6. Learned counsel for the applicant has argued that the application be allowed, as the applicant has a *prima facie* case in her favour, *balance of convenience* also lies in her favour and the non-applicant has no authority to malign the reputation of the applicant by way of posting and publishing baseless allegations against the applicant on *facebook* and other social media. He has further argued that there are reasonable restrictions to the fundamental right of freedom of speech and expression and it cannot be used defaming the other persons, as the non-applicant is continuously doing so after the filing of the suit, so the application may be allowed and the non-applicant may be restrained from posting or publishing any statement of any nature, against the applicant, her husband and her family members on *facebook* or on any other social media, including the print and electronic media, till the final disposal of the instant suit. Conversely, the learned Senior Counsel for the non-applicant has argued that the application is not maintainable, as the suit filed by the applicant (plaintiff) is not for injunction, so *ad interim* injunction cannot be granted. He has further argued that the fundamental right of freedom of speech is valuable right guaranteed under the Constitution of India and it cannot be abridged or abrogated. He has argued that the posts made by the non-applicant were not scandalous/libelous and defamatory in nature. The applicant has no *prima facie* case in her favour and *balance of convenience* is also not in her favour. The allegations of the applicant are baseless, so the application is required to be dismissed. In order to support his contentions, the learned Sr. Counsel for the non-applicant has placed reliance on a decision of Hon'ble Calcutta High Court rendered in ***A. Raja and M.A. Parameswari vs. P. Srinivasan Publisher and Printer of Junior Vikatan Vasan Publications Private Limited, K. Ashokan editor, Vasan Publications Private Limited***, ***Saroj Ganpath, chief Reporter and Prakash Jawadekar, (2010) AIR (Madras) 77.***

7. In rebuttal, the learned Counsel for the applicant argued that the non-applicant is continuously repeating his acts by posting and publishing scandalous/libelous and defamatory statements on *facebook* and social media and the applicant cannot maintain suit for every scandalous libelous and defamatory statement, so *ad interim* injunction is required to be granted in favour of the applicant. He has relied upon the judgment of co-ordinate Bench of this Court rendered in ***The Editor, Divya Himachal and others vs. Dr. Sukhdev Sharma and another*** (RSA No. 311 of 2018, decided on 25.07.2019). In addition to the judgment (supra) the learned Counsel for the applicant has also placed reliance on the following judicial pronouncements:

> ***1. Swatanter Kumar vs. The Indian Express Ltd. & others, (2016) 1AD(Delhi) 288; &***
>
> ***2. Subramanian Swamy vs. Union of India, Ministry of Law and Others, (2016) 7 SCC 221.***

8. At the very outset, it would be profitable to highlight relevant excerpts of a decision of Hon'ble Supreme Court rendered in ***Subramanian Swamy vs. Union of India, Ministry of Law and others, (2016) 7 SCC 221,*** which are as under:

> ***"120. Be that as it may, the aforesaid authorities clearly lay down that freedom of speech and expression is a highly treasured value under the Constitution and voice of***

dissent or disagreement has to be respected and regarded and not to be scuttled as unpalatable criticism. Emphasis has been laid on the fact that dissonant and discordant expressions are to be treated as view-points with objectivity and such expression of views and ideas being necessary for growth of democracy are to be zealously protected. Notwithstanding, the expansive and sweeping and ambit of freedom of speech, as all rights, right to freedom of speech and expression is not absolute. It is subject to imposition of reasonable restrictions.

Reasonable Restrictions

121. To appreciate the compass and content of reasonable restriction, we have to analyse the nature of reasonable restrictions. Article 19(2) envisages "reasonable restriction". The said issue many a time has been deliberated by this Court. The concept of reasonable restriction has been weighed in numerous scales keeping in view the strength of the right and the effort to scuttle such a right. In Chintaman Rao v. State of M. P., 1951 AIR(SC) 118 this Court, opined as under:- (AIR P 119, Para 7)

> *"7. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19 (1) (g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.""*

... ...

136. To appreciate what we have posed hereinabove, it is necessary to dwell upon balancing the fundamental rights. It has been argued by the learned counsel for the petitioners that the right conferred under Article 19(1)(a) has to be kept at a different pedestal than the individual reputation which has been recognized as an aspect of Article 21 of the Constitution. In fact the submission is that right to freedom of speech and expression which includes freedom of press should be given higher status and the individual's right to have his/her reputation should yield to the said right. In this regard a passage from Sakal Papers (P) Ltd. has been commended us. It says:- (AIR PP 313-14, Para 36)

"36. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom."

137. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the petitioners, for the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Article 21. Hence, the concept of equipose and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. The State of Gujarat, 1975 1 SCC 11 it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to co-exist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests. In Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others, 1991 Supp1 SCC 600 the Court has ruled that Articles relating to fundamental rights are all parts of an integrated scheme in the Constitution and their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes. In St. Stephen s College v. University of Delhi, 1992 1 SCC 558 this Court

> ***while emphasizing the need for balancing the fundamental rights observed that: (SCC P 612, Para 96)***
>
> > ***"96. ...It is necessary to mediate between Article 29(2) and Article 30(1), between letter and spirit of these articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change."***

Thus, the freedom of speech and expression is not unconditional, but it is subject to number of restrictions and these restrictions find mention in the Constitution itself. Article 19(1)(a) of the Constitution of India provides freedom of speech and expression and Article 19(2) imposes reasonable restrictions on the exercise of such right. As held in the judgment (supra) *"reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates.*

9. True it is that right of freedom of speech and expression, as encapsulated under Article 19(1)(a) of the Constitution of India, cannot be strangulated, however, this right is not unrestricted. The Constitutional Scheme, by incorporating Article 19(2), tries to balance between the freedoms granted under this right and to impose reasonable restrictions on this right so as to check its unreasonable use. Article 19(2), for ready reference is extracted hereunder:

> ***"[19(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with Foreign states, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.]"***

A bare reading of the Article 19(2) reveals that the State cannot make any legislation which invades the right and the right itself is available subject to restrictions, viz., security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

10. The judgment (supra) is fully applicable to the facts of the present case. Avowedly, the applicant filed the instant suit on 14.06.2019 for damages for defamation and slander seeking recovery of Rs.1,00,00,000/- (Rupees one crore) alongwith interest @18% per annum and the present application has been filed on 06.12.2019 for interim directions. Records also show that even after the filing of the instant suit the non-applicant is posting comments/statements on *facebook* qua the applicant and her husband. At this stage, when the main suit is pending adjudication, this Court does not feel it apt to analyze the comments/posts made by the non-applicant. At this stage this Court has only to see whether there exists *prima facie* case in favour of the applicant and whether *balance of convenience* exists in her favour or not.

11. As noted above, the non-applicant, even after filing of the instant suit by the applicant, is continuously making *facebook* comments/statements qua the applicant and her husband. Thus, firstly this fact only is sufficient that there exists a *prima facie* case in favour

of the applicant and secondly the applicant has maintained the suit seeking damages for defamation and slander from the non-applicant, so the non-applicant cannot be allowed in perpetuity, during the pendency of the suit, to post or publish comments/statements qua the applicant or her family members. In case the non-applicant is not restrained, through *ad interim* injunction, especially during the pendency of the suit, from posting or publishing any statement of any nature against the applicant, it may give rise to multiplicity of litigation, the applicant may suffer loss which cannot be compensated in terms of money, the applicant's reputation may be lowered in the estimation of others, through such posts or publications and on the other hand the non-applicant will not suffer any loss in case he is restrained from posting or publishing any statement/comment of any nature qua the applicant and her family members on *facebook* or on any other social media platform, including print or electronic media.

12. At this stage, while considering the application for *ad interim* injunction, this Court also finds that at present the reputation of the applicant is at stake and in case the non-applicant is not restrained from posting or publishing any comments/statements, she will suffer irreparable loss, which cannot be compensated in terms of money, whereas the non-applicant will not suffer any loss, so *balance of convenience* also exists in favour of the applicant.

13. Manifestly, the applicant has filed the suit for damages for defamation and slander and for recovery of rupees one crore, so in a way *ad interim* injunction is also covered under the main suit. Therefore, the present is a situation where this Court has also to see *interest reipublicae ut sit finis litium,* therefore as the basic idea of our legal system is that in the interest of society, as a whole, litigation must come to an end and every Court, while dealing with the matters should *adhere* to this well accepted principle.

14. Another well-known maxim *nemo debet bis vexari pro una et eadem causa* (no person should be twice vexed for the same offence) has application in this case as well. It is well established Common Law rule that no one should be put to peril twice for the same offence. Here in the present case, a suit is pending judicial adjudication, for which the non-applicant may be saddled with pecuniary compensation for damaging the reputation of the applicant and in case the non-applicant is not restrained in the interregnum to post or publish comments/statements on social medial, through *ad interim* injunction, he might be held responsible for that too. However, in no case a person can be twice vexed for the same offence, so *interim* injunction is required.

15. Now it would be apt to highlight the judicial pronouncements, as highlighted by the learned counsel for the applicant. In ***Swatanter Kumar vs. The Indian Express Ltd. & others, (2016) 1 AD (Delhi) 288,*** the Hon'ble Delhi High Court has held as under:

> ***"57. In the present case, assuming the complaint filed by the defendant No. 5 is found to be false after inquiry, then who would ultimately compensate and return the repute and sufferings of the plaintiff and mental torture caused to him and his family members.***
>
> ***... ... ...***
>
> ***59. It has been observed by the Supreme court in Sahara India (supra) that the order by the Court may include the direction not to disclose the identity of the victim, witness of complaint or of alike nature. The Court observed thus:***
>
> ***In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/her***

rights under article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ Court and seek an order of postponement of the offending publication/broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the Court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework."

In ***The Editor Divya Himachal and others vs. Dr. Sukhdev Sharma and another, RSA No. 311 of 2018, decided on 25.07.2019 (High Court of H.P.)*** a co-ordinate Bench of this Court has held as under:

"21. Winfield has defined defamation as follows:-

"Defamation is the publication of statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shun or avoid that person. It is libel if the statement be in permanent from and slander if it consists in significant words or gestures."

22. In view of the above definition of defamation, following are the essential ingredients of the tort of defamation:-

1. Malice. The words must have been published maliciously.

2. They must be defamatory.

3. The words must have reference to the plaintiff.

4. They must be published.

23. Meaning of the term "defamation" has been elaborately considered by the Hon'ble Supreme Court in its decision titled Subramanian Swamy vs Union of India, Ministry of Law and others, (2016) 7 SCC 221 wherein it was observed as under:

"23. Meaning of the term "defamation"

23.1. Salmond & Heuston on the Law of Torts, 20th Edn., Bata India Ltd. v. A.M. Turaz & Ors., 2013 53 PTC 536; Pandey Surindra Nath Sinha v. Bageshwari

Pd.., 1961 AIR (Pat) 164, define a "defamatory statement" as under:

"A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right thinking member of society"

23.2. Halsburys Laws of England, 4th Edn. Vol. 28, defines "defamatory statement" as under:

"10. Defamatory Statement-

A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

23.3. The definition of the term has been given by Cave, J. in Scott v. Sampson, (1882) LR 8 QBD 491(DC) as a "false statement about a man to his discredit."

23.4. "Defamation", according to Chambers Twentieth Century Dictionary, means to take away or destroy the good fame or reputation; to speak evil of; to charge falsely or to asperse. According to Salmond:

"The wrong of defamation, consists in the publication of a false and defamatory statement concerning another person without lawful justification. The wrong has always been regarded as one in which the Court should have the advantage of the personal presence of the parties if justice is to be done. Hence, not only does an action of defamation not survive for or against the estate of a deceased person, but a statement about a deceased person is not actionable at the suit of his relative. "Gatley's Libel and Slander (6th Edn., 1960) also Odger's Libel and Slander (6th Edn., 1929)".

23.5. Winfield & Jolowics on Torts (Sweet and Maxwell, 17th Edn., 2006) defines "defamation" thus:

"Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person."

23.6. In the book The Law of Defamation, (Richard O'Sullivan, QC and Roland Brown), the term "defamation" has been defined as below:-

"Defamation may be broadly defined as a false statement of which the tendency is to disparage the good name or reputation of another person."

23.7. In Parmiter v. Coupland(1840) 6 M&W 105: 151 ER 340, "defamation" has been described as:-

".....A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule........."

23.8. The definition of "defamation" by Fraser was approved by McCardie, J in Myroft v. Sleight (1921)90 LJ KB 883: 37 TLR 646. It says:

"a defamatory statement is a statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade.

23.9. Carter Ruck on Libel and Slander (Manisha Koirala v. Shashi Lal Nair, 2002 SCC Online Bom. 827 : (2003) 2 Bom.CR 136) has carved out some of the tests as under: (Manisha Koirala Case, SCC Online Bom. para 23)

"(1) a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, professional or trade.

(2) a false statement about a man to his discredit.

(3) would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?"

... ...

37. It cannot be denied that over the years, the newspapers have reached people of all categories irrespective of age, literacy and their capacity to understand. The impact of what is published therein on the society is phenomenal Unfortunately, this uncontrolled or unedited telecast or propagation of news is resorted to in the name of exercise of the right to freedom of speech and expression, or freedom of press and it is for this précise reason that the Press Council of India on 21.1.1993 had issued the following guidelines for guarding against the commission of the following journalistic improprieties and un-ethicalities:

"1. Distortion or exaggeration of facts or incidents in relation to communal matters or giving currency to unverified rumours, suspicions or inferences as if they were facts and base their comment, on them.

2. Employment of intemperate or unrestrained language in the presentation of news or views, even as a piece of literary flourish or for the purpose of rhetoric or emphasis.

3. Encouraging or condoning violence even in the face of provocation as a means of obtaining redress of grievance whether the same be genuine or not.

4. While it is the legitimate function of the Press to draw attention to the genuine and legitimate grievance of any community with a view to having the same redressed by all peaceful, legal and legitimate means, it is improper and a breach of journalistic ethics to invent grievances, or to exaggerate real grievances, as these tend to promote communal ill-feeling and accentuate discord.

5. Scurrilous and untrue attacks on communities, or individuals, particularly when this is accompanied by charges attributing misconduct to them as due to their being members of a particular community or caste.

6. Falsely giving a communal colour to incidents which might occur in which members of different communities happen to be involved.

7. Emphasizing matters that are apt to produce communal hatred or ill-will, or fostering feelings of distrust between communities.

8. Publishing alarming news which are in substance untrue or make provocative comments on such news or even otherwise calculated to embitter relations between different communities or regional or linguistic groups.

9. Exaggerating actual happenings to achieve sensationalism and publication of news which adversely affect communal harmony with banner headlines or distinctive types.

10. Making disrespectful, derogatory or insulting remarks on or reference to the different religions or faiths or their founders."

... ...

44. In Re Harijai Singh and another (supra), the Hon'ble Supreme Court observed as under:

"10. But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at

all items and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled license. If is were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. Infact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuse its liberty it must be punished by Court of Law. The Editor of a Newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations "If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline". It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.

11.......The editor and publisher are liable for illegal and false matter which is published in their newspaper. Such an irresponsible conduct and attribute on the part of the editor, publisher and the reporter cannot be said to be done in good faith, but distinctly opposed to the high professional standards as even as slightest enquiry or a simple verification of the alleged statement about grant of Petrol outlets to the two sons of a senior Judge of the Supreme Court, out of discretionary quota, which is found to be patently false would have revealed the truth. But it appears that even the ordinary care was not resorted to by the condemners in publishing such a false news items. This cannot be regarded as a public service, but a disservice to the public by misguiding them with a false news. Obviously, this

cannot be regarded as something done in good faith."

... ...

46. ***In Vishwanath Agrawal vs. Sarla Vishwanath Agrawal, (2012) 7 SCC 288, while dealing with the aspect of reputation, the Hon'ble Supreme Court observed as under:***

"55.....reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

47. ***In Kiran Bedi vs. Committee of Inquiry, (1989) 1 SCC 494, the Hon'ble Supreme Court reproduced the following observations from the decision in D.F.Marion vs. Davis, 55 ALR 171 (1927) which read as under:***

"25....... 'The right to the enjoyment of a private reputation,unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property.'"

48. ***In Mehmood Nayyar Azam vs. State of Chhattisgarh, (2012) 8 SCC 11, the Hon'ble Supreme Court ruled that:***

"1.......The reverence of life is insegregably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of 'creative intelligence'. When a dent is created in the reputation, humanism is paralysed."

49. ***Dealing with reputation as a cherished right, the Hon'ble Supreme Court in Umesh Kumar vs. State of A.P., (2013) 10 SCC 591, observed as under:***

"18......Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. Therefore, it has been

> ***held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. The International Covenant on Civil and Political Rights, 1966 recognises the right to have opinions and the right to freedom of expression under Article 19 is subject to the right of reputation of others.""***

Both the above judgments are fully applicable to the facts of the present case, as the same aptly deal with the Right encapsulated under Article 19(1)(a) of the Constitution of India.

16. In addition to the above judgment, the learned counsel for the non-applicant has also relied upon a decision of Hon'ble Madras High Court rendered in ***A. Raja & M.A. Parameswari vs. P. Srinivasan Publisher & Printer of Junior Vikatan Vasan Publications Private Limited, K. Ashokan Editor, Vasan Publications Private Limited, Saroj Ganpath, Chief Reporter & Prakash Jawadekar, (2010) AIR (Madras) 77,*** where it has been held as under:

> ***"7. Advancing arguments on behalf of the appellants, the learned Senior Counsel Mr. V.T. Gopalan and Mr. P. Wilson would submit that the finding of the learned Single Judge that all the news items do not relate to their private life and are related to the conduct of the appellants in public domain is against the documentary evidence and pleadings; that the respondents have published the family photographs of the appellants and have also published damaging news item in relation to the second appellant's private employment; that there was no necessity for publishing minor child's photograph; that the undertaking of the respondents in this regard is not in a proper format by way of an affidavit; that it is pertinent to point out that the second appellant is not a public figure and she is neither in a public domain; that under the circumstances, there was no necessity for the respondents to publish about the second appellant which is against the public morality and public decency; that fudgi9ng photographs in a manner which tended to be without any public decency, obscene, immodest, highly mischievous and giving raise to innuendo cannot be permitted on the grounds of press freedom; that such fudging of photographs is a deliberate distraction of the truth which was intentionally made for the purpose of creating a very bad opinion about the first appellant in the minds of the readers of the magazine; that while the first appellant is holding the office of Cabinet Minister in the Union Government, it cannot be said that his wife, the second appellant, also holds any such public office; that under the circumstances, publishing the photograph of the second appellant also cannot be justified at all; that the right guaranteed under Article 19(1) is not absolute and subject to Article 19(2); that when it affects the morality and decency or intrudes into privacy and family life of the appellants and reveals***

> ***the identity of a minor right yet holding that Article 19(1)(a) is supreme amounts to non-appreciation of law relating to the freedom of expression; that no person or citizen has right to make a defamatory statement; that the loss of reputation cannot be compensated only by way of payment of damages; that since the articles impugned were per see defamatory made recklessly, the appellants are entitled for an order of absolute injunction; that the respondents took no steps to establish that all the said articles impugned are true and that it is the exact interview given by the fourth right; that in as much as the respondents disown any act of reasonable verification in relation to the publication made even in relation to the first appellant, the learned single Judge by applying the decision reported in (1994)6SCC 632 ought to have granted an order of absolute injunction; that the statements and the articles are deliberate distortions of the facts without the least verification; that in such circumstances, the continuing malicious attitude of the respondents should be injuncted; that no specific reason has been assigned in the impugned order as to why the award of exemplary costs of Rs. 10000/- has been made even without a prayer from the respondents; that the same is unwarranted and uncalled for, and hence the order of the learned Single Judge has got to be set aside and interim injunction be ordered."***

However, the judgment (supra) is not applicable to the facts of the present case, as in the above case exemplary costs were granted for the publication, but in the present case the applicant is only praying for interim directions.

17. On the other hand learned Senior Counsel for the non-applicant has also placed reliance on a decision of Hon'ble Calcutta High Court rendered in ***Sunil Kakrania vs. Saltee Infrastructure Ltd., 2009 AIR (Cal) 260.*** In the judgment (supra), the Hon'ble High Court of Calcutta has held as under:

> ***"21. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the suit is one for recovery of money and the in the plaint, the description of the building constructed by the plaintiff has been described in Schedule 'A' with the averment in the plaint that the same was yet to be handed over the defendants and was in possession of the plaintiff. The Schedule 'B" reflects the calculation of the claim of the plaintiff. Thus, the Schedule 'A' cannot be said to be "property in dispute in suit" within the meaning of Order 39 Rule 1 of the Code as subject-matter of the suit is really the recovery of Rs. 1 crore and odd claimed in the plaint. In a simple suit for recovery of money, an immovable property cannot be "the property in dispute in suit" simply because the money claimed in the suit is allegedly payable for construction of such immovable property."***

The judgment (supra) is not applicable to the facts of the present case, as the facts of the present case are totally different, as in the instant case the interim relief, as prayed for by the applicant, is an offshoot of the main relief.

18. After analyzing law on the subject and also discussing the different aspects of the case and also the material available on record,

(a) This Court finds that the applicant has a prima facie case in her favour, as she by placing on record the material by way of documents and pleadings, has shown to the satisfaction of this Court that the material is there in the post/publication which can be ultimately found to be defamatory against her;

(b) Now, as far as balance of convenience is concerned, the same at this moment is in favour of the applicant and in case interim order is not passed in favour of the applicant, she will suffer irreparable loss. Whereas, the respondent will not suffer any irreparable loss in case interim order is passed in favour of the applicant;

(c) As far as equity is concerned, the same is also in favour of the applicant, as she is suffering due to the alleged post(s) against her; &

(d) As far as public policy is concerned, it is duty of the Courts to minimize the litigation and in case the interim order is granted, the same will reduce the litigation and if it is not granted, then the applicant may file a separate case for damages for each post that will multiply the litigation.

19. In these circumstances, taking into consideration the above mentioned circumstances, the application is allowed and the non-applicant (defendant) is restrained from posting or publishing any statement of any nature, against the applicant, her husband and her family members on *facebook* or on any other social media, including print or electronic media, till the disposal of the main suit. Accordingly, the application is disposed of.

20. The observations made hereinabove are only in order to decide the aforesaid application and will not have any bearing on the main suit.

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****

COMS No. 20 of 2019

BEFORE HON'BLEL MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rukmani Devi (since deceased) through her legal representative Sh. Gulab Singh son of late Sh. Tule Ram.

.....Appellant

Versus

Prem Lata & Anr. ...Respondents

R.S.A. No. 464 of 2012
Reserved on: 25.11.2019
Decided on : 01.01.2020

Indian Succession Act, 1925 – Section 63 – **Evidence Act 1872** – Section 68- Will, whether was duly executed? – Proof –Held, 'KG' and 'OP' advocates, who are attesting witnesses,

specifically deposing of executant having put thumb mark on Will in their presence –Also stating about their presence as well as of testator before the Registering Authority- Attesting witnesses deposing about Will as scribed on instructions of testator and of its having been read over to him by the scribe – They are also stating before the Court qua sound and disposing state of mind of 'AR' testator at the relevant time – Scribe of will an advocate was a relative of testator – Last rites of testator were performed by defendant No.2, who was given share under Will – Share under Will also given to 'PL' to whom gift of property was made earlier by the deceased – Said gift deed never challenged by plaintiff- Due execution of will stands proved on record – RSA dismissed. (Para 32 to 35).

Cases referred;

Bal Krishan & Anr. versus Shangri Devi & Ors. 2008 (1) Cur.L.J.(HP) 584,
Bhagat Ram (D) by L.Rs. versus Teja Singh (D) L.Rs. AIR 2002 Supreme Court 1,
Bishan Singh (deceased) by his Lrs versus Saran Singh & Ors., 2007(1) Civil Court Cases 209(P&H),
Charan Dass(deceased through his Lrs) versus Dole Ram in RSA No.48/2001,
Girja Datt Singh v. Gangotri Datt Singh, (S) AIR 1055 SC 346
Ishwar Dass versus Smt. Neelam Dassi deceased through her Lrs Shesh Ram and others, Latest HLJ 2016 (HP) 1252.
Punni versus Sumer Chand and others, AIR 1995 HP, 74,
Smt. Malkani versus Jamadar and others, AIR 1987 Supreme Court, 767,
Sohan Lal and Another versus Thakur Dass and others 2019 SCC HP 1975.
State of Rajasthan & Ors. versus Shiv Dayal & Anr. (CA No.7363 of 2000

Surendra Nath v. Jnanendra Nath, AIR 1932 Cal 574
Vellaswamy Servai v. Siraraman Servai, ILR 8 Rang 179 : (AIR 1930 PC 24),
Vijay Devi versus Navendra Singh Katoch, 2009 (2) Shim.LC 316,

[19] *Whether approved for reporting? Yes.*

For the appellant: **Mr.Bimal Gupta, Senior Advocate, with Ms. Kusum Chaudhary, Advocate.**

For the respondents: **Mr. O.P. Sharma, Sr. Advocate with Mr. Gurmeet Bhardwaj, Advocate.**

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellant under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 15.5.2012, passed by the learned Additional District Judge (Fast Track Court), Kullu, in Civil Appeal No.28 of 2011, affirming the judgment and decree dated 14.10.2011, passed by the learned Civil Judge (Sr. Division), Manali, District Kullu, H.P., in Civil Suit No.43 of 2008.

2. Briefly stating the facts giving rise to the present appeal are that the plaintiff/appellant (hereinafter to be called as 'the plaintiff') filed a suit for declaration to the effect that the land comprised in Khata Khatoni No.55/105, Khasra Nos. 1202, 1218, land measuring 1-18-41 hectare and Khata Khatoni No.56/106 to 56/114, Khasra No.1126, 1174, 1176, 1178, 1179, 1220, 1250, 1251, 1291, 1300, 1413, 1501, 1182, 1183, 1184, 1188, 1189,1217,1269,1451,1452,1348,1180,1219,1252,1253,1263, 1268, 1297,1232,1334,1496,1292,1293,1415, 1152,1127,1175,1177, 1260,1261,1301,1325, 1333, 1497 & 1226 total land measuring 4-57-81 hectares as per jamabandi for the year 2000-01, to the extent of 1/4th share situated at Phati Soyal, Kothi Barshai and

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19 *Whether reporters of Local Papers may be allowed to see the judgment? Yes.*

two houses wherein the plaintiff is residing, as per site plan (hereinafter to be called as 'suit property'). The plaintiff has alleged that she had solemnized marriage in the year, 1957 with Atma Ram(deceased) and at that time Atma Ram had given two bighas of Ropa and five bighas and 10 biswas of Bathal land to her as 'Istridhan', which is adjoining to the the house and is in exclusive possession of the plaintiff since then.

3. As per the applicant, thereafter, he had developed love and affection with respondent/defendant No.1 (hereinafter called the 'defendant No.1), who is daughter of Tulsi, the God-sister of the plaintiff. Tulsi, lateron settled in the house of Atma Ram, however, she could not bear any child from the loins of her husband, Atma Ram. As per the plaintiff defendant No.1 was the daughter of Tulsi from her previous husband. In the month of March,2008, Atma Ram fell ill and had grown very weak and was mentally infirm and treatment was given to him in Manali hospital. Defendant No.1 used to take Atma Ram under the pretext of treatment to Manali and used to take his signatures on many papers. Plaintiff averred that he never executed any Will. After his death, the last rites of Atma Ram were performed by the plaintiff. The defendants never rendered any services to Atma Ram during his life time. After about 15 days of the death of Atma Ram to utter shock and surprise of plaintiff, the defendant No.1 and her husband started saying that they have got the Will of Atma Ram. The defendant No.1 procured Will in her favour fraudulently under the pretext of treatment of her husband. On 3.7.2008, plaintiff again was shocked to know that the defendant had got herself entered as nominee of Atma Ram in the bank accounts in connivance with the bank officials. Hence, the suit for declaration to declare the Will Ext.DW5/B, null and void and decreeing the suit for permanent prohibitory injunction restraining the defendants from interfering into the ownership and possession of plaintiff over the suit property in any manner and defendant No.1 be directed through a decree of mandatory injunction to hand over the entire amount withdrawn by her from the banks.

4. The defendants filed written statement and resisted the suit on merits as well they maintained the preliminary objections. On merits, it is averred that Atma Ram married for the second time with Smt. Tulsi Devi mother of defendant No.1 and kept her as second wife. During his life time, Atma Ram gifted his land in favour of defendant No.1 on 19.12.2001,as per deed Ex.DW2/A and mutation number 57,58 Ext.DW1/E and Ext. DW1/F were attested. It has been denied that any land was given to the plaintiff as Women's Estate *(ISTRIDHAN).* The defendant averred that she was born from the wedlock of Atma Ram and Tulsi Devi, as is evident from her school certificates Ext.DW1/B & C and Atma Ram has been recorded as her father. Atma Ram was suffering from heart ailment and was treated at Chandigarh and defendant No.1 and she incurred rupees five lakh on his treatment. Atma Ram was satisfied with the services of defendant No.1 and he had gifted suit property vide gift deed Ex.DW2/B and thereafter, Atma Ram had duly executed Will Ex.DW5/B. As per Will Ex.DW5/B, the plaintiff has also been given share in the land as well as in the house. It has been averred that deceased Atma Ram had desired that his last rites be performed by defendant No.2 and for the said purpose, he had also given part of the suit property to him in the Will Ex.DW5/B. It has also been averred that as per the wish of deceased Atma Ram, defendant offered two lacs to the plaintiff, but she refused to accept the same.

5. On the pleadings of the parties, the learned Trial Court framed the following issues for determination and adjudication:-

> **"1. Whether the plaintiff was only wife of deceased Atma Ram, as alleged? OPP.**
>
> **2. Whether the plaintiff has inherited the entire estate left by deceased Atma Ram, as alleged? OPP.**
>
> **3. Whether the plaintiff is owner in possession of the suit land, as alleged ? OPP.**

4. Whether the plaintiff is entitled for relief of permanent prohibitory injunction, as alleged? OPP

5. Whether the plaintiff is entitled for a relief of mandatory injunction as alleged? OPP

6. Whether the plaintiff is estopped by her acts and conduct from filing the present suit? OPD.

7. Whether the suit of the plaintiff is not maintainable? OPD.

8. Whether the suit is bad for non-joinder of necessary parties? OPD.

9. Whether the defendant No.1 is co-owner in the suit land as per gift dated 19.12.2001? OPD.

10. Whether the suit is bad for mis-joinder of necessary parties? OPD.

11. Whether deceased Atma Ram executed valid and last Will dated 16.5.2008 in favour of plaintiff and defendants, as alleged? OPD.

12. Relief."

6. The learned Trial Court after deciding Issue No.1 in favour of the plaintiff, Issue No. 2 against the plaintiff, Issue No.3 partly in favour of the plaintiff, Issue No.4 against the plaintiff, Issue No.5 against the plaintiff, Issue No.6 and 7 in favour of the defendant, Issue No.8 against the defendant, Issue No.9 in favour of the defendant, Issue No.10 against the defendant and Issue No.11 in favour of the defendant dismissed the suit.

7. The plaintiff, thereafter, maintained an appeal before the learned lower Appellate Court, which was dismissed vide the impugned judgment and hence, the present regular second appeal, which was admitted for hearing on the following Substantial Questions of Law::-

> **"1. Whether Will dated 16.5.2008 (Ex.DW-5/B) is executed in accordance with Section 63 of the Indian Succession Act.**
>
> 2. Whether findings of the Courts below are based upon misreading, misinterpreting and misconstruing of oral and documentary evidence on record and the view taken by both the Courts below is totally perverse and contrary to evidence led by the propounder of the Will."

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

9. Mr. Bimal Gupta, learned Senior Counsel for the appellant, while referring to Section 63 of the Indian Succession Act, has argued that the two conditions necessary for the execution of the Will are:

> **(i) That the testator should sign the Will in the presence of atleast two attesting witnesses; and**
>
> **(ii) the witnesses should sign the Will in the presence of the Testator.**

He has argued that neither the scribe nor the witnesses in their examination-in-chief has deposed that the witnesses have signed the Will in the presence of the Testator. He has further argued that as per the scribe and the witness DW 5 and DW6, the Testator has not signed the Will on that particular day, as the hands of the Testator were trembling and thus put his thumb impression on the Will, which is a concocted story.

10. While inviting attention of this Court of the document (Ext.DW5/B) of the Court below, he has argued that on the same day the Testator has signed the withdrawal slip in the Bank while withdrawing the amount. So, as per the learned Senior Counsel for the appellant, the Will is suspicious and the Will

is required to be declared null and void, which the Courts below have wrongly upheld. He has argued that the Court below while dealing with the issue in paragraph 13 of the judgment passed by the learned First Appellate Court and in Para 22 and 23 of the leaned Trial Court, both the Courts below have not touched this issue while upholding the Will that when a person can sign on the same day why he will put the right hand thumb impression on the Will. In these circumstances also, the Will becomes suspicious.

11. The learned Counsel has placed reliance upon the decision of Hon'ble Supreme Court rendered in case titled ***Charan Dass(deceased through his Lrs)*** versus ***Dole Ram in RSA No.48/2001, decided on 06.11.2012*** and ***Sohan Lal and Another versus Thakur Dass and others 2019 SCC HP 1975.***

12. Conversely, Mr. O.P. Sharma, learned Senior counsel for the respondents argued that no question of law is involved in the appeal and so the appeal needs dismissal. He has argued that even otherwise also, the present appeal cannot be maintained as it is the respondent only who is legally entitled to inherit the property as per the law laid down by the Hon'ble Supreme Court. To support his arguments he has relied upon the judgments passed by the Hon'ble Apex Court rendered in ***State of Rajasthan & Ors.*** *versus* ***Shiv Dayal & Anr. (CA No.7363 of 2000 and*** **Vijay Devi** versus **Navendra Singh Katoch, 2009 (2) Shim.LC 316,** and in **Bishan Singh (deceased) by his L.Rs** versus **Saran Singh and ors.**

13. Mr. O.P. Sharma, Senior counsel appearing for the defendant has further argued that the Will contains right hand Thumb impression of the executant on it, but when he appeared before the learned Registrar for the registration of the Will, he has put left hand thumb impression. He has further argued that the law does not require which thumb impression is to be marked by the testator. He has also argued that there is no allegation that Atma Ram was not of sound state of mind at the time of execution of the Will. Mr. Sharma has further argued that the Bank Officer, while appearing in the witness box, has specifically stated that the hands of the testator were trembling and he could sign with difficulty and there is no contradiction in the statement of the marginal witnesses and that of Bank Manager, as it is on record that the testator was signing with his left hand and that is the reason that he could put his left thumb impression. He has further relied upon a judgment of this Hon'ble High Court rendered in ***Ishwar Dass*** versus ***Smt. Neelam Dassi deceased through her Lrs Shesh Ram and others,*** **Latest HLJ 2016 (HP) 1252.** He has further argued that the law is settled that the property inherited by the widow and in case of no legal heir from her husband, it will go to the heirs of the husband and not to any other person. So, in these circumstances, he has argued that the property cannot be inherited by the present appellant. In these circumstances also, the appellant/plaintiff has no case in his favour. As per this, the daughter of late Atma Ram also can inherit the property. He has also placed reliance on the matriculation certificate of Mrs. Prem Lata. He has also relied upon a judgment rendered in ***Smt. Malkani*** *versus* ***Jamadar and others, AIR 1987 Supreme Court, 767*** and argued that the beneficiaries taking active partition in the execution of the Will does not make the Will suspicious. He has further argued that as per the law settled in ***Bhagat Ram (D) by L.Rs.*** *versus* ***Teja Singh (D) L.Rs. AIR 2002 Supreme Court 1,*** after the death of Rukmani, no one on her side could inherit the estate of Atma Ram, as the property goes to the source from where it has come. He has emphasized that the appeal be dismissed as both the judgments are after appreciating the facts in accordance with law.

14. In rebuttal Mr. Gupta, senior counsel has argued that Atma Ram was capable of signing the documents whereas he had put his right thumb impression, hence, the Will in question becomes suspicious.

15. To appreciate the arguments of the learned counsel for the parties, I have gone through the record in detail.

16. Perusal of the record depicts that marriage between the plaintiff Rukmani and Atma Ram was solemnized on 17.10.1957 and no issue was born out of their wedlock. Thereafter, Atma Ram started cohabiting with Smt. Tulsi Devi sometime in the year 1970. Any Hindu Marriage to be held valid has to fulfill conditions of Section 5 of the Hindu Marriage Act, which reads as under:

5. Conditions for a Hindu marriage:

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled namely:-

(I) Neither party has a spouse living at the time of the marriage,

1[(ii) at the time of marriage, neither party-

(a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) Has been subject to recurrent attacks of insanity 2[***]

(iii) The bridegroom has completed the age of 3[twenty-one years] and the bride,the age of 4[eighteen years] at the time of marriage;

(iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) The parties are not Sapindas of each other, unless the custom or usage governing each of them permits of amarriage between the two;

17. PW1, Smt. Rukmani has stated that she was the wife of deceased Atma Ram, as the marriage was solemnized in the year 1957 and at the time of marriage Atma Ram had given her 2 Bighas of Ropa and 5 Bighas and 10 Biswas of Bathal land, as ***Istridhan***. There were no children. Thereafter, Atma Ram developed love and affection with defendant No.1 (Prem Lata), who is the daughter of Tulsi, who was her God-sister and used to visit her quite often. Tulsi later on settled in the house of Atma Ram, but there were no children between the union of Atma Ram and Tulsi and defendant No.1 Prem Lata is the daughter of Tulsi Devi from her previous husband. She used to look after her husband Atma Ram. In March, 2008, Atma Ram fell seriously ill and had grown very weak and was mentally infirm. Atma Ram was under treatment at Manali hospital and defendant No.1 used to take Atma Ram under the pretext of treatment of Manali and used to take his signatures on many papers. Atma Ram never executed any Will during his life time. Atma Ram expired on 23.5.2008 and after 15 days of his death to her surprise defendant No.1 proclaimed that Atma Ram had executed a Will during his life time. Thereafter, she enquired about the matter from the local Patwari and came to know that a mutation had been got entered by the defendants on the basis of Will dated 16.5.2008 Ext. DW5/B. In cross-examination, she has stated that her husband had three brothers. She has further admitted that last rites of Atma Ram were performed by defendant No.2 Rajesh Kumar. Defendant No.1

was brought up, educated and married off by Atma Ram. She has denied that Atma Ram had gifted part of suit land to defendant No.1 Prem Lata during his life time. She has also denied that Prem Lata used to look after Atma Ram and also helped in his medical treatment. She has denied that defendant No.1 Prem Lata had offered her a sum of Rs.2,00,000/- which she had refused. Atma Ram used to sign and did not affix thumb impression. Atma Ram had performed *Kanya Dan* of Prem Lata. She has denied that she is out of possession of the suit land.

18. PW-2 Cheering Ram was an Officer from Himachal Gramin Bank Banzar branch, who presented withdrawal receipts Ext.PW2/A to Ext.PW2/D of Atma Ram. He has stated that Atma Ram used to sign the documents. Last withdrawal by Shri Atma Ram had been done on 16.5.2008. In his cross-examination, he has admitted that Atma Ram was ill and his hands used to tremble.

19. PW-3 Sher Singh was the dealing Clerk of the Bank, who brought withdrawal voucher Ext.PW3/A and stated that Atma Ram used to sign. In cross-examination, he has admitted that he did not know Atma Ram personally. RPW-1 Sangat Ram was the witness, who was examined by the plaintiff in rebuttal. He has reiterated the version of plaintiff in examination-in-chief. In cross-examination, he expressed his ignorance as to how much land was in whose possession. Now, coming to the Ext.DW5/B, i.e. Will, perusal of it shows that DW5 Lekh Raj, Advocate is scribe of the Will in question. He has stated that the Will was drafted as per the directions of Atma Ram in presence of marginal witnesses namely, K.G. Thakur and Om Prakash Advocates. Thereafter, Will was read over and explained to Atma Ram, who admitted the contents to be correct and affixed his right thumb impression over the same. He has further stated that Atma Ram did not sign the Will, as due to his old age, his hands were trembling and his eye sight was weak. Thereafter, the Will was got registered before the Registrar. In cross-examination, he has stated that he does not remember as to how many documents he has scribed. The Will was got typed on Computer. Om Prakash had come to him along with K.G. Thakur, Advocate, Rukmani (plaintiff) and Tulsi Devi. He does not remember as to who had brought the papers. He had made a rough draft of Will. Atma Ram had affixed his thumb impression on the Will as his hands were trembling and his eye sight was weak. He does not remember as to who had called Om Prakash Sharma, Advocate. He has denied that Atma Ram was not in sound disposing mind at the time of execution of Will Ext.DW5/B. He has denied that Will is a forged document.

20. The judgments as cited by the learned counsel for the appellant are considered. In **Charan Dass (deceased through his LRs) versus Dole Ram, in RSA No.48 of 2001, decided on 06.11.2012.** wherein it has been held as under:

> **"10. In the light of the above provisions and the above decision, the evidence has to be appreciated as to whether it complies with the above provisions of law or not. In the present case, the will in question has been proved in evidence as Ex.PW2/A. It was executed by Smt. Bresti, who thumb marked the Will dated 15.3.1989. The names of the scribe mentioned is as Sh. Anup Ram, Document Writer and the name of the attesting witness mentioned is as Mohar Singh, s/o Kanshi Ram and there are signatures of one Khyal Chand, Pradhan, Gram Panchayat also over the Will. Out of these persons, the plaintiffs examined the scribe as PW-4, Anup Ram. A perusal of the statement shows that he simply stated that at the instance of Smt. Bresti, he wrote the Will Ex.PW2/A. He stated that in red circle "B", there are his signatures. He further stated that the Will was read over to Bresti, who affixed her thumb mark on being**

satisfied and thereafter, the witness Khyal Chand and Mohar Singh signed the same.

11. It is clear from the perusal of the statement that this witness never stated that the Will was read over to Smt. Bresti in presence of the witnesses and she signed it in presence of the witnesses or both the witnesses signed in her presence. His statement only proves that it was thumb marked by Bresti and then it was signed by both the witnesses and nothing else was stated as is required by law as mention above. He admitted that he is not an attesting witness of the Will. Out of the two attesting witnesses, Khayala Ram was stated to be dead and the plaintiffs examined PW-2 Mohar Singh. A perusal of the statement of Mohar Singh shows that the Will was executed in favour of the plaintiffs mark A/ Ex.PW2/A. He further stated that within a circle, there are his signatures and the Will was read over and the second witness Khayala Ram is dead. He further stated that it was written by the Deed Writer.

12. From a perusal of the statement, it is also clear that he did not state that the will was thumb marked by Smt. Bresti, in presence of both the witnesses or that both the witnesses signed in her presence. Therefore, the statement of both these witnesses, the attesting witness and scribe do not prove that the requirements of Section 63 of Indian Succession Act and Section 68 of Evidence Act were complied with."

21. In the instant case, the attesting witnesses have deposed that the Will was signed by the Testator in their presence. Thereafter, it was attested in the office of the Sub Registrar where the witnesses were present and it was attested in the presence of the witnesses. So, this judgment is not applicable to the facts of the present case.

22. In ***Sohan Lal and Another*** *versus* ***Thakur Dass and others 2019 SCC HP 975***, it has been held :

"14. The controversy in the case in hand mainly relates to Section 63(c) of the Indian Succession Act, 1925 (hereinafter referred to as "the Act"). At the very outset the same is extracted hereunder:

"Section 63 in The Indian Succession Act,

63. Execution of unprivileged Wills. --

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 12 [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:--

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

15. Thus, as highlighted above, as per the mandate of Section 63(c) of the Act, a Will is to be attested by two or more witnesses, each of them must have seen the testator of the Will putting his/her signatures or affix mark on the Will and the witnesses must put their signatures on the Will in the presence of the testator. Thus, Section 63 of the Act lays down conditions qua proof of execution of valid Will. A Will has to be proved in the manner provided in Section 63 of the Act. Section 63(c) clearly provides that a Will has to be attested by two or more witnesses, but it is not mandatory that both these witnesses should be present simultaneously and they put their signatures in each others' presence. The mandatory requirement is that these witnesses must have seen the testator signing the Will or affixing his mark thereon or they have received personal acknowledgement from the testator of his signature or mark on the Will. Besides this, other mandatory prerequisite is that the attesting witnesses of the Will must sign the Will in presence of the testator.

16. Thus, in view of mandatory requirements laid down by Section 63 of the Act the propounder of the Will must prove that the attesting witnesses saw him signing the Will or affixing his mark thereon and they also signed in his presence.

23. This judgment, if applied, to the facts of the present case, as the witnesses have deposed that it was thumb mark by the Testator, the inference is that had they seen the Testator while affixing his thumb impression.

24. In **Punni** versus **Sumer Chand and others, AIR 1995 HP, 74,** it has been held:

"11. As regards attestation, Clause (c) aforementioned requires that the Will shall be attested by two or more witnesses. It is not necessary that both of them be present simultaneously at the time of putting their signatures but the requirement is that each of the attesting witness must have seen the testator sign or affix his mark to the Will or has received from the testator a personal acknowledgment of his signature or mark on the Will. There is also an additional requirement that each of the attesting witness shall also sign the Will in the presence of the testator......"

25. The learned Counsel has placed reliance upon a decision of this Hon'ble High Court rendered in **Bal Krishan & Anr.** versus **Shangri Devi & Ors. 2008 (1) Cur.L.J.(HP) 584,** it has been held :

"13. The learned counsel appearing on behalf of the plaintiff before the trial Court had submitted that there were as many as 5 suspicious circumstances to doubt the genuineness of the will: (i) the active participation by the legatee, (ii) the denial of benefit to the plaintiff

who was otherwise entitled to succeed to him, (iii) the witness Amar Singh being related (brother in law of the legatee), (iv) inherently improbable dis-position made in the will, and (v) non-production of the Will at the earliest time.

17. The other suspicious circumstance is the manner in which the Will in question was written and executed. It has come in the evidence that the Will was written by one Shri Sanjeev. Shri Sanjeev has not been examined as a witness on the ground that he had died. The appellant, Bal Krishan has not produced on record even the death certificate of Sanjeev to prove his death. The presence of Shri Krishan Dutt Sharma at the time of the execution of the Will is also doubtful in view of the contradictions in the statements made by Bal Krishan (DW-1) and Shri Amar Singh (DW-2). Moreover, Amar Singh (DW-2) is closely related to Bal Krishan and his statement with regard to the execution of the Will cannot be believed being interested witness. There are material contradictions in the manner in which the parties have left for Rajgarh for the execution of the Will from their respective villages. There is no explanation why Matha would go to the house of Amar Singh to witness the execution of the Will. According to Bal Krishan (DW-1), Matha had gone to visit Amar Singh for taking him on 11.2.1985 and on that day they all had reached and stayed at village Shargaon in the evening of 11.2.1985. Next day they left for Rajgarh at about 8.00 a.m. from Shargaon. However, Amar Singh (DW-2) had stated that Matha had come to him 2 or 3 days before for informing his intention to execute a Will. Amar Singh had not stated that he had come with Matha and Bal Krishan to village Shargaon in the evening of 11.2.1985 and all of them had gone on 12.2.1985 to Rajgarh. He had stated that he had met Matha Ram and Bal Krishan in the Tehsil office at Rajgarh on 12.2.1985. It also casts doubt about the very presence of Shri Amar Singh at the time of execution of the will. Shri Krishan Dutt Sharma has not been examined as a witness. He was the material witness to explain the manner in which the will was executed. It also appears from the bare perusal of Ex.DW-2/A that the document has not been registered by completing all the codal formalities. The manner in which the signatures of the witnesses and testator have been obtained have been dealt with extensively by the trial Court and those findings are affirmed.

20. Their Lordships of the Hon'ble Supreme Court have held in Ram Purnima Deb and another v. Kumar Khagendra Narayan Deb and another, AIR 1962, SC 567 that there is no doubt if a Will has been registered, that is a circumstance which may, having regard to the circumstances, proved its genuineness. But the mere fact that a Will is registered Will not by itself be sufficient to dispel all suspicions. Their Lordships have held as under:- "There is no doubt that if a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered Will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration Will dispel the doubt as to

the genuineness of the Will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered wills have not been acted upon : (see, for example, Vellaswamy Servai v. Siraraman Servai, ILR 8 Rang 179 : (AIR 1930 PC 24), Surendra Nath v. Jnanendra Nath, AIR 1932 Cal 574 and Girja Datt Singh v. Gangotri Datt Singh, (S) AIR 1055 SC 346. Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a will; though the fact that there has been registration would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a will the execution of which he was admitting. The question therefore is whether in the circumstances of the present case the evidence as to registration discloses that the testator knew that he was admitting the execution of a will when he is said to have put down his signature at the bottom of the will in the presence of Arabali. We have scrutinized that evidence carefully and we must say that the evidence falls short of satisfying us in the circumstances of this case that the testator knew that the document the execution of which he was admitting before Arabali and at the bottom of which he signed was his will. Therefore we are left with the bald fact of registration which in our opinion is insufficient in the circumstances of this case to dispel the suspicious circumstances which we have enumerated above. We are therefore not satisfied about the due execution and attestation of this Will by the testator and hold that the propounder has been unable to dispel the suspicious circumstances which surround the execution and attestation of this Will. In the circumstances, no letters of administration in favour of the respondent can be granted on the basis of it."

26. The facts of the present case are different as the Attesting witnesses have stated that the Thumb impression was put in their presence and they were present before the Registering Authority when it was registered, which is clear from the photographs, on the Will, so the above judgment is not applicable to the facts of the present case.

27. Hon'ble Punjab & Haryana High Court in **Bishan Singh (deceased) by his Lrs versus Saran Singh & Ors., 2007(1) Civil Court Cases 209(P&H),** held :-

"8. The common practice in the rural arreas amongst the illiterates is that except on account of some physical disability, it is generally the left thumb mark which is put on important documents like a will or other documents creating a right or title in some property by the males and right thumb impression is put by the ladies. In fact even in respect of Panchayat proceedings and other day to day working amongst (the rural persons as a matter of practice and habit, the left thumb impression is put on documents by male members and right thumb impression by ladies where because of the illiteracy they are unable to sign. This being the

practice it is easy in case of any doubt or ambiguity to compare the thumb impression with the standard thumb impressions of the person concerned. Deviating from his practice would result in great hardship and any one wanting to set up a document like a Will of someone could easily be able to do so by putting a right thumb impression in the case of a male and left thumb impression in the case of already so as to, in case of doubt or suspicion, avoid the comparison of their thumb impressions with their standard and admitted thumb impression which are otherwise generally available. In Smt. Harbans Kaur and Anoop Singh 1991 Shimla Law Journal 217, this Court considered the question as to which thumb impression is normally to be affixed by a male executant on a sale deed. It was held that petition writers always get the left thumb impression of a male on a sale deed and in case it is not possible to do so, only then the right thumb impression of a male executant is got affixed. The same would apply to documents like Wills executed by males. Therefore, this practice of accepting the right thumb impressions of male executants on documents like a Will is liable to be discouraged and it is only when it can otherwise be shown as to why the standard form of putting the left thumb impression in the case of a male and a right thumb impression in the case of a female is being deviated from, the court would consider the question in the facts and circumstances of each case. Physical disability to put the left thumb impression in the case of a male and right thumb impression in the case of a lady can be a valid ground for deviating from the practice.

9. In the case in hand, no reason has been given for deviating from his practice. Therefore, it is somewhat unusual for Fakir Singh to have put has right thumb impression on a document which is an important document being his Will when in the normal circumstances on the sale deed dated 1.5.1981 Ex. D.1 he had put his left thumb impression which is as per the prevalent practice. The intention of putting the right thumb impression on the Will can only be to avoid the comparison of the same with the standard thumb impression of the executant so as to take the stand that the executant inadvertently and unknowingly put the right thumb impression which is now not comparable. The propounder of the will has failed to dispel this suspicious circumstance which he was under an obligation to remove by leading cogent and convincing evidence. The reason recorded by the learned trial Court is that the handwriting expert has opined that the disputed document bears the right thumb impression of deceased Fakir Singh. It is further recorded by the learned trial Court that : "But I could not understand as to how this expert has come to this conclusion. It is not specifically mentioned that RTI (Right Thumb Impression) of deceased Fakir Singh were taken in the Court and then it was compared with specimen thumb impression of L.T.I. (Left thumb Impression) of deceased." Accordingly the contention of the learned Counsel for the defendant was held to be not maintainable. In fact the thumb impressions of a deceased person could not possibly have been taken in court. Therefore, the reasoning recorded by the learned Trial Court in rejecting the argument of the learned Counsel for the defendant is not tenable. Therefore, in my view the reasons and findings recorded by the Courts below as regards the validity of the Will dated. 3.6.1985 (Ex. P.1) are without any merit. The right thumb

impressions were put so as to avoid the possibility of the same being got compared with the standard left thumb impression of Fakir Singh the testator of the Will (Ex. P.1). As such it is evident that in the case in hand the right thumb impression of the testator has been put so that the thumb impressions cannot be got compared. This circumstance in the facts and circumstance of the case makes the Will (EX. P.1) set up by the plaintiffs to be doubtful inasmuch as the thumb impression could not be got compared."

28. This judgment is also not applicable to the facts of the present case, as it was Thumb marked when it was being registered and the Thumb mark of the testator was noted put that time also. So, this does not create any doubt in the mind of the Court that the Will was not executed out of the free mind by the testator as the testator was having only one daughter who is the respondent.

29. The judgments as relied upon by the learned counsel for the respondent are considered and this Court finds that these are applicable to the facts of the present case as the left hand thumb impression was put on the Will when the testator appeared before the registering Authority for attestation of the Will.

30. In these circumstances, the Will cannot be said to be suspicious. In in ***Bhagat Ram (D) by L.Rs.*** *versus* ***Teja Singh (D) L.Rs. AIR 2002 Supreme Court 1,*** in para 8 whereof it has been held as under:-

8. We do not find any merit in the contention raised by the Counsel for the respondents. Admittedly, Smt. Santi inherited the property in question from her mother. If the property held by a female was inherited from her father or mother, in the absence of any son or daughter of the deceased, including the children of any pre-deceased son or daughter, it would only devolve upon the heirs of the father and, in this case, her sister Smt. Indro was the only legal heir of her father. Deceased Smt. Santi admittedly inherited the property in question from her mother. It is not necessary that such inheritance should have been after the commencement of the Act. The intent of the Legislature is clear that the property, if originally belonged to the parents of the deceased female, should go to the legal heirs of the father. So also under clause (b) of sub-Section (2) of Section 15, the property inherited by a female Hindu from her husband or her father-in-law, shall also under similar circumstances, devolve upon the heirs of the husband. It is the source from which the property was inherited by the female, which is more important for the purpose of devolution of her property. We do not think that the fact that a female Hindu originally had a limited right and later, acquired the full right, in any way, would alter the rules of succession given in sub-section 2 of Section 15."

31. Thous this judgment is of some help to the respondent but is not material for adjudicating the present lis.

32. PW-6 K.G. Thakur, Advocate is the marginal witness to Will in question, he has stated that Atma Ram was related to him. He is practicing as an Advocate since the year 1978 and Atma Ram used to come to him for legal advice. Tulsi Devi is second wife of Atma Ram and defendant No.1 Prem Lata is his daughter. Atma Ram married Tulsi Devi, as he had no children with Rukmani (plaintiff). Atma Ram brought up defendant No.1 Prem Lata and paid for her studies etc. and thereafter, married her off to Chhavinder Singh. He has stated that on 16.5.2008, Atma Ram had executed a valid Will Ext.DW5/A, in which, he is a marginal witness. The Will was scribed by Lekh Raj, Advocate, on the direction of Atma Ram and Atma Ram had

affixed his thumb impression in presence of himself (K.G. Thakur) and other marginal witness Om Prakash, Advocate. Further stated that Atma Ram had affixed his thumb impression, as because of old age, his hands used to tremble and his eye sight was also weak. Atma Ram was in sound disposing mind and was in a position to understand his good and bad. Thereafter, Atma Ram and himself and other marginal witness had appeared before Registrar in the Registrar's office and the Will was again read over and explained to Atma Ram, who admitted it to be correct and affixed his thumb impression over the same. As per the last wish of Atma Ram, his last rights were performed by defendant No.2 Ramesh Kumar, who has also been awarded a share in the suit land in Will Ext. DW5/B. Earlier also, Atma Ram had gifted a part of suit land to defendant No.1, Prem Lata. In cross-examination, he has stated that he does not remember as to what day of the week, it was on 16.5.2008. He had come to Manali on that date alongwith Atma Ram, Tulsi Devi and Rukmani in his own car. Atma Ram had told him that he wanted to write a Will and requested him to come to Manali. He was not aware as to whether Atma Ram had gone to the Bank on that date the will was scribed by Lekh Raj Advocate. Lekh Raj, Advocate had initially prepared rough draft of the Will and thereafter, the same was got typed on a Computer. Thereafter, Lekh Raj, Advocate had read over and explained the contents of the Will to Atma Ram in presence of marginal witnesses and Atma Ram accepted the same to be correct and affixed his thumb impression, because his eye sight was weak. He has expressed his ignorance as to whether Atma Ram had withdrawn money from the bank on 16.5.2008 and had signed the withdrawal voucher. The Will in question was scribed between 12.00 noon and 1.00 p.m He has denied that Atma Ram did not make Will and it is a forged document.

33. DW-2 Chhaivinder Thakur, Advocate is the scribe of gift deed Ext.DW2/B, who stated that he had scribed gift deed as per the directions of Atma Ram and had read over and explained it to Atma Ram and Prem Lata and thereafter, the document was got registered. In cross-examination, he has denied that gift deed is false document. DW-3 Atma Ram and DW4 Devi Singh are the marginal witnesses to gift deed Ext.DW2/B.

34. The fact that earlier Atma Ram had gifted a part of suit land to defendant No.1 Prem Lata by way of gift deed Ext.DW2/A and mutation number 57 Ext.DW1/E and 58 Ext. DW1/F had been attested in this regard is not in dispute. It is also not in dispute that the plaintiff has not challenged mutation number 57 and 58 respectively.

35. After analyzing the above evidence, it is clear that as per the marginal witness PW6, Atma Ram was related to him. The Will was scribed by Lekh Raj, Advocate, on the direction of Atma Ram and Atma Ram had affixed his thumb impression in presence of himself (K.G. Thakur) and other marginal witness Om Prakash, Advocate. Further stated that Atma Ram had affixed his thumb impression, as because of old age, his hands used to tremble and his eye sight was also weak. Atma Ram was in sound disposing mind and was in a position to understand his good and bad. Thereafter, Atma Ram and himself and other marginal witness had appeared before Registrar in the Registrar's office and the Will was again read over and explained to Atma Ram, who admitted it to be correct and affixed his thumb impression over the same. As per the last wish of Atma Ram, his last rights were performed by defendant No.2 Ramesh Kumar, who has also been awarded a share in the suit land in Will Ext. DW5/B. Earlier also, Atma Ram had gifted a part of suit land to defendant No.1, Prem Lata. In cross-examination, he has stated that he does not remember as to what day of the week, it was on 16.5.2008. He had come to Manali on that date alongwith Atma Ram, Tulsi Devi and Rukmani in his own car. Atma Ram had told him that he wanted to recite a Will and requested him to come to Manali. He was not aware as to whether Atma Ram had gone to the Bank on that date the will was scribed by Lekh Raj Advocate. Lekh Raj, Advocate had initially prepared rough draft of the Will and thereafter, the same was got typed on a Computer. Thereafter, Lekh Raj, Advocate

had read over and explained the contents of the Will to Atma Ram in presence of marginal witnesses and Atma Ram accepted the same to be correct and affixed his thumb impression, because his eye sight was weak. He has expressed his ignorance as to whether Atma Ram had withdrawn money from the bank on 16.5.2008 and had signed the withdrawal voucher. The Will in question was scribed between 12.00 noon and 1.00 p.m He has denied that Atma Ram did not make Will and it is a forged document.

36. From the above, it is clear that the judgment passed by the learned Courts below are after appreciating the facts and law which has come on record correctly and the Will dated 16.5.2008, is executed in accordance with the Section 63 of the Indian Evidence Act and the Substantial Question of law is answered accordingly.

37. The Substantial Question of Law No.2 is answered holding that the Court below has appreciated the pleadings and interpreted the law orally and the documentary evidence correctly and so this question is answered accordingly.

38. The net result of the above discussion is that the appeal, which sans merits, deserves dismissal and is accordingly dismissed. However, taking into consideration the facts and circumstances of the case, the parties are left to bear their own costs.

39. In view of the disposal of the appeal, pending application(s) if any, shall also stands disposed of.

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

Deep Ram ....Appellant/defendant.

Versus

Sohan Lal Sharma ... Respondent/plaintiff.

RSA No. 667 of 2008
Decided on: 28.11.2019

Limitation Act, 1963 – Article 54 – Agreement of sell – Period of limitation and its commencement – Held, period of limitation for specific performance is three years from the date fixed for performance or if no such date is fixed, when plaintiff has noticed that its performance is refused – No date was fixed in the agreement in question for execution of sale deed – Period of limitation would commence from date when plaintiff issued notice to defendant requiring him to execute sale deed. (Para 16 & 17).

Whether approved for reporting?[20] Yes ____________

For the appellant : Ms. Seema K. Guleria, Advocate.

For the Respondent : Mr. Ashok Sood, Senior Advocate, with Mr. Khem Raj, Advocate.

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[20] *Whether reporters of the local papers may be allowed to see the judgment?*

Ajay Mohan Goel, J *(Oral)*

By way of this appeal, the appellant has prayed for setting aside of the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Shimla, H.P. in Civil Suit No.107/1 of 2000/98, titled as Sohan Lal Sharma Versus Deep Ram, decided on 31.08.2005, vide which the suit filed by the present respondent was decreed by the learned Trial Court in the following terms:-

> "In the light of my findings on the foregoing issues, the suit of the plaintiff succeeds and is hereby decreed with costs. I hereby pass a decree for specific performance of agreement of sale in favour of the plaintiff and against the defendant. For the purpose of identification of the suit property the agreement Ext.PW1/A and copy of jamabandi Ext.DW1/A shall be the part of the decree. The defendant is mandated to execute the sale deed of the suit property as described in the agreement Ext.PW1/A and jamabandi Ext.DW1/A in favour of the plaintiff within a period of three months to be reckoned from today. A decree of permanent prohibitory injunction is also passed in favour of the plaintiff and against the defendant restraining the defendant from selling the suit property in favour of any other person except plaintiff. However, the decrees passed subject to the condition that the plaintiff shall deposit in the Court deficit court fee of `29/- within a fortnight period, otherwise the suit shall be deemed to have been dismissed. Decree sheet be drawn up accordingly. The file after due completion be consigned to the record room".

as well as for setting aside the judgment and decree passed in appeal by the Court of learned District Judge (F), Shimla, H.P. in Civil Appeal No.62-S/13 of 07/05, titled as Deep Ram Versus Sohan Lal Sharma, decided on 23.10.2008, whereby the first appeal filed by the present appellant against the judgment and decree passed by the learned Trial Court was dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that respondent/ plaintiff filed a suit for specific performance as well as permanent prohibitory and mandatory injunction against the present appellant *inter alia* on the ground that vide agreement to sell dated 28.06.1990, plaintiff had agreed to purchase half share of land situated towards southern side (6 karms x 7 karms) and half share of old house mentioned in Akash Tatima Sazra Kistbar Mauja-Kasumpti Junga, Tehsil and District Shimla, H.P. comprised in khata khatauni No.17/27 min, kh. No.256/122/1, measuring 0-4 biswas which portion of the land agreed to be sold to the plaintiff was now comprised in kh No.340 as per Nakal Akash Tatima Sazra Kistbar Mauja-Kasumpti-Junga, Tehsil and District Shimla, H.P. (hereinafter referred to a the suit property) for total consideration of `70,000/-.

3. According to the plaintiff, this amount was paid by the plaintiff by way of bank draft dated 28.06.1990 for a sum of `25,000/- as well as by way of payment of `45,000/- in cash against a receipt duly acknowledged by the defendant in the agreement to sell itself. As per the plaintiff at the time of execution of the agreement possession of the half share of the land as well as half share of the old house stood handed over by the defendant to the plaintiff. On his property, defendant constructed a five storeyed building whereas plaintiff raised a three storeyed building on part of the land and the remaining portion was vacant. While raising construction of the five storeyed building defendant extended projection of his property on the land of the plaintiff and also opened windows etc. on the said common wall despite objections. According to the plaintiff, defendant had no right to do so i.e. to open windows etc. the land of the plaintiff and on the common wall, as plaintiff had paid money in proportion to his contribution towards the construction of the wall. It was further the case of the plaintiff that in terms of Clause 4 of the agreement it stood agreed between the parties that after completion of one storey or as and when plaintiff felt it necessary, defendant would

execute a sale deed in his favour. Plaintiff was ready and willing to perform his act and was requesting the defendant since the year 1996 to execute the sale deed in his favour, however, defendant failed to do so. Plaintiff served a notice dated 07.05.1998 upon the defendant for the purpose of execution of the sale deed, however, despite receipt of the notice, defendant did not execute the sale deed. It was further the case of the plaintiff that there were certain trees growing upon the suit land and plaintiff had every right to use them, however, defendant with a malafide intent applied for cutting of one of the tree, claiming ownership over the same to the Municipal Corporation. As per the plaintiff that defendant was threatening not to execute the sale deed and dispose of the property. As per the plaintiff, the cause of action lastly arose on 07.05.1998 when notice was served upon the defendant asking him to execute the sale deed within 15 days, which he did not do. Accordingly, plaintiff filed the suit praying for a decree of specific performance of contract and for permanent prohibitory injunction for restraining the defendant from raising any construction over the suit land and cutting two 'Deodar' trees.

4. The suit was resisted by the defendant *inter alia* on the ground that the same was barred by limitation. It was further the defence of the defendant that plaintiff had failed to perform his part of the agreement as plaintiff had only paid an amount of `45,000/- to the defendant and the balance amount in terms of the agreement entered into between the parties was not paid by the plaintiff. As per him `25,000/- was paid by way of Bank Draft and `20,000/- in cash. Though, the defendant did not deny the execution of the agreement to sell, but according to him, the plaintiff had failed to perform his part of the agreement and therefore, he was not entitled for any decree as prayed for. Incidently, the construction of house over the suit land by plaintiff was not specifically denied, however, as per the defendant, plaintiff could be treated as licencee over the same. Defendant contended that Clauses 3 and 4 of the agreement were not adhered to and thus violated by the plaintiff. Receipt of `25,000/- was categorically denied. As per him, the trees standing over the land belonged to himand plaintiff had no right or title over the same. Further, as per him, the common wall which was agreed to be constructed by the parties in fact had not yet been constructed and the land on the spot was vacant.

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

> " 1. Whether the plaintiff is entitled to the decree for specific performance of agreement of sale dated 28.6.1990 as prayed ? OPP.
>
> 2. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed? OPP.
>
> 3. Whether plaintiff is entitled to the relief of mandatory injunction as prayed? OPP.
>
> 4. Whether the suit in the present form is not maintainable as alleged? OPD.
>
> 5. Whether plaintiff is estopped from filing th present suit as alleged? OPD.
>
> 6. Whether the suit is barred by time limitation as alleged? OPD.
>
> 7. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD.
>
> 8.Whether plaintiff has no cause of action? OPD.
>
> 9. Whether the plaintiff is not in possession of the suit land as alleged? OPD.

10. Relief".

6. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

"Issue No.1: Yes.

Issue No.2 : Yes.

Issue No.3 : Yes.

Issue No.4 : No.

Issue No.5 : No.

Issue No.6 : No.

Issue No.7 : No.

Issue No.8 : No.

Issue No.9 : No.

Relief : Suit decreed with costs in the manner indicated in the relief clause as per operative portion of the judgment".

7. Learned Trial Court held that the execution of the agreement i.e. the agreement to sell stood duly proved on record. It took note of the fact that the execution of the document in issue i.e. Ext.PW1/A was not disputed even by the defendant. While negating the statement of DW-2 Surat Ram, one of the marginal witnesses, who deposed in the Court that plaintiff had not made any payment to the defendant, learned Trial Court held that his statement could not be looked into because the same was beyond pleadings. Learned Court further held that contents of the agreement Ext.PW1/A when perused harmoniously with the written statement, demonstrated that possession of the suit land stood delivered by the defendant to the plaintiff. It held that this also stood duly proved by the statements of PW1-Sohan Lal, PW-2 Dinesh Thakur and PW-3 Surinder Sharma. On these basis, learned Trial Court held that the plaintiff was entitled for a decree of specific performance of agreement to sell dated 28.06.1990. It further held that as the possession of the suit land was with the plaintiff and as plaintiff was entitled for a decree of specific performance of agreement to sell, therefore, plaintiff was also entitled for a decree of permanent prohibitory injunction. Learned Trial Court also held that the suit was within limitation as in terms of the agreement which was entered into between the plaintiff and defendant, the starting point of limitation was to be in terms of Clause 4 of the agreement i.e. when the plaintiff felt the necessity of executing the sale deed. It held that Notice stood issued to the defendant to execute the sale deed on 07.05.1998, which was duly served upon defendant and thus, limitation of three years had to be construed as from 07.05.1998 and therefore, the suit was within limitation. Accordingly, learned Trial Court passed a decree for specific performance of agreement to sell in favour of the plaintiff and against the defendant. Learned Trial Court also mandated the defendant to execute the sale deed with regard to property described in Ext.PW1/A within three months as from the date of judgment and decree. It also granted a decree for permanent prohibitory injunction in favour of the plaintiff and against the defendant restraining defendant from selling the suit property in favour of any other person except plaintiff.

8. In appeal, these findings were upheld by the learned First Appellate Court. Learned Appellate Court while dismissing the appeal filed by the defendant held that Clause 4 of the agreement clearly stipulated that the sale deed was to be executed after completion of one storey or as and when the second party felt it necessary. It held that the recitals clearly suggested that it was allowed to the second party i.e. the plaintiff to fix the time when the sale

deed was to be executed. On these basis, it held that the limitation started running only as from that date when plaintiff felt it necessary to execute the sale deed. Learned Appellate Court further held that as far as contention of the defendant that entire sum of `70,000/- was not paid was concerned, the same was without any merit as the factum of passing of the said consideration was duly mentioned in the sale agreement Ext.PW1/A itself and the statement of Surat Ram, one of the marginal witnesses to the contrary, was of no assistance to the defendant.

9. On these basis, learned Appellate Court held that the learned Trial Court had correctly decided the controversy between the parties regarding readiness and willingness of performance by the plaintiff as well as the suit of the plaintiff being within limitation.

10. Feeling aggrieved, defendant filed this second appeal, which was admitted on 12.12.2008, on the following substantial questions of law:-

> "1. Whether the Courts below have misread, misinterpreted and mis-constructed the documents Ext.PW-1/A having contrary clauses relating to the time period as to its execution?
>
> 2. Whether the document Ext.PW-1/A stating contrary averments qua payment of consideration have been rightly interpreted by Courts below in the light of oral, cogent evidence produced by present appellant?"

11. Learned counsel for the appellant while making submissions on Substantial questions of law, argued that both the learned Courts below have erred in not appreciating that the suit was hopelessly time barred and further amount of `70,000/- was not paid by the plaintiff to the defendant in terms of the agreement to sell which vitiated the agreement entered into between the parties. Learned counsel for the appellant also argued that Ext.PW1/A was not binding on the appellant as Clauses therein were contrary to each other. No other point was urged.

12. On the other hand, learned Senior Counsel, appearing for the respondent argued that both the learned Courts below have concurrently held in favour of the plaintiff and rightly so that an amount of `70,000/- was duly paid by the plaintiff to the defendant and also that the suit was within limitation. He argued that the terms of the contract were explicit that the sale deed was to be executed in terms of Clause 4 thereof which conferred the right upon the plaintiff to decide as to when he wanted the sale deed to be executed. Learned Senior Counsel argued that as from the date when Notice was issued to the defendant to execute the sale deed, the suit which was filed within a period of three years and therefore, there is neither any misreading nor any misconstruction of Ext.PW1/A by the learned Courts below. He has further argued that there were no contradicting Clauses in the agreement as contended by the appellant.

13. I have heard learned counsel for the parties on the said substantial questions of law and have also gone through the judgments and decrees passed by the learned Courts below as well as the record of the case.

14. Ext.PW1/A is the agreement entered into between plaintiff and defendant on 28.06.1990. In terms of this agreement, the suit land was agreed to be sold by present appellant to the respondent herein for total sale consideration of `70,000/-. A perusal of the contents of the agreement demonstrates that it stood mentioned therein that the entire sale consideration stood received by the seller and the breakup of the same was also mentioned in the agreement. To be more clear, it was mentioned in the agreement that out of the total sale consideration of `70,000/-, the seller had received `25,000/- by way of bank draft drawn on Punjab & Sindh Bank, Shimla dated 28.06.1990 and remaining `45,000/- was received by way of cash at the time of signing of the agreement. Clause 1 of the agreement states that the first party i.e. the seller had received full and final payment of `70,000/- and had acknowledged the same. He had handed over the possession of half share of the land/ house

to second party and first party will have no objection if the second party (purchaser) raises any construction over the said land. Clause 4 of the agreement read as under:-

> "That after completion of one Storey or as and when the Second party feels necessary the First Party will execute a sale deed in favour of Second party"

Having perused the contents of agreement to sell thoroughly, in my considered view, there is no merit in the contention of learned counsel for the appellant that there were contrary terms contained in the said agreement. Even otherwise, the appellant cannot be permitted to take this plea especially as it is a signatory to the said agreement and it is bound by the terms of the agreement as it stood entered into by the appellant with the respondent. In addition, as it is clearly borne out from the Clauses of the agreement that the total sale consideration stood received by the seller, therefore, the contention of learned counsel for the appellant that both the learned Courts below have erred in coming to the conclusion that the total sale consideration stood paid to the appellant has no merit. Concurrent findings to this effect by both the learned Courts below are clearly borne out from the contents of Ext.PW1/A. There is nothing on record that after signing of the agreement at any stage, this issue was raked up by the appellant with respondent that he had not paid total sale consideration in terms of the agreement. In my considered view, this stand which was subsequently taken in the written statement was nothing but an afterthought. Similarly, statement of marginal witness DW-2 Surat Ram is also of no assistance to the appellant, as has been rightly held by both the learned Courts below because his deposition in the Court that no sale amount was paid by the plaintiff to the defendant, is contrary to the stand taken by the defendant who in the written statement admitted that `45,000/- was indeed received by him. Accordingly, in view of the reasoning returned hereinabove, it cannot be said that there is any misreading or misconstruction by the learned Courts below qua the Clauses of Ext.PW1/A or the same was not executable on account of purportedly contradictory Clauses contained therein.

15. Now, coming to the issue of limitation, I have already quoted the contents of Clause 4 of the agreement to sell in *extensio* hereinabove. A perusal of the said Clause clearly demonstrates that it was agreed between the parties that the sale deed would be executed either after completion of one storey or when the purchaser feels it necessary that the first party should execute a sale deed in his favour.

16. Article 54 of the Limitation Act, 1963 provides that period of limitation for specific performance of a contract is three years, as from the date fixed for the performance or if no such date is fixed, when the plaintiff has noticed that performance is refused. Admittedly in the present case in Ext.PW1/A, execution of which is not disputed by the appellant also, no date was fixed for performance of the agreement to sell. In these circumstances, the second part of Article 54 of the Act comes into picture, which contains that in case no date is fixed for performance of contract, then the limitation starts when plaintiff has noticed that performance is refused.

17. In this case, plaintiff had issued notice dated 07.05.1998, for execution of the sale deed, issuance of which is not in dispute. Admittedly, post issuance of the said notice, sale deed was not executed by the defendant in favour of the plaintiff. In my considered view, the omission on the part of the defendant to execute the sale deed, after a notice was issued by the plaintiff to the defendant to execute the sale deed is the point of start of limitation for specific performance of the agreement in the present case. It is not in dispute that as from the date when the notice was issued, the suit was filed within a period of three years. This is exactly what has been held by both the learned Courts below also while holding that the suit filed by the plaintiff was within limitation. The findings so returned by the learned Courts below are thus clearly borne out from the record of the case and are duly substantiated by the provisions of the Limitation Act. Therefore, there is no perversity in the findings returned by both the learned Courts below that the suit filed by the plaintiff was within limitation. Substantial questions of law are answered accordingly.

18. In view of the discussion hereinabove, as there is no merit in the present appeal, the same is accordingly dismissed, so also, pending miscellaneous application(s), if any. Interim order, if any, stands vacated.

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

Manohar Lal ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 130 of 2018
Judgment reserved on : 19.11.2019
Date of Decision : February 27, 2020

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 (b)(ii)(c) – Recovery of commercial quantity of 'charas'- Proof of- Appeal by accused against conviction and sentence- Accused alleged to be holding bag in his lap while travelling in a bus from which contraband was recovered- Accused taking plea that said bag was taken by police from luggage rack of the bus and it was not recovered from him- Held on facts, (i) bus conductor ignorant as to exactly from where in the bus bag was lifted by the police prior to his calling by them to seat where accused was sitting, (ii) version of Investigating Officer that he searched bag outside the bus is not corroborated from other witnesses including a police witness or documents on record, (iii) it is otherwise improbable that without noticing contents of bag, the police would make passenger alight along with driver and conductor, (iv) co-passengers of bench occupied by accused who were material witnesses, not associated in the investigation, (v) signatures of witnesses 'HK' and 'HC' on seizure memo appear to have been obtained on blank paper and contents scribed later on as handwriting seems to have overlapped the signatures, (vi) Font size and spacing in between writings evidently leading to inference that contents were made to fill in the space above signatures, (vii) other tampering in seizure memo qua quantity of 'charas' alleged to be recovered from accused- Prosecution failed to connect bag in question to have been recovered from accused and in proving its case beyond reasonable doubts- Appeal allowed- Conviction set aside and accused acquitted. (Para 18, 19 & 29 to 31)

Whether approved for reporting?[21] *Yes.*

For the appellant	:	Mr. Dibender Ghosh, Advocate, Legal Aid Counsel for the appellant.
For the respondent	:	Mr. Narender Guleria, Additional Advocate General for the respondent/State.

***Per:* Anoop Chitkara, Judge.**

Challenging the judgment of conviction for possessing 1 k.g. & 300 grams charas, convict Manohar Lal (appellant herein) has come up before this Court, by filing the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973, through a Legal Aid Counsel.

2. The gist of the facts apposite to decide the present appeal, traces its origin to FIR No. 131 of 2015, dated 1.4.2015 (Ext. PW-13/A), registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (After now called NDPS Act), in Police Station Sadar, Chamba, Distt. Chamba, H.P.

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21 **Whether reporters of Local Papers may be allowed to see the judgment?**

3. On March 31, 2015, as per entry No. 68(A), recorded in the daily station diary (Ext. PW-9/A), police party comprised of HC-Vijay Singh (PW-12), Const. Amit Kumar (PW-2), and HHG Dalip Kumar (not examined), proceeded to set up a check post towards Parel bridge. They departed from the Police Station Sadar, Chamba, at 10.50 p.m., in the official vehicle, driven by HHG Ravinder Kumar (PW-4). The Officiating SHO of the Police Station, SI Sakini Kapoor (PW-13), recorded such entry.

4. At around 11.35 p.m., when the police party was present at Parel Bridge, then a bus run by the Himachal Road Transport Corporation, bearing registration No. HP73 4504, reached there. The police party signaled the bus to stop and started searching the passengers and their luggage. When the police checked the passenger sitting on seat No. 33, carrying a cloth bag on his lap, the said person became perplexed. This gesture and body language aroused suspicion in the mind of the search party. On inquiry about his identity, he disclosed his name as Manohar Lal (convict). After that, the police called the driver of the bus Himmat Kumar (PW-1), and Conductor Harish Chander (PW-3). In their presence, on opening the cloth bag, it contained a bedsheet, and inside the bed sheet, there was a hand-stitched cotton bag, which contained a polythene bag. Inside this polythene bag, police noticed contraband in the shape of sticks. On smelling it, the police, based on its experience, prima facie, detected it to be charas.

5. After that, the Investigating Officer HC Vijay Singh (PW-12) deputed the driver of the police vehicle, HHG Ravinder Kumar (PW-4), to bring the weighing scale from the police station, which was at a distance of about 6 km from the spot. On the receipt of the electronic weighing scale, the Investigating Officer HC Vijay Singh (PW-12) weighed the contraband, which measured to be 1kg & 300 grams. After that, the Investigating officer re-packed the charas, similarly right up to the main bag. The Investigating Officer (PW-12) placed the bag in a cloth parcel and sealed with five seal impressions of seal-X and prepared a search memo (Ext. PW-1/A). He filled up the NCB form (Ext. PW-9/F), and handed over the seal to Constable Amit Kumar (PW-2). He also obtained the specimen seal impression of seal-X, on a piece of cloth (Ext. PW-1/B). Constable Amit Kumar (PW-2) took photographs (Ext. PW-2/B & 2/C) of the search & seizure operation. The Investigating Officer (PW-12) further directed Constable Amit Kumar (PW-2) to go to the police station and report the offence. Upon this Constable, Amit carried Ruka (Ext. PW-5/A) to the Police Station Sadar Chamba, for the registration of FIR. The Investigating Officer (PW-12) also recorded the statements of the witnesses under Section 161 Cr.PC, and prepared spot map (Ext. PW-12/B).

6. On receipt of information at the police station, the Officiating SHO, SI Sakini Kapoor (PW-13) registered FIR (Ext. PW-13/A), and handed over its copy to Const. Amit Kumar (PW-2) for information to SI Vijay Singh (PW-12).

7. The Investigating Officer (PW-12) arrested the accused and produced the accused as well as the case property before SI Sakini Kapoor (PW-13), who resealed the parcel with three impressions of seal-M and prepared reseal memo (Ext. PW-10/B). After resealing, PW-13 handed over seal impression-M to Const. Arwind Thapa (PW-10).

8. On 1.4.2015, SI Sakini Kapoor (PW-13) deposited the sealed parcel, sample seals, seizure memo, resealing memo, and three copies of the NCB form with HC Dinesh Kumar (PW-9), who was posted as the MHC in the police station at the appropriate time. On receipt of the case property, HC Dinesh Kumar (PW-9) entered the case property at Sr. No. 666 of the Maalkhana Register, as per extracts (Ext. PW-9/B). On the next day, i.e., 2.4.2015, he handed over the case property to Const. Avdesh Kumar (PW-7), along with Road Certificate No. 99/15 (Ext. PW-9/E), with a direction to deposit the same at the State Forensic Science Laboratory, Junga, for chemical analysis. Const. Avdesh Kumar (PW-7) took the case property to SFSL Junga and deposited it on 4.4.2015. On 1.5.2015 Const. Sher Singh (not examined), carried the case property, along with a report of chemical analysis (Ext. PX), from SFSL Junga, and handed over the same to the Investigating Officer. The Investigating Officer (PW-12) also prepared the special report (Ext. PW-5/B) and sent the same to the Superintendent of Police, Distt. Chamba through Lady Const. Sanjeepa (PW-8).

9. After completion of the investigation, the then SHO in Police Station Sadar, Chamba, SI Harnam Singh (PW-11) prepared the police report under Section 173(2) CrPC and presented the same before the Special Judge, Chamba, seeking prosecution of the accused.

10. The learned Special Judge took cognizance of the offence and supplied the copies of the police report to the accused in compliance with the provisions of Section 207 CrPC.

11. Vide order dated 1.8.2015, the learned Special Judge, Chamba proceeded to charge the accused under Section 20(ii)(C) of the NDPS Act, for possessing 1 kg &300 grams of charas, allegedly recovered from his exclusive and conscious possession, to which the accused did not plead guilty and claimed trial.

12. After the examination of the prosecution witnesses, in compliance with Section 313 CrPC, the Trial Court put the incriminating evidence to the accused, to which he denied all the incriminating circumstances. In answer to question twenty-four, accused stated that the police had foisted a false case against him on recovering the bag from the rack of the bus, which was not claimed by anyone.

13. The Court offered the accused to bring any evidence in support of his defence. However, he did not avail of his legal rights. Consequently, the trial court closed the evidence. The accused also did not file any written submissions as contemplated under Section 314 CrPC.

14. After hearing the arguments, the learned Special Judge, Chamba, accepted the prosecution evidence, and vide judgment dated 4.1.2017, passed in Sessions Trial No. 20 of 2015, titled as State of Himachal Pradesh vs. Manohar Lal, held the accused guilty. The Trial Court convicted the accused under Section 20(b)(ii)(C) of the NDPS Act, and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of rupees one lac. In default of payment of fine to further undergo rigorous imprisonment for one year. Challenging this judgment of conviction, the appellant has come up before this Court by filing the present appeal.

15. We have heard Mr. Debinder Ghosh, Advocate, learned legal aid counsel for the appellant-convict and Mr. Narender Guleria, learned Additional Advocate General for the respondent-State. We have also waded through the entire record.

16. A retrospection of the preceding paragraphs reveals that although the prosecution has proved all the steps leading from their departure from the Police Station up to the production of the case property in the Court during the trial, however, two aspects of the evidence need discussion.

17. The case of the prosecution is that they had entered the bus from the front as well as the rear portion simultaneously. The version of Const. Amit Kumar (PW-2) is that the Investigating Officer HC Vijay Singh (PW-12), had entered into the bus from the front door, whereas he along with HHG Dalip Kumar (not examined) had entered into the bus from the rear door. It has come explicitly in the evidence that at that time, the driver was sitting on his seat. The driver of the bus Himmat Kumar, who testified as PW-1, stated in his cross-examination that at the time of checking, he was sitting on the driver seat, and the Police called him and the Conductor later on. This fact is corroborated even by the Investigating Officer (PW-12) in his cross-examination, wherein he stated that the driver was sitting on his seat, and the Conductor was issuing tickets to the passengers when he reached at seat No. 33.

18. Similarly, the Conductor of the bus Harish Chander, who testified as PW-3 stated that at the time of checking of the bus, he was in the middle portion and was issuing tickets. He said in his examination-in-chief that while checking the bus, the Police called him and the driver near seat No. 33. After that, the Police searched the bag of the accused and noticed charas in it. In cross-examination, PW-3 Harish Chander categorically stated that <u>he could not tell from where the Police had lifted the bag prior to calling him to seat No. 33</u>.

19. As per the version of the Investigating Officer HC Vijay Singh (PW-12), when they reached at seat No. 33, then the accused, who was sitting there, and was carrying bag on his lap, became frightened. On his becoming perplexed, suspicion arose in the mind of the Investigating Officer, and he alighted him along with the driver from the bus. According to this witness it was outside the bus that he conducted the search. Now there is no corroboration to the statement of this witness by the other three spot witnesses, namely the driver Himat Kumar (PW-1), conductor Harish Chander (PW-3), and the police official Const. Amit Kumar (PW-2). Even this version of checking the bag outside the bus does not get corroboration from the earlier version recorded in the search memo (Ext. PW-1/A), and the ruka (Ext. PW-5/A) as well as the special report (Ext.PW-5/B). Thus, this isolated version of

the Investigating Officer (PW-12) that he had checked the bag outside the bus, is contrary to the all other evidence proved on record according to which the police had searched the bag inside the bus.

20. Even otherwise it is improbable that without noticing the contents of the bag the police would make the passenger alight the bus alongwith the driver and conductor. On the face of it, the testimony of the Investigating Officer (PW-12) is not credible.

21. HC Vijay Singh, PW-12, the Investigating Officer, admitted in his cross-examination that the passengers were sitting on all the three seats bearing numbers 31, 32, and 33. He acknowledged that apart from accused Manohar Lal, one 'Nikhal' was sitting on one of the seats bearing numbers 31 or 32. The Investigating Officer did not offer any explanation for not associating this co-passenger Nikhal. He was the most material witness because the police had called the driver and the conductor to seat No. 33 later on. This lapse would undoubtedly have an impact to prove whether the police recovered the bag containing charas from the lap of the accused or not.

22. Both the driver (PW-1) and the conductor (PW-3) did not support the case of the prosecution. The conductor namely Harish Chander (PW-3), in his cross-examination explicitly stated that the Police called him and the driver to seat No. 33 and clarified in the following terms - "It is correct that I cannot tell from where the police had lifted the bag prior to calling me to seat No. 33". After this testimony, the only evidence to connect the accused with the bag and to prove that the bag containing charas was on the lap of the accused, is that of the Investigating Officer (PW-12). At the time, the Investigating Officer noticed the bag on the lap of the accused, Const. Amit Kumar (PW-2) was searching passengers from the rear of the bus, and the driver and conductor were also not present.

23. The law is no more res Integra that the case set up by Prosecution would be proved only on the testimonies of Police officials, provided their testimonies inspire confidence and are believable. However, there is another aspect of the matter, which creates doubt on the credibility of the statements of the Investigating Officer (PW-12) and Const. Amit Kumar (PW-2). The Prosecution does not dispute that the passengers were sitting on all the seats of the bus, and it was full to its capacity. It has come in the evidence that no passenger was standing. Even if the police could not associate Nikhal, who was sitting on seat No. 31 or 32, still there is no explanation about not associating any other passengers as witnesses.

24. Another aspect that needs consideration is whether the Investigating Officer had ample time to complete the formalities like weighing the charas, preparing the parcels, stitching the cloth parcel, sealing the same with seals, preparing NCB form, fixing the specimen seal on the NCB form and writing seizure memo and Ruka within forty-five minutes to one and a half-hour. It assumes importance because nothing could proceed on the spot until the receipt of the weighing scale from the police station, which was at a distance of 6 to 7 km from the place of seizure.

25. According to conductor Harish Chander (PW-3), the bus remained at the spot for forty-five minutes. However, as per the statement of the driver Himmat Kumar (PW-1), the bus stayed at the place for one and a half hours. As per the version of the Investigating Officer (PW-12), it took them two hours and fifteen minutes to complete the proceedings at the spot. It has also come in the evidence that the Investigating Officer had deputed HHG Ravinder Kumar (PW-4) to bring the electronic weighing scale from the police station. The distance of the police station from the spot was 7 km. The Investigating Officer (PW-12) admitted the distance in his cross-examination. It has come explicitly in the cross-examination of the Investigating Officer that he wrote ruka (Ext. PW-5/A) at 1.30 a.m. As per the ruka, the time mentioned is 1.30 a.m., and the distance of the police station from the spot is 6 km. Before the preparation of ruka, the Investigating Officer had also prepared the seizure memo (Ext.PW-1/A). This seizure memo contains the signatures of the Driver Himmat Kumar (PW-1) and the Conductor Harish Chander (PW-3).

26. Another contradiction inferable from evidence is about the time for which the police had halted the bus on the spot. According to the conductor Harish Chander (PW-3), the bus stopped for forty-five minutes, and as per the driver Himat Kumar (PW-1), it halted for one and a half hours.

27. The second aspect is that a bare look at the search memo (Ext.PW-1/A), even without any aid of a magnifying glass, reveals that the signatures of both the witnesses Himat Kumar

(PW-1) and Harish Chander (PW-3) appears to have been obtained on blank paper, and the contents scribed later on. The handwriting seems to have overlapped the signatures, and especially the signatures of Harish Chander (PW-3) towards its end, and the signature of Himmat Kumar (PW-1) in its beginning, when it appears that the word "Shri" (in Hindi) has overwritten the signatures.

28. Similarly, the signatures of the accused are on the extreme bottom, whereas there was a lot of space above it for him to sign. Had police obtained the signatures after writing the document, then accused Manohar would not have signed just at the foot of the page, and signatures of both the witnesses would not have been done where they appear on the document.

29. A further perusal of this document reflects that on the top of the page, the font size is significant, and the spacing is huge, however, as one goes the page downwards, the font size, as well as the spacing, starts reducing, so as to make all the contents fit in to the space above signatures.

30. There is another defect in the seizure memo (Ext. PW-1/A). Initially, what was mentioned was '3' kgs & 300 grams, charas, but later on, the figure '3' was overwritten by figure '1'. Probably the police had only one blank paper with signatures of the witnesses and the accused; otherwise, they would have rewritten the entire document to overcome this material defect, which could have raised severe suspicion against the police team itself.

31. The result of the above analysis and discussion leads to an irrefutable conclusion that the Prosecution has failed to connect the bag to have been recovered from the conscious and exclusive possession of accused Manohar Lal. The Prosecution has miserably failed to prove its case beyond reasonable doubts, and the benefit must go to the accused.

32. Hence, for all the reasons mentioned above, the appeal is allowed. The judgment of conviction and sentence, dated 4th/11th January 2017, passed by Special Judge, Chamba Division, Chamba, H.P., in Sessions Trial No. 20 of 2015, titled as State of Himachal Pradesh vs. Manohar Lal, is set aside, and the accused is acquitted of the charged offence. The appellant Manohar Lal be set at liberty immediately, if not required in any other case after compliance of the provisions of Section 437-A CrPC. The fine amount, if deposited, be refunded to the accused. The Registry to prepare the release warrants, in the terms described above.

The appeal stands disposed of, so also pending application(s), if any.

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

Shri Diwakar. ……Appellant.

Versus

The State of Himachal Pradesh. ……Respondent.

Cr. Appeal No. 106 of 2018

Reserved on: 10.1.2020.

Decided on: 26.2.2020.

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 – Recovery of commercial quantity of 'charas'- Appeal against conviction and sentence- Divergence of opinion between Hon'ble Judges of the Bench qua guilt of accused- Reference to Hon'ble third Judge- Held, on facts (i) independent witness 'RK' of recovery and seizure not supporting prosecution case during trial, (ii) he specifically stating that his signatures were obtained by police on blank papers, (iii) 'RK' having no acquaintance with accused and has no reason to depose falsely, (iv) police witness also contradicting prosecution case on material particulars and showing ignorance when he left spot with rukka and when he reached police station, (v) contradictions in his statement vis-à-vis photographs qua time of sealing of contraband, (vi) mode of proceeding of police party for patrol duty from police post not reflected in departure report and (vii) Police personnel in whose private vehicle police party claimed to have gone for patrol not examined during trial- Case of prosecution doubtful- Appeal dismissed- Conviction and sentence set aside. (Para 12, 15, 16, 19 & 20)

Cases referred;

Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri. L.J. 481),
Gunwantilal v. State of H.P. (1973) ISCR 508: (1972) Cri. L.J. 1187)
Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri. L..J 300),
Noor Aga Vs. State of Punjab, (2008) 16 SCC 417.
Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri. L.J. 930)).
Ritesh Chakravarty v. State of Madhya Pradesh JT 2006(12)SC 416].
Rubyana alias Smita Sanjib Bali Vs. State of Maharashtra, Crl. L. J. 148
State of H.P. Versus Rajesh Dhiman and another, 2012(3) Shimla Law Cases,
State of Punjab v. Baldev Singh, (1999) 3 SCC 977,
Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936 (37) Cri. L.J. 939),
Supdt. and L. R. v. Anil Kumar Bhunja, (1979) 4 SCC 274: (1979) Cri. L. J. 1390)

Whether approved for reporting?[1] Yes.

For the appellant : Mr. B.B. Vaid, Advocate.
For the respondent : Mr. Yudhbir Singh Thakurt, Dy. AG.

Per Dharam Chand Chaudhary, Judge.

This appeal has been heard by a Division Bench of this Court. Both the Judges constituting the Division Bench are divided in their opinion, hence dissenting judgments came to be delivered on 5.7.2019. As per the order of the same day passed by the Division Bench, the record of the appeal was placed before the Chief Justice of this Court in terms of the provisions contained under Section 392 of the Code of Criminal procedure. The Chief Justice as per order dated 29.7.2019 has ordered to place the same with the opinions of the Judges constituting the Division Bench before this Court for recording its opinion after such hearing as deemed appropriate.

2. The present is a case where the I.O PW8 HC Bhupender Singh accompanied by PW9 HHC Tara Chand, C. Vinay Kumar and HHG Jeet Ram while on *Naka* at Sheer Galu near Paltoj towards Naggar-Jana road apprehended the appellant (hereinafter referred to as the accused) and on suspicion, when search of the black coloured back pack Ext. P-2 he was carrying on his back, the substance Ext.P4 allegedly *charas* weighting 1.512 Kg. was recovered therefrom.

3. There is no need to detail all the facts and also the evidence available on record because the same have been discussed in detail in both the judgments. Since this Court has to give its opinion about the dissenting view of the matter taken by the Judges constituting the Division Bench, therefore, discussing the facts of the case and elaboration of the evidence recorded by learned trial Court would unnecessarily overburdened this judgment, of course, the facts of the case and also the evidence available on record would be referred to hereinafter in this judgment as and where it is required to do so.

4. I have carefully gone through the dissenting judgments rendered in the matter by brother Sureshwar Thakur, *J*, hereinafter referred to as the first judgment and brother Anoop Chitkara, *J*, hereinafter referred to as the second judgment, vis-a-vis the facts of this case and also the evidence available on record.

5. As a matter of fact, learned trial Court on appreciation of the evidence available on record has convicted the accused for the commission of the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act' in short). He has been sentenced to undergo rigorous imprisonment for ten years and also to pay fine of Rupees one lac for the offence he committed. The accused, therefore, being aggrieved and dis-satisfied with the findings of conviction and sentence recorded by learned trial Court has preferred the present appeal in this Court.

6. In the first judgment, learned Judge of this Court has agreed with the findings of conviction and sentence recorded by learned trial Court and dismissed the appeal. The brother Judge in the second judgment has, however, taken a contrary view of the matter and accepted the appeal, hence quashed the findings of conviction and sentence recorded against the accused on the ground that for want of cogent and reliable evidence, no such finding could have been recorded.

7. The present is a case where the prosecution besides the official witnesses namely HHC Tara Chand PW9, HC Bhupender Singh PW8 and HHC Jeet Ram, the members of police patrol has also associated Shri Rajender Kumar PW6 as an independent witness. In the first judgment, the evidence as has come on record by way of the testimony of PW9 Tara Chand and the I.O. PW8 HC Bhupender Singh has been accepted as legal and valid. Though PW6 Rajender Kumar, the independent witness has turned hostile to the prosecution except for having admitted his signature on the consent memo Ext.PW8/A, personal search memo Ext.PW8/B, Recovery memo Ext.PW8/C, arrest memo Ext.PW8/J and memo of search of the accused Ext.PW8/K. However, in the first judgment an opinion has been formed that he having admitted his signatures on these documents, he has witnessed the search and seizure on the spot and a presumption to this effect can be drawn against him under Sections 91 and 92 of the Indian Evidence Act. Even the aid of Sections 91 and 92 taken in the first judgment to support such findings is also not legally admissible as the provisions contained thereunder are not at all attracted in the given situation. The NCB Form Ext.PW2/A, the entries Ext.PW2/K in the Malkhanna register qua deposit of the recovered *charas* and Ext.PW2/C the R.C. whereby the case property was deposited in the Forensic Science Laboratory as per the 1st judgment also corroborates the prosecution case. The report Ext.PW8/M received from the Forensic Science Laboratory has also been relied upon in the first judgment for forming an opinion that the recovered substance was *charas*. On compliance of Section 50 of the NDPS Act, in the first judgment after discussion it has been held that the present being a case of recovery of the *charas* from back pack, the strict compliance thereof was not required.

8. Now if coming to the second judgment, the infirmities such as there was no mention in daily diary rapat No. 14 Ext.PW7/A that the I.O. was having kit. It is doubtful that the printed NCB proformas, torch, cloth parcels, seal 'T', sealing wax, thread and needle were available with the I.O. PW8. The provisions contained under Section 50 of the NDPS Act have been discussed in this judgment also and it is concluded that the present being a case of chance recovery and contraband allegedly *charas* recovered from the back pack and not during personal search of the accused, the consent of the accused before his search was not required to be obtained. The glaring inconsistencies, discrepancies and contradictions in prosecution evidence have also been taken note of in this judgment. Learned Judge has taken note of the statement of PW9 HHC Tara Chand to the effect that the photographs were clicked in the evening time and not during night. The photos have been compared with the statement made by PW9 and an opinion formed that the same were clicked in the dark before the said witness left the spot at 7:20 P.M. with Rukka. The time of recording Rukka is 7:20 P.M. According to PW9, the photographs were taken before he left the spot with rukka. In the documents Ext.PW3/A there is no mention that the police party left police post, Patlikuhal vide rapat Ext.PW7/A in vehicle No. HP-34-9273. The IO. PW8 has, however, stated that the police party went to the spot in vehicle No. HP-34-9273 a private car. PW9 HHC Tara Chand has also stated that they went to the spot in private vehicle. PW8 the I.O. has further stated that the vehicle was of HHG Jeet Ram accompanying the police patrol but said Jeet Ram has not been examined.

9. The second judgment deals with the matter qua the independent witness PW6 Rajender Kumar having turned hostile to the prosecution in detail and records a finding that irrespective of he admitted his signature on the documents the same does not support the prosecution case qua recovery of the contraband allegedly *charas* from physical and conscious possession of the accused. In the second judgment an opinion has been formed that the trend of writing of documents Ext.PW8/A, Ext.PW8/B, Ext.PW8/C, Ext.PW8/D, Ext.PW8/J and Ext.PW8/K amply demonstrates that these documents have been written

after obtaining signatures of the independent witness thereon. Therefore, the learned Judge having rendered the second judgment formed an opinion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt and as such while allowing the appeal and setting aside the findings of conviction and sentence the accused has been acquitted of the charge framed against him under Section 20 of the NDPS Act.

10. In this backdrop and to form an opinion based upon the given facts and circumstances of the case and also the evidence available on record, this Court has heard Mr. B.B.Vaid, learned counsel representing the appellant-convict and Mr. Yudhbir Singh Thakur, learned Deputy Advocate General representing the respondent-State.

11. The first and foremost point for consideration is as to whether irrespective of the independent witness has turned hostile to the prosecution and except for admitting his signature on the documents, referred to hereinabove, he has not supported the prosecution case at all, his statement still can be relied upon to bring guilt home to the accused or not? The answer to this poser in all fairness and in the ends of justice would be in negative because while denying the entire prosecution case in the witness box being wrong and giving an explanation that he had put his signature on blank papers, he has caused major dent in the prosecution story and when it is well settled that more heinous the offence committed, the strict is the degree of proof required to record the findings of conviction. No such findings could have been recorded with the help of such a statement as has been made by PW6 Rajender Kumar in this case. The law on the issue is also no more *res intergra* as in the judgment authored by a Division Bench of this Court in Criminal Appeal No.411 of 2011 on 12th April, 2016, it has been held as under:

> ……As noticed above, there are two sets of witnesses, i.e. independent and officials. The independent witnesses no doubt have admitted their presence on the spot, however, as per their version they were not present there at the time when search and seizure had taken place and rather at a stage when the contraband, allegedly Charas, was allegedly lying there in a bag. PW-2 Purshotam while stating that the accused in their presence had disclosed his name as Raj Kumar, resident of Jallandhar before the Police, also admits the presence of accuse don the spot. They, however, have not supported the prosecution case qua the manner in which the search and seizure has taken place on the spot and turned hostile.
>
> The official witnesses no doubt have supported the case as disclosed from the perusal of the final report filed under Section 173 Cr.P.C. and the documents annexed therewith. However, in view of the evidence having come on record, by way of testimonies of the independent witnesses and the official witnesses, there emerge two possible views on record. It is well settled at this stage that in a case where on the basis of evidence available on record two possible views emerge on record, the view favouring the accused has to be believed and the benefit of doubt to be given to him and not to the prosecution. Otherwise also, in the Act, there is provision of stringent punishment if an offender is found to have committed the office.
>
> Therefore, the proof to connect the accused with the commission of the offence must be beyond all reasonable doubt and the initial burden to bring the guilt home to an accused booked for the commission of an offence under the Act lies on the prosecution. In case the prosecution succeeds to prove the charge beyond all reasonable doubt against the accused, it is only in that situation that the presumption as envisaged under Sections 35 and 54 of the Act can be raised. We are drawing suport to substantiate the findings so arrived at form the judgment of Apex Court

in ***Noor Aga*** Vs. ***State of Punjab, (2008) 16 SCC 417.*** This judgment reads:

> “56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., ‘proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of ‘wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh, (1999) 3 SCC 977, it was stated:
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> > “It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.”
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> [See also Ritesh Chakravarty v. State of Madhya Pradesh JT 2006(12)SC 416].
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> 57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.
>
> 58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is ‘preponderance of probability' on the accused. If the prosecution fails to prove the Page 15 foundational facts so as to attract the rigours of Section 35 of the Act, the actus

> reus which is possession of contraband by the accused cannot be said to have been established.
>
> 59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.
>
> 60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself."

12. Analyzing the given facts and circumstances of this case and also the evidence available on record, it is not proved beyond all reasonable doubt that the police party headed by PW8 HC Bhupender Singh had nabbed the accused at the place of occurrence in the presence of the only independent witness PW6 Rajender Kumar as he has not supported this part of the prosecution case at all as during his lengthy cross-examination conducted by learned Public Prosecutor he has denied all the suggestions given to him being incorrect meaning thereby that he was not at all present on the spot nor the *charas* recovered from the back pack, allegedly he was carrying with him. The documents Ext.PW8/A, Ext.PW8/B, Ext.PW8/C, Ext.PW8/D, Ext.PW8/J and Ext.PW8/K as per his version were not reduced into writing in his presence and rather his signature were obtained on blank papers. The bare perusal of the trend of writing of the document Ext.PW8/A reveals that the same has been squeezed in the end whereas gap in the end of document Ext.PW8/C between its contents and the signature of witnesses and accused. Similarly, in Ext.PW8/B there is not much space between the contents of the documents written and the signature of the witnesses. Similar is the position with respect to the arrest memo Ext.PW8/J and personal search memo Ext.PW8/K. Therefore, it would not be improper to conclude that the signatures of PW6, the so called independent witness, were taken on blank papers and it is because of that an effort has been made to adjust the contents of the documents taking into consideration the space available. Therefore, the statement of PW6 Rajender Kumar that his signature were obtained on blank papers appear to be nearer to the factual position. The statement of this witness has, therefore, demolished the entire prosecution case.

13. It is significant to note that the accused herein belongs to Uttrakhand whereas PW6 Rajender Kumar is a local resident of village Nathan, Tehsil and District Kullu. He cannot be said to have any acquaintance with the accused so as to believe that it is for this reason he has deposed falsely in the witness box to help the accused. There is nothing on record to show that PW6 has made a false statement for some oblique purpose or extraneous considerations. Therefore, brother Justice Chitkara has rightly refused to place reliance on the statement of PW6 Rajender Kumar in order to record findings of conviction against the accused.

14. True it is that in a case where an independent witness has turned hostile to the prosecution, however, the official witnesses have supported the same, their testimony cannot be discarded if otherwise inspires confidence. However, in that situation, the testimony of such official witnesses is required to be scrutinized with all circumspections and precaution. In this regard, I am drawing support from the judgment rendered by a Co-ordinate Bench of

this Court in ***State of H.P.*** Versus ***Rajesh Dhiman and another, 2012(3) Shimla Law Cases.***

15. Now if coming to the case in hand, the only official witness examined by the prosecution is PW9 HHC Tara Chand. Though HHG Jeet Ram and C. Vinay Kumar were also the members of the police patrol, however, they have neither been associated to witness the search and seizure nor examined as witness. The only official witness, therefore, is Tara Chand PW9. His statement is not consistent and rather he has contradicted the police case and also improved his version while in the witness box. In this regard, it is pointed out from his statement in cross-examination that he had no idea as to when he reached in Police Station and the time when he left the spot with Rukka. He also have no idea as to at what time the police party finally returned from the spot on completion of the investigation there nor the name of the person driving the vehicle in which they had gone to the spot, disclosed. According to him they had checked the vehicles on the way and passers by on the spot, however, this is not the prosecution case. He was also not aware about the distance between Sheer Galu from Paltoj nor as to when they reached on the spot.

16. The accused, according to him, was seen on the spot at 4:40 P.M. However, as per the version of the I.O. PW8, the independent witness Rajender Kumar had already arrived at the spot at 4:35 P.M. He is also not aware of qua the time taken for verification of the antecedents of the accused and antecedents of the independent witness Rajender Kumar. He is also not aware about the time when the contraband allegedly *charas* recovered from the accused. According to him, it was evening time when the case property sealed and not dark. The photographs, however, show that the same were clicked in dark. The photographs were clicked in his presence, however, he did not remember as to who had clicked the same. Though he had taken lift from the spot, however, according to him, does not remember the name of the driver, number and nature of the vehicle particularly when the vehicle as per the version of I.O. PW8 was that of HHG Jeet Ram, one of the members of the police patrol. Therefore, the statement of PW9 that he does not remember the name of the driver and nature of the vehicle speaks in plenty about the correctness of the statement ibid. He also does not remember as to how much time was taken for registration of FIR and preparation of file and at what time he left Police Station, Manali with case file to the spot. Though he had taken lift from police station, however, he does not remember the name of the driver and type of the said vehicle. The FIR number, according to him, was there on Ext.PW6/B scribed by the I.O. with blue ink. The I.O., however, has stated that initially in this document the FIR number though was scribed with red ink, however, later on, written the same with blue ink. What necessitated the I.O. to do so also remained unexplained.

17. The I.O. PW8 though cannot be taken as a witness to the search and seizure. However, he has also contradicted the prosecution case as according to him PW6 Rajender Kumar arrived at the spot at 4:35 P.M. whereas as per the prosecution case he arrived there after the accused intercepted at 4:40 P.M. why this witness has not recorded the time etc. in the statement of PW9 Tara Chand when the same find mention in various documents including Rukka also rendered the prosecution story doubtful.

18. Not only this but the statement of PW9 that they went to the spot in a private vehicle goes to show that he has improved his earlier version as nothing to this effect is there either in the documents prepared by the I.O. nor in daily diary rapat Ext.PW7/A. Therefore, the evidence as has come on record by way of the testimony of sole official witness HHC Tara Chand is not suggestive of that search and seizure has taken place in a manner as claimed by the prosecution.

19. The photographs Ext.PW8/H1 to Ext.PW8/H7 on the face of it demonstrate that the same were clicked when it was dark and not in day light/evening time. Therefore, the photographs also belie the testimony of PW9 HHC Tara Chand that the same were taken in the evening when it was not dark. Otherwise also as per his version the photographs were taken before

his leaving the spot along with Rukka to Police Station, Sadar Manali for the purpose of getting the FIR registered. The Rukka Ext.PW8/D reveals that the same was reduced into writing at 7:20 P.M. Being the month of February in Kullu district by 7:20 P.M. the night already sets in motion. Therefore, it is doubtful that the photographs were taken on the spot and on this score also, the solitary statement of official witness HHC Tara Chand is not sufficient to bring the guilt home to the accused.

20. In daily diary rapat No. 14 Ext.PW7/A there is no mention about the mode by which the police party left police post, Patlikuhal for patrolling in Jana area. The other documents i.e. the recovery memo Ext.PW8/C and the Rukka Ext.PW8/D as well as special report Ext.PW3/B are also silent as to by what mode the police party went to the spot. It is for the first time the I.O. PW8 and PW9 have stated that they went to the spot in a private vehicle. As per the I.O. PW8 the said vehicle was of HHG Jeet Ram. Had the police party left the police post in the vehicle of HHG Jeet Ram, why he would have not mentioned so in the documents referred to hereinabove? HHG Jeet Ram has also not been examined. Therefore, an adverse inference has to be drawn against the prosecution and as such, it would not be improper to conclude that the search and seizure has not taken place in the manner as claimed by the prosecution. Therefore, in my considered opinion no finding of conviction could have been recorded on the basis of such evidence available on record against the accused.

21. It is worth mentioning that learned Judge who has delivered the second judgment also emphasized that in daily diary No. 14 Ext.PW7/A there is no mention that the I.O. PW8 had the I.O. kit with him when left the police post and there being no evidence as to from where the electronic scale, the printed NCB proformas, torch, cloth parcels, seal 'T', sealing wax, thread and needles were brought, hence held the sampling and sealing process to be not proved in accordance with law. Also that for want of printed NCB proformas there was no occasion to the I.O. to have filled-up the relevant columns thereof on the spot. I am, however, not in agreement with the findings so recorded by brother Anoop Chitkara, *J.* because taking I.O. kit with him while leaving the police station/police post for patrolling/detection of crime in the area is the routine duty of I.O. It is not required to be recorded any where including the rapat daily diary that the Kit was available with the I.O., PW8. Therefore, it would not be improper to conclude that PW8 I.O. was having the I.O. kit with him. In the kit there use to be kept electronic weighting scale, cloth, thread, needles, wax and also seal as well as the proforma like NCB and also the blank papers. Therefore, no adverse inference could have been drawn on this score against the prosecution.

22. True it is that the link evidence taken note of in the first judgment by brother Sureshwar Thakur, *J,* i.e. NCB proforma Ext.PW2/A, road certificate Ext. PW2/B qua the deposit of case property in Forensic Science Laboratory, the entries Ext.PW2/C whereby the case property deposited by SI/SHO Bala Ram PW5 with MHC of the police Station in the Malkhana etc. is there on record, however, such evidence would have some relevancy had the prosecution been otherwise succeeded to prove beyond all reasonable doubt that the contraband allegedly *charas* has been recovered from the physical and conscious possession of the accused. It has been held by the High Court of Bombay in ***Rubyana alias Smita Sanjib Bali*** Vs. ***State of Maharashtra, Crl. L. J. 148*** that sine-qua-non for attracting the penal provisions contained under the Act is the recovery of the contraband from conscious and exclusive possession of the accused alone. The relevant portion of this judgment is reproduced here as under:

> "The sine qua non for attracting the penal provisions, viz. Sections 20 and 21 of the N.D.P.S. Act, and Section 25 read with Section 7 of the Arms Act is that the appellant must be found in possession of the contrabands and the fire arms. The term "possession" is not defined in the N.D.P.S. Act. The term "possession" has been judicially construed to mean, in various decisions, as under :-

'Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

(See in this connection Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri. L.J. 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri. L..J 300), Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936 (37) Cri. L.J. 939), and Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri. L.J. 930)).

The Apex Court in Supdt. and L. R. v. Anil Kumar Bhunja, (1979) 4 SCC 274: (1979) Cri. L. J. 1390) observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it. "The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri. LJ) :-

"13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes 11th Ed.).

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed. page 52) describes 'possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it'.

16. In Gunwantilal v. State of H.P. (1973) ISCR 508: (1972) Cri. L.J. 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical

possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed (at p 1189 of Cri LJ):

In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

23. The net result of the aforesaid discussion is that the prosecution has miserably failed to prove with the help of cogent and reliable evidence that the contraband allegedly *charas* weighing 1.512 Kg. has been recovered from the accused when on 13.2.2015 intercepted by the police of Police Post, Patlikuhal under Police Station, Manali around 4:40 P.M. at Sheer Galu near Paltoj road on Naggar-Jana road. The prosecution, as such, has failed to bring the guilt home to the accused beyond all reasonable doubt. The view of the matter taken by Brother Chitkara J. is legally and factually sustainable. The appeal is, therefore, allowed and the findings of conviction and sentence recorded against the accused are quashed and set aside. Therefore, he is ordered to be set free forthwith, if not required in any other case. Registry to prepare release warrants accordingly.

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

Sonu. ..... Non-applicant/Appellant.

Versus

State of H.P. Applicant-respondent.

Cr.MP No. 815 of 2018 in
Cr. Appeal No. 405 of 2017.
Reserved on: 24.2.2020.
Decided on: 26.2.2020.

Code of Criminal Procedure, 1973 (Code) - Section 311- Re-examination of witness- Permissibility- Divergence in opinion between Hon'ble Judges of the Bench qua permitting prosecution to re-examine a Medical Officer pursuant to application filed under Section 311 of Code before the Hon'ble Bench- Reference to Hon'ble Third Judge- Held, blood samples of accused were taken by Medical Officer concerned for DNA examination- Those were sent to FSL for examination and found connecting accused with crime in question- Filing of application for taking samples of blood and identification memos prepared at the time of sampling already stand proved on record in statement of Investigating Officer- Medical Officer, however, was not examined qua these aspects of the matter by Public Prosecutor- It was on account of oversight and inadvertent omission on his part- Necessity to examine said Medical Officer is writ large on face of record- Re-examination of witness is not to fill lacuna in prosecution case but to ensure complete justice to parties- Application allowed. (Para 17 & 20)

Cases referred

Manju Devi versus State of Rajasthan and another Apex Court in (2019) 6 SCC 203,
Rajaram Prasad Yadav Vs. State of Bihar and another,

Whether approved for reporting?[1] Yes.

For the non-applicant/ : Mr. Praveen Chauhan, Advocate.

appellant

For the applicant/ : Mr. Kunal Thakur, Deputy A.G.

respondent

Per Dharam Chand Chaudhary, Judge.

In this appeal, an application registered as Cr.MP No. 815 of 2018 filed under Section 311 of the Code of Criminal Procedure by the respondent-State/prosecution for seeking permission to re-examine PW13 Dr. Richa Gupta has been heard by a Division Bench of this Court comprising Justice Tarlok Chauhan, *J.* and Justice Chander Bhusan Barowalia, *J.* and decided vide judgment dated 7.9.2018. Both the Judges constituting the Division Bench have, however, divided in their opinions, hence dissenting judgments came be be passed in this application.

2. In view of the dis-agreement in the judgments rendered by the Judges, constituting the Division Bench, the matter was placed before the Chief Justice in terms of the provisions contained under Section 392 of the Code of Criminal Procedure. The Chief Justice as per order dated 26.10.2018 has ordered to place the matter with the dissenting opinions of the Judges constituting the Division Bench before this Court for recording its opinion after such hearing as deemed appropriate. It is how this mater landed in this court.

3. The present is a case where the charge against the appellant-convict is that during the intervening night of 11th/12th May, 2014 at Village Sarahan, Tehsil and district Chamba he subjected the prosecutrix (name with-held) to sexual intercourse, who was about 12 years of age at that time and thereby committed an offence punishable under Section 376 of the Indian Penal Code and Section 6 of Protection of Children from Sexual Offences Act, 2012.

4. The facts leading to file the application under Section 311 of the Code of Criminal Procedure have been succinctly stated in both the judgments and as this Court has only to give its opinion about the dissenting view of the matter taken by the Judges constituting the Division Bench, therefore, to detail the facts of the case further would be a futile exercise and to over burden the judgment unnecessarily.

5. It is, however, desirable to refer to the circumstances leading to file application under Section 311 of the Code of Criminal Procedure and as to whether the re-examination of PW13 Dr. Richa Gupta is essentially required for just decision of the case.

6. The grounds in the application for re-examination of PW13 Dr. Richa Gupta in a *nut shell* are that consequent upon the order passed by the trial Court in an application filed by the prosecution for obtaining blood samples of the prosecutrix and the accused for DNA Profiling, the I.O. PW11 SI Kamlesh Kumar has made an application to Medical Officer, Regional Hospital, Chamba for obtaining the blood samples of the accused and the prosecutrix for DNA Profiling. The accused and prosecutrix were also produced in the hospital before PW13 Dr. Richa Gupta. She had taken the blood samples of both of them on FTA cards on completion of codel formalities and handed over the same to the police for needful. The grounds so raised finds support from oral as well as documentary evidence available on record. PW11 while in the witness box has stated that an application for obtaining the blood samples of the accused and the victim Ext.PW11/K was made by him in the trial Court. The same was allowed vide order Ext.PW11/L. Subsequently, he filled the identification forms Ext.PW11/M qua the victim whereas Ext.PW11/N qua the accused. Their blood samples were obtained on FTA cards.

7. Now if coming to the documentary evidence, the identification memos Ext.PW11/M and Ext.PW11/N reveal that the blood samples of the victim and the accused were obtained by Dr.

Richa Gupta. The same bears their signature in token of taking their blood samples. The order Ext.PW11/L passed by learned Sessions Judge, Chamba on the application Ext.PW11/K made by the I.O. reveal that learned trial Judge after recording satisfaction qua the DNA Profiling of blood of the accused is essentially required for just decision of the case allowed the same with a direction to the Superintendent, District Jail, Chamba to produce the accused before the Medical Officer in Regional Hospital, Chamba for drawing his blood sample.

8. Now if coming to the explanation as to why the re-examination of the witness is required, the case of the prosecution is that Dr. Richa Gupta while in the witness box could not be examined qua this aspect of the matter. The statement of Dr. Richa Gupta amply demonstrate that she has not been examined at all qua this aspect of the matter. Although the appellant-convict has contested and resisted the application on the ground *inter alia* that the prosecution had ample opportunity before learned trial Court to have examined/re-examined Dr. Richa Gupta at an appropriate stage in the trial Court and also that at this belated stage to allow this application to re-examine and consequently to re-examine this witness would be nothing but to fill-up the lacuna left in the prosecution case and in that event mis-carriage of justice and serious prejudice likely to be caused to him. Yet the necessity or otherwise to re-examine PW13 Dr. Richa Gupta has to be considered in the light of the factual matrix hereinabove.

9. Now if coming to the divergent opinion formed by the Judges, constituting the Division Bench, it is significant to point out here that brother Justice Barowalia who has authored the judgment for the Division Bench on taking into consideration the given facts and circumstances and also the rival submissions as well as analysing the provisions contained under Section 311 of the Code of Criminal Procedure has dismissed the application while drawing the following conclusion:

i) The witness was examined approximately three years back, therefore, allowing the application and her re-examination would amount to fill-up the lacuna left in the prosecution case;

ii) PW13 Dr. Richa Gupta while in the witness box has not stated anything about taking the blood samples of the victim and the accused, therefore, filing the application at a belated stage when the appeal is on hearing board is nothing but amount to fill-up the lacuna. The first and foremost principle for exercising the powers to recall a witness for re-examination is that it is expedient and in the ends of justice to do so; and

iii) No prejudice, serious in nature, should be caused to the accused by allowing the application and to re-call the witness for re-examination.

10. In the opinion of brother Barowalia, *J.* the re-examination of the witness if allowed at a belated stage would be nothing but to fill-up lacuna left in the prosecution case and also that prejudice, serious in nature, is likely to be caused to the accused in that event. Nothing has, however, come as to whether the re-examination of the witness is required for just decision of the case or not and the application has been ordered to be dismissed.

11. Now if coming to the dissenting judgment authored by brother Chauhan, *J.* the dis-agreement is based upon the following factors:

i) If the re-examination of PW13 Dr. Richa Gupta is permitted, no serious prejudice is likely to be caused thereby to the appellant-convict nor such an exercise of power would result in miscarriage of justice to him; and

ii) Allowing the application and to re-examine the witness would not amount to fill-up the lacuna in the prosecution case.

12. Brother Chauhan, *J.* in support of his dis-agreement has placed reliance on the law laid down by the Apex Court by way of several judicial pronouncements right from the year 1996 till 2017 as is apparent from paras-4 to 17 of the judgment he authored. The legal principles culled out on the basis of the law so discussed reads as follow:

i) Lacuna in the prosecution case must be understood as the inherent weakness or latent wedge in the matrix thereof.

ii) the advantage of a lacuna in the prosecution case normally go in favour of the accused but an oversight during the course of trial cannot be treated as irreparable lacuna.

Iii) the function of the criminal courts is administration of criminal justice and not to count errors committed by the parties during the course of trial. The object of Section 311 of the code is that there may not be failure of justice on account of mistake of either party in bringing the valuable piece of evidence on record or leaving ambiguity in the statements of witnesses examined by either side.

iv) The determinative factor is as to whether it is essential to re-examine a witness for the just decision of the case.

v) The only object underlying Section 311 of the code is to bring on record the evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society.

vi) The nature, scope and object of Section 311 of the Code dealing with the principles for exercise of discretionary power is that the power under Section 311 of the Code though is vast one and can be exercised at any stage of the trial. However, should be exercised only in those cases where the evidence to be tendered by the witness on re-call is germane to the issue involved. In case such evidence could not be adduced or brought on record due to an inadvertence, the power is not limited to re-call a witness for further cross-examination with reference to his previous statement but also to take additional evidence for any reasons at a just decision.

vii) This discovery of truth is essential principles of any trial or inquiry to render a just decision after discovering all relevant facts.

viii) Of course power must be exercised judiciously and not capriciously or arbitrarily as any improper or capricious power may lead to undesirable results.

ix) The additional evidence must not be received as a disguise for retrial or to change the nature of the case against either of the parties.

x) The opportunity to cross-examine the witness qua the additional evidence recorded on re-examination and to produce rebuttal evidence, if any, should be given to the other party.

xi) The very use of words such as "any Court", "at any stage", or "or any inquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of Section 311 of the Code have to be exercised in the widest possible terms and do not limit the discretion of the Court in any way. Fair trial entails the interest of the accused, the victim and of the society, therefore, fair trial includes the grant of fair and proper opportunities to the parties. Where the offence is against society, it is the unfortunate victim, who is the actual sufferer, hence it is imperative for the prosecution to ensure that no stone is left unturned to bring guilt home to the accused.

xii) That the power under Section 311 of the Code must be exercised with caution and circumspection and only for strong and valid reason as recall of a witness already examined is not an opportunity as a matter of course and discretion given to the court in this regard has to be exercised judicially to prevent failure of justice.

xiii) that delay in filing the application for re-calling a witness is one of the important factor and the same should be explained in the application.

13. Besides, the principles culled out by the Apex Court after examining the entire case law in ***(2013) 14 SCC 461,*** titled ***Rajaram Prasad Yadav*** Vs. ***State of Bihar and another*** have also been taken into consideration by brother Chauhan, *J.*

14. The Apex Court in ***(2019) 6 SCC 203***, titled ***Manju Devi*** versus ***State of Rajasthan and another*** has again reiterated the legal principles hereinabove while holding that discretionary powers under Section 311 Cr.P.C. is essentially intended to ensure that every necessary and appropriate measure should be taken by the court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned and also ensure that no prejudice is caused to anyone. Also that the age of the case itself is not a decisive factor to deny the prayer made for re-examination of a material witness.

15. The reasons for taking a contrary view of the matter to allow the application recorded by brother Chauhan, *J.* also reads as follow:

> "…..From a conspectus consideration of the above decisions, it would be evidently clear that the principles as culled out by learned brother Barowalia, J., in para 8 of the judgment, are in tune and in conformity with the judgments of the Hon'ble Supreme Court. However in my considered opinion, the salutary provisions of Section 311 of the Code have not been taken into consideration as while considering an application under this provision is one of the main objects to be taken into consideration to enable the Court to find out the truth and render a just decision, such power can be exercised at any stage of any enquiry, trial or other proceedings. The object of Section 311 of the Code is, as a whole, to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society.
>
> Adverting to the present case, it has to be borne in mind that the same is an extraordinary one, where the non-applicant/accused has been charged for offences punishable under Section 376 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012, therefore, in such circumstances, the prosecution case cannot be made to suffer only because the Public Prosecutor failed to question PW13 Dr. Richa Gupta with regard to DNA profiling, which is an extremely vital evidence in this case to enable the Court to find out the truth and render a just decision.
>
> In my considered opinion, the evidence of PW13 Dr. Richa Gupta is essential to a just decision of the case as it is necessary to find out truth or obtain proper proof of facts of this case, which would not only enable this Court to arrive at a just but also a correct decision. Undoubtedly, allowing this application is going to cause some prejudice to the

> accused/non-applicant, but then the exercise of such power cannot be dubbed as filing up lacuna in prosecution case because, as already stated above, re-examination of the witness is essential for a just and correct decision of the case....”

16. I have read both the judgments. But my views are also at variance with that of my learned brother Justice Barowalia. Being so, for the reasons to be recorded hereinafter my opinion in the matter is also the same as has been formed by brother Chauhan, *J.*

17. The oral as well as documentary evidence, discussed at the outset, the prosecution case qua seeking permission of the court for obtaining blood sample of the accused is duly proved from the order Ext.PW11/L passed by learned Sessions Judge, Chamba on the application Ext.PW11/K filed by the prosecution. The identification memos Ext.PW11/M and Ext.PW11/N amply demonstrate that Dr. Richa Gupta has taken the samples of the victim of the occurrence and also the accused on FTA cards. The blood samples were subsequently forwarded to the Forensic Science Laboratory for DNA Profiling. The Forensic Science Laboratory report is Ext.PX which discuss the blood sample of victim and that of the accused Ext.P1 and Ext.P2 were received there for analysis. The result under the heading “observations” is that on the salwar and vaginal swab of the victim the DNA matches with the DNA Profile obtained from the blood sample on FTA card of the accused. As already noticed at the very outset PW13 Dr. Richa Gupta has not been examined at all qua this aspect of the matter. The reasons, therefore, obviously is an oversight and inadvertent omission on the part of the learned Public Prosecutor. The necessity to re-examine PW13 Dr. Richa Gupta vis-a-vis the gravity and heinousness of the offence allegedly committed is writ large on the face of the record. There should be fair trial between the parties. Allowing to re-examine PW13 Dr. Richa Gupta is not to fill-up any lacuna left in the prosecution case and rather required for just decision of the case and to ensure complete justice to the parties on both sides.

18. Though brother Chauhan, *J.* has also observed in last part of the judgment that allowing the application at this stage is likely to cause prejudice to the appellant-convict, however, for the reasons recorded hereinabove, no prejudice is likely to be caused to him as he will have an opportunity to cross examine Dr. Richa Gupta and even also to produce evidence in rebuttal, if so advised. The present is also not a case where the application should be dismissed only because of filed at a belated stage, for the reasons that plain reading of section 311 of the Code amply demonstrate that court may at any stage of inquiry, trial or other proceeding under the Code re-call and re-examine any person already examined as witness if his/her evidence appears to it to be essential for just decision of the case.

19. In view of the legal principles discussed hereinabove and the given facts and circumstances, the present in my considered opinion is a case where PW13 Dr. Richa Gupta is required to be re-examined as to do so is essentially required for just decision of the case.

20. The net result of the aforesaid discussion would, therefore, be that the application deserves to be allowed and the witness Dr. Richa Gupta re-called for re-examination in terms of the judgment rendered by brother Tarlok Chauhan, *J.* Ordered accordingly.

BEFORE HON’BLE MR. JUSTICE ANOOP CHITKARA. J.

1. <u>Cr. MP(M) No. 1984 of 2019</u>

Shubham Bitalu ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

2. <u>Cr. MP(M) No. 1985 of 2019</u>

Ravinder Ranjta ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1984 of 2019 alongwith
Cr.MP(M) No. 1985 of 2019
Judgments reserved on: January 4, 2020.
Date of Decision: February 28 , 2020.

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20 & 29- Recovery of 938 tablets of Nitrosun-10- Regular bail- Grant of- Held, prohibited psychotropic substance was recovered from residential flat of co-accused ‘SB’- Bail petitioners were merely visitors to house of ‘SB’- In complaint which was sent by neighbour of ‘SB’, no allegation that bail petitioners were regular visitors to house of ‘SB’ or they were part of drug mafia- No material has come on record during police investigation connecting bail petitioners with contraband recovered from premises of ‘SB’ - Their mere presence in the house is not sufficient to deny bail to bail petitioners- Petitions allowed- Bail granted subject to conditions. Para 7 & 10)

Cases referred;

Ismailkhan Aiyubkhan Pathan v. State of Gujarat, (2000) 10 SCC 257,
MohdAlam Khan v. Narcotics Control Bureau, (1996) 9 SCC 462,
Naushad v. State of Kerala, 2000(3) Crimes 15,

Whether approved for reporting?[22]***YES***.

For the petitioner : Mr. Peeyush Verma, Advocate, for the petitioner(s).

For the respondent: Mr. Nand Lal Thakur, Addl. A.G. and Mr. Rajat Chauhan, Law Officer, for the respondent/State.

<u>Anoop Chitkara, Judge.</u>

For possessing 938 tablets of Nitrosun-10 which is a prohibited drug, the petitioners who are under arrest, and were merely present in the home of the other accused, from where the Police had recovered the Psychotropic Substances, on being arraigned as accused in FIR Number 95 of 2019, dated Aug 13, 2019, registered under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called “NDPS Act”), in the file of Police Station East Shimla, District Shimla, HP, disclosing non-bailable offences, have come up before this Court under Section 439 CrPC, seeking regular bail.

2. Status report stands filed. I have seen the status report(s) as well as the Police file, to the extent it was necessary for deciding the present petition, and heard learned Counsel for the parties.

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[22] **Whether reporters of Local Papers may be allowed to see the judgment?**

3. Prior to the present bail petition, the petitioners had filed a petition under Section 439 CrPC, before Special Judge, Shimla, HP. However, vide order dated 13.09.2019 the Court dismissed the petition.

FACTS

4. The gist of the First Information Report and the investigation is that on receipt of a secret information the Police party reached at Flat No. 10, Block C-26, Housing Board Colony, Vikasnagar, Shimla Town on Aug 13, 2019 at 11.45 a.m. On reaching near the flat the police party heard commotion from inside the said flat and the main door was open. On this the Investigating Officer alongwith the police officials entered into the flat. In the bed room three persons were creating ruckus and talking in a loud voice. The Police party asked about their identities and they revealed their names as Sameer Bajaj (owner of the flat), Shubham Bitalu (petitioner in Cr.MPM No. 1984 of 2019) and Ravinder Ranjta (petitioner in Cr.MPM No. 1985 of 2019). The Police also noticed that articles were lying scattered on the bed. Amongst these articles the police found strip of Nitrosun-10 drug and one tablet was unwrapped. It raised suspicion in the mind of the Police that there might be more drugs in the house/flat. On this the police party associated independent witnesses and in their presence conducted the search of the house. In another room of the flat there was a wooden shelve on which a carry bag was lying. On checking the said carry bag, police recovered 46 strips of Nitrosun-10 drug. Out of these 46 strips, one tablet was found missing from one strip and the remaining 45 strips had 20 tablets each. Consequently, police recovered, 938 tablets of Nitrosun-10 drug, in all. Subsequently, the police party also complied with the procedural requirements under the NDPS Act and the CrPC and arrested the accused persons including the present bail petitioners. The recovered substance was sent to the laboratory for chemical analysis and it opined as under:

> "Various scientific tests such as physical identification, chemical, chromatographic analysis were carried out in the laboratory with the exhibit stated as tablets of Nitrosun-10, with representative & homogenous sample the above testes performed indicated the presence of Nitrazepam in the exhibit stated as Nitrosun-10. On quantitative analysis, the amount of Nitrazepam was found to be 9.98 mg per tablet in the exhibit stated as Nitrosun-10. The result thus obtained is given below. The exhibit stated as Nirosun-10 is sample of NITRAZEPAM tablets."

ANALYSIS AND REASONING:

5. Pre-trial incarceration needs justification depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, accused fleeing from justice, hampering the investigation, and doing away with witnesses. The Court is under the Constitutional obligation to safeguard the interests of the victim, the accused, the society, and the State.

6. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

7. The case of the State is that the quantity recovered is commercial quantity. Without going into the said controversy, in the present case more important question for the purpose of deciding the present bail petition is that whether the petitioners, who were visitors to the home of the main accused, from whose home, the Police had recovered the contraband, had the initial knowledge and awareness of the drugs being kept in the said house? The Police had conducted the search of the house on the basis of complaint of a neighbor, who apprised the Police that the house is a den of drugs. However, he did not name the present petitioners as

the regular visitors or members of the drug mafia. The Police either did not make out any investigation to connect them as members of the mafia, or the incriminating material did not come in the investigation against the petitioners. Thus, mere presence in the house, without other evidence implicating them, or pointing out that they were regular visitors to the said house, would entitle the petitioners to grant of bail, subject to the stringent conditions, as detailed in this order.

8. The following judicial precedents guide as follows:

a) In MohdAlam Khan v. Narcotics Control Bureau, (1996) 9 SCC 462, Supreme Court holds,

> "3. At the outset, it may be pointed out that the appellant was tried by the Special Judge along with the other accused and also along with a connected case. On 5-3-1989, officials of Narcotic Control Bureau, Bombay (N.C.B. for short) raided the houses of the co-accused. One of the co-accused by name, Raj Babu Pardan, pointed out the residence of the appellant situated at second floor, S.M. Mansion, 299 Bellasis Road, Bombay, thereby suggesting to conduct a raid in that premises as well. Accordingly that house of the appellant was searched on 6-3-1989 and some incriminating documents along with cash amount of Rs. 45,000/- came to be seized. In connection with that seizure, the appellant was brought to the office of the Narcotic Control Bureau, Bombay for interrogation. While the appellant was in the office of the Narcotic Control Bureau, Bombay for the purpose of interrogation, the Intelligence Officer of the said Bureau received information to the effect that the appellant was having another flat No. 102, in building No. 8A1 Quba Co-operative Housing Society, Millat Nagar, Andheri, Bombay-58. The further information received was to the effect that the appellant was trafficking in narcotic and psychotropic drugs in a big way and that he had stored Mandrex tablets numbering 50,000 to 60,000 in that house. On receipt of this information on the evening of 7th March, 1989, the said premises came to be searched in the presence of Panchas. In the search, the officials seized 50,000 Mandrex tablets contained in a maroon coloured bag along with certain documents. The samples of the said Mandrex tablets were drawn under a panchnama. The Deputy Director of Narcotic Control Bureau, was informed about the result of the search. It may be noted that the said search was conducted when the appellant was being interrogated by the Narcotic Control Bureau officials. It is also common ground that the said premises was under lock and key and the search party broke upon the lock for conducting the search. In the course of the interrogation, the appellant was asked about the seizure of those 50,000 Mandrex tablets and he was said to have given statements under Section 108 of the Customs Act, 1962, and also under Section 67 of the N.D.P.S. Act, 1985. In the course of the search and seizure of the said premises along with the contraband tablets and agreement dated 8.3.1989, supposed to have been signed by the appellant in favour of the promoter/builder was also seized by the officials.
>
> 8. The learned Additional Solicitor General submitted that the agreement by the appellant found in the premises in question and recovered by the officials containing the signature of the appellant is sufficient to establish that the appellant was the owner and in possession of the premises. In this connection, he invited our attention to Section 66 of the N.D.P.S. Act and submitted that the prosecution has established the case beyond doubt. He also submitted that the admission of the appellant during the course of interrogation under Section 67 of the N.D.P.S. Act is admissible in evidence and coupled with the fact of seizure of agreement containing the signature of the appellant, it is not open to the learned counsel for the appellant to contend that the prosecution has failed to establish the ownership of the appellant regarding the premises in question.

9. We have considered the rival submissions. We do not think that the learned Additional Solicitor General is right in invoking the aid of Section 66 of N.D.P.S. Act for Section 66(i) visualises the production of a document which has been seized from the custody or control of any person or furnished by any person. In this case, the document namely the agreement has not been seized from the custody of the appellant or it has been furnished by him. In order to invoke the aid of Section 66, the prosecution should have established that the appellant is the owner and was in actual possession of the flat in question. Therefore, we are not able to accept the argument of the learned Additional Solicitor General. It is not in dispute that the appellant did not admit his signature in the agreement in question. The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from concerned Registrar's office or by examining the neighbours. No statement has been made by the prosecution that in spite of the efforts taken by them, they could not produce the document or examine the neighbours to prove the ownership of the appellant relating to the flat in question. It is relevant to note here that two independent witnesses attested the panchnama. Only one of them was examined as P.W. 5 who did not support the prosecution version and therefore was treated as hostile. In this case except the retracted statements of the appellant to connect the appellant with the house in question, no other independent evidence is available to sustain the finding of the learned Special Judge extracted in the beginning and confirmed by the High Court.

10. The High Court was not right in holding that “the learned Trial Judge was therefore right in holding that in view of Section 66 of the N.D.P.S. Act, the said document can be admitted in evidence and it goes to show that the said flat was owned by the appellant”. Again the High Court observed that “even assuming” that the said agreement is excluded from consideration, there remains the specific information received, Exhbt. 33 and his own statement recorded by the Authority under Section 313, Exhbt. 83 and 84 and all of them go to show that the appellant was the owner of the said flat. As pointed out earlier that nobody has identified the flat in question as belonging to the appellant and in the absence of corroborating evidence, one cannot come to a confirmed conclusion regarding ownership and possession on the basis of the retracted statements of the appellant alone.

11. For all the reasons, we hold that the prosecution failed to establish the ownership of the flat in question as belonging to the appellant and consequently the conviction and sentence challenged in this appeal cannot be sustained. Accordingly, the appeal is allowed and the conviction and sentence passed against the appellant are set aside.”

b) In Ismailkhan Aiyubkhan Pathan v. State of Gujarat, (2000) 10 SCC 257, in a case where 6 persons were found present in a room, from which a gunny bag was recovered, which was containing charas, Supreme Court holds,

“2. The summary of the prosecution case is the following:

PW 7 Inspector of Police of Crime Branch in the Vigilance Squad got some sleuth information on 6-5-1991 that illicit trafficking was going on in the room on the 1st floor of a building which was in the possession of one Nasir. He also got information that the said Nasir had kept a stock of "charas" and was dealing with the same through his servants. On the strength of the aforesaid information PW 7 along with other police personnel reached the said building for the purpose of catching the culprits. He called out the name of Nasir but none came out holding that name. However, when he entered the room he found all the 6 accused persons therein. He found a gunny bag being kept in the corner of the room. It

was opened and the substance therein was tested with the help of Shri B.N. Dave, who came by that way (that person is said to be an expert attached to the Forensic Science Laboratory). Mr Dave conducted an "on-the-spot scientific test" and proclaimed that the substance was "charas".

3. It is unnecessary for us to go into the other evidence because we will assume that whatever PW 7 has said is correct and the rest of the evidence for the prosecution had only supported the version of PW 7. But the question is how the appellants can be fastened with the liability for possession of the contraband article wrapped in the gunny bag which was kept in the room.

4. There is no evidence that anybody had seen that any one of the accused was dealing with narcotic drugs . There is also no evidence to show that any one of them had admitted either through a confession or otherwise of any incriminating role. Nor is there evidence that the accused persons, who were found sitting in the room, had possession of the room, actual or constructive. It is the prosecution case that the said room was in the possession of Nasir. But that Nasir is not an accused in this case . He was not examined as a prosecution witness to disclose as to how the accused persons happened to be in the room. None of the neighbours supported the prosecution case that any one of the accused had a connection with the article in question.

5. Thus, we are left with only a modicum of evidence as against the accused, which only shows that they were present in the room which was in the possession of one Nasir and that the said room contained a gunny bag with the narcotic substance "charas".

6. We are unable to sustain the conviction of the offence under Section 20(b) read with Section 29 of the Act as for any one of the appellants on the strength of the aforesaid evidence. It is too insufficient to bring home the guilt of the appellants.

7. It appears that the High Court put the burden on the appellants to explain as to how they were present in the room. This is what the High Court has observed:

"In the present case , at odd hours of the night when the premises was raided, all the accused were present and have not explained as to how and why and since when they were present in the premises. Therefore, in our opinion, only inference can be drawn from their unexplained presence in the premises, they being not tenants of the premises is that they were in possession of the premises at the relevant time and the substance found from that premises is possessed by them."

8. There is no statutory provision for drawing any presumption that a person who was present at any particular place shall be presumed to be in possession of the narcotic or psychotropic substance. No presumption under law can be drawn even under Section 114 of the Evidence Act merely because these persons were present when PW 7 went there.

9. Either those persons would have been casually present in the room or at least one of them would have been unaware of what was going on inside the room. We are not told who among the many accused that one possible innocent person could have been.”

c)In Om Prakash alias Baba v. State of Rajasthan, 2009 (10) SCC 632, Supreme Court holds,

"2. The prosecution story is as under :

On 11-9-1999 at about 7.00 a.m., PW 11, Ram Chander, SHO, Kotwali Fatehpur and several other police officials raided the house allegedly belonging to the appellant to arrest Pankaj, his son in some criminal matter, and as they approached his residence, they saw the appellant who was present, attempting to run away. He was however apprehended and the house entered and searched and a huge quantity of Charas, opium and Gaanja were recovered from under a mattress in a newly- constructed room. The S.H.O. sent information to the Superintendent of police, Seekar and completed the other formalities relating to the search & seizure. Several independent witnesses were also called to countersign the search memos. The contraband recovered was sent to the Malkhana and thereafter for analysis to the Laboratory and a report was duly received. On completion of the investigation the appellant was charged for the offences above-mentioned and as he pleaded innocence, he was brought to trial.

11. A bare perusal of the evidence aforementioned would reveal that the ownership and possession of the house and the place of recovery is uncertain. As a matter of fact PW.3 has categorically stated that the house from where the recovery had been made belonged to one Durga Bhanji and not to the appellant. Even assuming for a moment that the house did belong to the appellant and was in his possession, the prosecution was further required to show the appellant had exclusive possession of the contraband as a very large number of persons including the appellant and five of his brothers, their children and their parents were living therein. Admittedly, there is no evidence as to the appellants exclusive possession."

d) In Naushad v. State of Kerala, 2000(3) Crimes 15, Kerala High Court has held as follows,

"4. ... Thus as rightly pointed out by the learned Counsel for the appellant, there is no reliable and acceptable evidence that the room in question, was in the exclusive and conscious possession of the appellant and the other family members had no access to this room. Hence, it is very difficult to accept the case of the prosecution that the room in question was in the exclusive possession of the appellant."

9. Given the above reasoning, in my considered opinion, the judicial custody of the petitioners/accused is not going to serve any purpose whatsoever, and I am inclined to grant bail on the following grounds, apart from above, but subject to stringent conditions:

a) The petitioners are in judicial custody since Aug 13, 2019.

b) The investigation is complete and the report under section 173(2) CrPC stands filed.

c) The petitioners are permanent resident of address mentioned in the memo of parties; therefore, their presence can always be secured.

d) In the status report, there is no mention of previous criminal history of the bail petitioner.

10. In the result, the present petitions are allowed. The petitioners shall be released on bail in the present case, in connection with the FIR mentioned above, on their furnishing personal bonds in the sum of Rs.10,000/- each, with two sureties each in the like amount to the satisfaction of the Trial Court or any other Court exercising jurisdiction over the concerned Police Station where FIR is registered.

11. The Court executing the personal and surety bonds shall ascertain the identity of the bail-petitioner, her family members, and of sureties, through AADHAR Card, Pan Card, Ration

Card, etc. The petitioners shall mention phone numbers and other details, on the reverse page of the bonds.

12. The Counsel for the accused and the attesting official shall explain all conditions of this bail to the petitioners.

13. The petitioners undertake to comply with all directions given in this order and the furnishing of bail bonds by the petitioners is acceptance of all such conditions:

> **a)** The petitioners shall appear before the Court which issues the summons or warrants, and shall furnish fresh bail bonds to the satisfaction of such Court, if such Court directs to do so.
>
> **b)** The petitioners shall not hamper the investigation.
>
> **c)** The petitioners undertake not to contact the complainant and witnesses, to threaten or browbeat them or to use any pressure tactics.
>
> **d)** The petitioners undertake not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any police officer or tamper with the evidence.
>
> **e)** The petitioners shall neither influence nor try to control the investigating officer in any manner whatsoever.
>
> **f)** In case, the petitioners are arraigned as accused of the commission of any offence, prescribing the sentence of imprisonment of more than seven years and in case the bail petitioners are arraigned as accused in any case, under the provisions of the NDPS Act, irrespective of the quantity, be it a small quantity, then within thirty days of knowledge of such FIR, the petitioners shall intimate the SHO of the present police station, with all the details of the present FIR as well as the new FIR. It shall be open for the State to apply to this Court or to the Trial Court for cancellation of this bail, if it deems fit and proper.
>
> **g)** Within 30 days from today, the petitioners shall sell, or surrender, all firearms along with ammunition, and arms licenses, if any, to the authority which had given such permission.
>
> **h)** Apart from above, in case the Petitioners do not turn up before the Trial Court, then the trial Court may issue Non-Bailable warrants and send the petitioners to the Judicial Custody for the period for which the presence of the petitioners cannot be dispensed with. If the petitioners violate any other condition(s) as stipulated in this bail order, then the Trial Court may direct the Public Prosecutor to file a cancellation application before it and it shall be lawful and permissible for the Trial Court to cancel the bail.
>
> **i)** Until the conclusion of the trial, the petitioners shall not enter within a radius of five kilometers from the said house, i.e., Flat No. 10, Block C-26, Housing Board Colony, Vikasnagar, Shimla, HP, from where the alleged drug was recovered. The default of this condition, even for a single time, shall lead to automatic cancellation of this bail, qua the accused who violates it.
>
> **j)** In case the petitioners repeat the offence or commit any offence where the sentence is seven years or more, then before granting bail, the Courts shall consider the fact that they were warned earlier about not repeating the offence and not committing it.

14. This order of bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the petitioners.

15. In case the petitioners find the bail condition(s) as violating fundamental or other right, or any human right, or faces any other difficulty due to any condition, then, the petitioner may file a reasoned application for modification of such term(s).

16. It is clarified that the present bail order is only with respect to the above-mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, registered against the Petitioners.

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

18. The petitions stand allowed in the aforesaid terms.

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

Lal Chand ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.660 of 2017
Reserved on : 20.11.2019
Date of Decision : 29.2.2020

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 – Recovery of commercial quantity of 'charas'- Proof of- Appeal against conviction and sentence recorded by Special Judge- Accused arguing that evidence of prosecution witnesses is full of contradictions and benefit of doubt should have been given to him- Effect of contradictions- Held, individual contradiction, discrepancy or embellishment in prosecution case, if considered singly may not be fatal but the cumulative effect thereof creates doubt, then its benefit is to be extended to accused. (Para 27)

Evidence Act, 1872- Sections 101 & 102- Burden of proof- Principles summarized- Held, stringent the punishment, higher the assurance of evidence for conviction and sentencing is required. (Para 18)

Evidence Act, 1872- Sections 101 & 102- Burden of proof in criminal case- Defence plea- Relevancy- Held, plea raised by accused in his defence is of no consequence in a criminal case- Burden to prove case beyond reasonable doubts is always on prosecution (as per Hon'ble Shri Justice Dharam Chand Chaudhary, J.) . (Para 9)

Whether approved for reporting? Yes.

For the Appellant : Mr. Dibender Ghosh, Advocate, as Legal Aid Counsel.

For the Respondent : Mr. Vikas Rathour & Mr. Narinder Guleria, Additional Advocates General.

Vivek Singh Thakur, Judge

The present appeal has been preferred by accused-convict-appellant Lal Chand against the judgment dated 25.3.2017, passed by learned Additional Sessions (Special) Judge, Kullu, District Kullu, Himachal Pradesh, in Sessions Trial No.38 of 2015, titled as *State of Himachal Pradesh v. Lal Chand*, whereby the accused has been convicted for having committed an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of `1,00,000/-, and further to undergo simple imprisonment for a period of one year in case of default of payment of fine.

2. We have heard learned counsel for the accused, learned Additional Advocate General, and also gone through the record.

3. Prosecution case in brief is that a police party, headed by ASI Dinesh Kumar (PW-9), consisting of HHC Tikkam Ram (not examined), HHC Chet Ram (PW-8), had left Police

Station, Sadar (Kullu) in official vehicle, bearing No.HP-34A-9986, being driven by Constable Karam Chand (not examined), for patrolling in the jurisdiction of Police Station, Sadar (Kullu), after making DD Entry No.7, dated 28.3.2015 at 4 a.m. (Ex.PW-5/A). At about 5.15 am, when police party was present near Raugi*/8///
//
/// Nala, on the road from Kullu to Manali, a person, carrying a bag in his hand, was noticed coming on foot from Manali side to Kullu side, who, on noticing the police party, took about turn and started running towards Manali, whereupon he was chased and apprehended by ASI Dinesh Kumar (PW-9), with the help of other police officials, at a distance of 10 metres and was asked reason for running from the spot, but he could not give satisfactory answer. On asking about his carry bag, he started trembling and did not answer anything, causing suspicion of carrying stolen articles and necessitating the search of his bag. As per prosecution case, at that time, there was no movement on the road and the place was secluded. Therefore, PW-9 ASI Dinesh Kumar sent HHC Tikkam Ram in search of witneses towards Kayas, who returned after about 20 minutes and informed that he did not find any person, which led to the forming of search party by associating PW-8 HHC Chet Ram and HHC Tikkam Ram (not examined), for carrying out search and seizure procedure. Before conducting search of the accused, the police party gave its search to the accused vide Memo Ex. PW-8/A, and thereafter during search of the bag of the accused, stick-shaped black substance was found wrapped in a transparent polythene envelope. On the basis of experience, after smelling the substance, it was identified as charas. After weighing the same, alongwith the carry bag, on Electronic Weighing Machine, it was found to be 2.015 kg. Thereafter, the contraband substance, alongwith the carry bag, was sealed in a cloth parcel with seal impression 'I' and taken into possession vide Memo Ex.PW-8/E, which was signed by the accused and two witnesses, namely PW-8 HHC Chet Ram and Tikkam Ram, copy of which was also supplied to the accused, free of cost. Facsimile of the seal Ex.PW-8/B was also taken on a piece of cloth. Thereafter, Ruka (Ex.PW-8/C) was prepared and sent to Police Station, Kullu, through PW-8 HHC Chet Ram, who reached the Police Station at 9.15 a.m. and handed over the same to SHO Anil Kumar (PW-4). On the basis of Ruka, FIR No.77/15, dated 28.3.2015 (Ex.PW-4/A) was registered at 9.15 a.m. and after making endorsement (Ex.PW-4/B) on the Ruka, the case file was handed over to PW-8 Chet Ram for giving it to Investigating Officer ASI Dinesh Kumar.

4. It is the case of prosecution that the accused was arrested on the spot at about 10.30 a.m., after giving him information about his arrest vide Memo Ex.PW-8/F, which was signed by the accused as well as Tikkam Ram (not examined) and PW-8 Chet Ram. After arrest of the accused, his personal search was conducted vide Memo Ex.PW-8/G, according to which a Mobile Phone, a copy of Memo Ex.PW-8/E and an amount of `620/- were found being carried by him.

5. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure and Spot Map (Ex.PW-9/A) was prepared by the Investigating Officer (PW-9) on the spot and thereafter case property alongwith accused was taken to the Police Station and produced before PW-4 Inspector Anil Kumar (SHO) at 2.05 p.m. and in this rgard GD Entry No.16A (Ex.PW-2/A) was made in Daily Station Diary of the Police Station. Thereafter, PW-4 had resealed the parcel of the contraband substance with seal 'S' and filled the relevant column of NCB Form in triplicate and had taken sample of seal 'S' on a separate piece of cloth (Ex.PW-4/C). Thereafter, the case property alongwith documents was handed over to MHC Rakesh Kumar (PW-3) by PW-4 Inspector Anil Kumar, after making GD Entry No.18A, dated 28.3.2015 (Ex.PW-2/B) in the Daily Station Diary, at 2.25 p.m. PW-3 MHC Rakesh Kumar, after entering the case property and the documents at Sr. No.1753 in the Malkhana Register (Abstract Ex.PW-3/B), had kept the same in Malkhana.

6. PW-9, the Investigating Officer prepared Special Report (Ex.PW-6/A) on 29.3.2015 and had sent it to the Additional Superintendent of Police, which was received by him at 5.20 p.m. and was handed over to PW-6 Constable Ajay Sharma, his Assistant Reader, who had made entry in the Register at Sr. No.24 (Abstract Ex.PW-6/B).

7. On 30.3.2015, the recovered contraband was sent for Chemical Examination by PW-3 MHC Rakesh Kumar through PW-1 Constable Mahesh Kumar, vide RC No.112/15 (Ex.PW-3/C), alongwith Forwarding Letter (Ex.PW-4/D). PW-1, after depositing the case property with State Forensic Science Laboratory, Junga, had handed over the receipt thereof to PW-3 HHC Rakesh Kumar.

8. On receipt of the report (ExPW-9/B) of the Chemical Examiner and completion of investigation, challan was presented in the Court for trial.

9. On fining prima facie complicity of the accused in the alleged crime, he was charge-sheeted for having committed an offence under Section 20 of the NDPS Act. The accused had pleaded not guilty and claimed trial.

10. To bring home the guilt of the accused, prosecution examined as many as 9 witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:

> "I am innocent. In fact, on 27.3.2015 at 7.00 P.M., I was waiting for the bus at Bus Stand Kullu for Manali side and I was under the influence of liquor. One unclaimed bag was found underneath the bench made for the passengers to sit at Bus Stand. Other passengers were also there. All the passengers denied the ownership of the unclaimed bag. On search of the bag charas was recovered from the said bag on the Bus Stand. I was under intoxication and could not reply satisfactorily at the Bus Stand. Therefore, on suspicion I alongwith the bag was brought to Police Station for thorough investigation and on suspicion on 28.3.2015 at morning time false case was made against me."

The accused had chosen not to lead any evidence in defence.

11. On conclusion of trial, accused stands convicted and sentenced, as aforesaid.

12. Learned counsel for the accused has pointed out that there are glaring contradictions and discrepancies in the evidence of the prosecution, going to the root of the genesis of the prosecution story, for which the accused is entitled for acquittal. He has pointed out that it is claim of the prosecution that the accused was apprehended at 5.15 a.m. and HHC Tikkam Ram, who was sent for search of independent witnesses, came back after 15-20 minutes and thereafter official witnesses were associated in the search and seizure procedure and after giving their search to the accused, personal search of the accused was conducted, meaning thereby that search of the accused was conducted at about 5.30-5.35 a.m., but in Memo of personal search of officials (Ex.PW-8/A), time of giving personal search by these officials has been mentioned as 5.20 a.m. and further in the NCB form the time of recovery of the contraband substance has been mentioned as 7.15 a.m., which indicates that the entire story of recovery of contraband substance has been cooked up by the prosecution by sitting in the Police Station, which probablizes the defence of the accused that he was apprehended a day before the alleged recovery on Bus Stop, while he was intoxicated, after thrusting upon him the recovery of contraband substance from an unclaimed bag lying on the Bus Stand. Further that it is the prosecution case in the Special Report (Ex.PW-6/A) that photographs were taken on the spot, but no such photographs have been produced in the Court, rather it is claimed by the prosecution witnesses in the Court that no photographs were taken on the spot, which again creates serious doubt about the case of the prosecution, and lastly it is submitted that there being habitation and market within a radius of 100-300 metres from the spot of the alleged recovery, and also alleged spot of recovery being on the Kullu-Manali National Highway, no efforts, made to join independent witnesses, have been proved on record and only official witnesses have been cited as available witnesses. It is further contended that PW-8 and PW-9 have admitted that vehicles were crossing from the road, but there is nothing on record to reflect that any effort, to associate any occupant of those vehicles, was made by the Investigating Officer.

13. Mr. Sunny Dhatwalia, learned Deputy Advocate General, has submitted that the contradictions and discrepancies pointed out by the learned counsel for the accused are minor in nature and do not go to the root of the case and thus are not of any help to the accused. He has supported the impugned judgment and reasons enumerated therein by the learned Special Judge.

14. It is claim of prosecution that the accused was noticed on the spot at 5.15 a.m. In Ruka (Ex.PW-8/C), Special Report (Ex. PW-6/A) and FIR (Ex.PW-4/A), it is categorically stated that when HHC Tikkam Ram, who was sent by PW-9 ASI Dinesh Kumar in search of independent witnesses, returned empty handed after 20 minutes, then the police officials, PW-8 Chet Ram and HHC Tikkam Ram, were associated as witnesses for conducting the search of the accused, and thereupon they gave their search to the accused. Believing the prosecution case as such, the time of giving personal search by the police officials must be 5.30-5.35 am, however, in the Memo of Search (Ex.PW-8/A), this time is mentioned as 5.20 a.m.

15. In his deposition in Court, PW-8 Chet Ram has categorically stated that after associating himself and HHC Tikkam Ram in the investigation, the Investigating Officer gave his personal search to the accused and regarding that Memo Ex.PW-8/A was prepared and he had signed the said Memo in Red Circle 'A'. He is silent about his personal search and that of HHC Tikkam Ram, having been given to the accused a claimed by PW-9ASI Dinesh Kumar in his deposition as also in Memo Ex.PW-8/A, which renders not only Memo Ex.PW-8/A but also the sequence of events, as claimed by the prosecution, to be doubtful.

16. Further, even if timings mentioned in Ex.PW-8/A are ignored, there is another document NCB Form Ex.PW-3/A filled-in by the Investigating Officer on the spot, wherein in Column-3, time of seizure has been mentioned as 7.15 a.m. There is a gap of two hours between recovery of contraband substance and taking the same into possession, as if we believe the Ruka, Special Report and also the Memo Ex.PW-8/A, time of recovery is about 5.30 a.m. Wherefrom the time of seizure has been mentioned in NCB Form Ex.PW-3/A as 7.15 a.m., is not clear.

17. As per statement of Investigating Officer (PW-9), the police party remained on the spot for about three hours, meaning thereby that the police party was on the spot till 8.15-8.30 a.m. Even if further margin of half an hour is given, the police party should have left the place by 9 a.m. In the Memo of information of arrest Ex.PW-8/F, the accused has been shown to have been arrested at 10.30 a.m. on the spot near Raugi Nala. According to PW-8 Chet Ram he returned to the spot with the case file at 10.30 a.m., after registration of FIR at 9.15 a.m. If PW-9 Investigating Officer is believed, the police party was not there after 9 a.m., then how the accused was arrested at 10.30 a.m., on the spot, and to whom PW-8 Chet Ram met and handed over the case file on the spot at 10.30 a.m., are the facts which could not be reconciled with the other timings of the story mentioned in the prosecution case.

18. In Special Report (Ex.PW-6/A), it is categorically mentioned by the Investigating Officer that the Site Map was prepared and the photographs on the spot were taken, but no such photographs have seen light of the day during trial. In their cross-examination, PW-8 Chet Ram and PW-9 ASI Dinesh Kumar have stated that no photographs were taken. Special Report was prepared by PW-9 Investigating Officer on the very next day of the alleged recovery of the contraband substance, i.e. on 29.3.2015, which was sent by him to his superior, i.e. Additional Superintendent of Police, wherein he has categorically recorded that photographs of the spot were taken. In his deposition in Court, he has not clarified the same despite the fact that mention of taking photographs in Special Report (Ex.PW-6/A), prepared by him, was put to him and he had admitted the same to be correct. There is no explanation on record, either documentary or oral, to reconcile this discrepancy.

19. Ex.PW-8/G is a Memo of personal search of the accused, conducted after his arrest, wherein recovery of Mobile Phone and some cash alongwith a copy of seizure memo has been indicated. At the bottom of this Memo there is an endorsement, alleged to have been made by the accused, wherein he has stated that he has received his Mobile Phone and

Cash. The accused was arrested and articles recovered during his personal search (Jamatalashi) were taken into possession by the police and thereafter the said articles were to be returned only after his release, that too under the orders of the competent Court or authority only. It is not clear that under what circumstance and for what reason and under which provision, these articles have been shown to have been returned to the accused, that too on the Memo of personal search conducted on his arrest. The arrested person cannot be allowed to carry his mobile phone or cash with him in any eventuality. In the given facts and circumstances, it is another circumstance to discredit prosecution story.

20. It is the case of prosecution that the accused was arrested at 10.30 a.m. and thereafter his personal search was conducted vide Memo Ex.PW-8/G, but in GD Entry Ex.PW-2/A, entry made after resealing the case property in the Police Station by PW-4 Inspector Anil Kumar, it has been mentioned that after handing over the accused by PW-9 to PW-4, he was interrogated and thereafter, after conducting his personal search, he was lodged in the Lock-up, but no Memo of such personal search has been produced in Court. In case personal search had already been conducted on the spot, there was no occasion to conduct the personal search again. It again creates doubt about fairness of investigation.

21. It is claimed by prosecution that recovery of contraband was effected on the National Highway at about 5.20-5.35 a.m. in the month of March. It is not dark in the morning in the month of March at 5.30 a.m. It was not absolutely secluded place as it has also come in evidence in cross-examination of PW-8 Chet Ram, though denied by PW-9 Dinesh Kumar, that habitation at Raison was at a distance of 150 metres from the spot and during that period vehicles were also crossing the spot. HHC Tikkam Ram was sent in search of independent witnesses but in which direction, he was sent or he went, has not been clarified in the evidence on record. No one was available or someone available had refused to become a witness has also not been clarified. The facts could have been clarified by HHC Tikkam Ram but incidentally he has not been examined by the prosecution. It is also true that, for more than one reason, it may not be possible for prosecution every time to arrange or to make available and associate independent witnesses to witness the search and seizure process during police investigation. Keeping in view the stringent provisions of NDPS Act and consequences thereof, affecting the personal liberty of accused, the Legislature as well as Courts have legislated and evolved procedure to provide fair investigation, safeguarding the interest of accused, and for this reason necessity of associating independent witnesses at the time of search and seizure process is pressed into. However, in exceptional circumstances, in cases where satisfactory and plausible explanation for non-joining or non-availability of independent witnesses is there, Courts do not reject the case of prosecution only for not joining or associating independent witnesses. In present case, no plausible, satisfactory explanation has come on record for not joining or associating the independent witnesses. The only version of PW-8 Chet Ram and PW-9 ASI Dinesh Kumar, available on record, speaks that HHC Tikkam Ram was sent for search of independent witnesses but after 20 minutes he reported non-availability of the same. As stated supra, reason for the same has not come on record despite the fact that there was habitation at a distance of 150 metres and the alleged spot of recovery is National Highway, wherefrom vehicles were also crossing.

22. It is also settled law that in absence of independent witnesses, testimony of official witnesses is not to be discarded only on this count. In case evidence on record, otherwise is found cogent, reliable and trustworthy, conviction can be based upon the testimony of official witnesses only. But, in present case, prosecution has chosen not to produce even the available official witness(es). There are only four main witnesses of the spot, out of them PW-9 ASI Dinesh Kumar, HHC Tikkam Ram and Driver Constable Karam Chand remained on the spot throughout, during investigating, whereas PW-8 HHC Chet Ram had left the spot at 8.30 a.m. and, according to him, he had returned to the spot at 10.30 a.m. Between 8.30 a.m. and the time when the police left the spot, only PW-9 HHC Tikkam Ram and Driver Constable Karam Chand were present on the spot, but the prosecution has not examined HHC Tikkam Ram, who alongwith Shri Nihal Chand, Additional Superintendent of Police was given up being repetitive in nature, as the contents of recovery memo and Special Report have been proved by other witnesses. Constable Karam Chand, Driver of official

vehicle, has not been cited as witness nor has been examined. It is true that it is quality of evidence not quantity which matters but at the same time considering the facts and circumstances of present case, where no independent witness is there and punishment for offence charged is also stringent, prosecution should have examined available witnesses to corroborate version of Investigating Officer PW-9 Dinesh Kumar.

23. PW-9 ASI Dinesh Kumar is Investigating Officer. To corroborate his statement in entirety, examination of Tikkam Ram was necessary, as he was the person who was with PW-9 during the entire investigation. PW-8 HHC Chet Ram remained with the Investigating Officer for a specific period and rest of the investigation, which was conducted in the presence of Tikkam Ram was to be corroborated/proved by him. Therefore, withholding the examination of HHC Tikkam Ram is also fatal to the prosecution.

24. According to PW-8 Chet Ram, after departing from the spot at 8.30 a.m., he reached in Police Station at 9.15 a.m. and thereafter FIR Ex.PW-4/A was recorded by PW-4 Anil Kumar and the case file was handed over to PW-8 Chet Ram at 9.45 a.m. who reached back on the spot at 10.30 a.m. According to PW-4 Anil Kumar, he had received the file at around 8.30 a.m. Arrival of PW-8 Chet Ram in the Police Station is 9.15 a.m. How can and wherefrom Ruka was received by PW-4 Anil Kumar at 8.30 a.m. is irreconcilable. Further, according to the prosecution story, police party was having official vehicle and Investigating Officer PW-9 Dinesh Kumar has expressed his ignorance about the means by which PW-8 Chet Ram had gone to Police Station and returned from there, which indicates that the official vehicle was not used by PW-8 Chet Ram for going and coming back. By arranging the means for visit to and return from the Police Station, PW-8 Chet Ram had taken 45 minutes for one side journey. It is also prosecution case, as has come in deposition of PW-9 Dinesh Kumar, that police party had left the spot after three hours and even after giving concession of half an hour, at the most, the police party had left the place at 9 a.m. Contrary to this, it has also come in evidence that police party was on the spot till 10.30 a.m. In any case, if this discrepancy is ignored for a moment, there is no evidence that police party had stayed on the spot after 10.30 a.m. Therefore, at least, after 10.30 a.m., the police had left for the Police Station, but as per GD Entry No.16 (Ex. PW-2/A), police party had arrived in the Police Station at 2.05 p.m. After consuming time to arrange the means to reach and come back from Police Station, a police official has taken 45 minutes, to cover the distance from spot to Police Station, whereas by using the official vehicle, the police party had taken 4-5 hours to reach the Police Station from the spot. In Ruka Ex.PW-8/C, distance of place of recovery from the Police Station has been mentioned as 15 kms. It is again unbelievable that for travelling a distance of 15 kms, that too on National Highway, in official police vehicle, the police party consumed 4-5 hours. In these circumstances, testimony of police official with respect to timings claimed in the documents, as well as in their deposition, is not trustworthy.

25. It is also noticeable that appellant-Accused has raised specific defence that on 27.3.2015 at 7.30 p.m., when he was intoxicated and was not able to reply the interrogation of the police official, at a Bus Stop where other passengers alongwith luggage were also present and Charas was found in an unclaimed bag lying there, then he was apprehended and taken to the Police Station for thorough investigation and on suspicion, on 28.3.2015, a false case was foisted upon him. Suggestions have also been put to PW-2 Saroj Kumari and PW-5 Khub Ram that Daily Station Diary entries, i.e. No.7 Ex.PW-5/A, No.16 Ex.PW-2/A and No.18 Ex.PW-2/B are fabricated. To prove movement of police party, i.e. departure at 4 a.m., from the Police Station and return at 2.05 p.m. to the Police Station, prosecution has relied upon GD Entry No.7 dated 28.3.2015 (Ex.PW-5/A) and GD Entry No.16 dated 28.3.2015 (Ex.PW-2/A), and for establishing the resealing of case property and depositing the same in Malkhana and putting the accused in Lockup at 2.25 p.m., prosecution has placed on record copy of GD Entry No.18 dated 28.3.2015 (Ex.PW-2/B). For proving Ex.PW-5/A, Ex.PW-2/A and Ex. PW-2/B, prosecution has examined PW-2 Lady Constable Saroj Kumari and PW-5 HHC Khub Ram. These Reports have been disputed on behalf of accused by putting suggestion to the witnesses that the aforesaid Reports were fabricated lateron, meaning thereby the timing of entry of these GD entries in Daily Station Diary has been disputed by the accused. No doubt, a Certificate Ex.PW-2/C has been placed

on record, wherein PW-2 Saroj Kumari has certified that Rapt Nos.16 and 18 dated 28.3.2015 were entered by her in the official Computer, which is an electronic device maintained in the Police Station by her and that at the time of making entries and also taking out the print of the same the system was in working order with proper power supply and no tampering, addition, alteration or editing had been done to any of the contents of the electronically generated document, either by her or any other person. A similar certificate (Ex. PW-5/C) has been produced on record by PW-5 Khub Ram with respect to copy of Report No.7. But these Certificates do not certify that these reports were entered in Daily Station Diary at the time as reflected in these copies of reports nor there is such assertion in the deposition of PW-2 Saroj Kumar and PW-5 Khub Ram. Normally, contents, including the data and time contained in the copies of such reports, are considered to be true and correct and are believed by the Courts, but when timings thereof are disputed by the accused and it is claimed that these documents are fabricated and timings thereof are manipulated and further that evidence otherwise on record is indicating irreconcilable timing of events and ultimately not establishing convincing story on record, it becomes imperative for the prosecution to prove the timing of preparation of record of such electronic documents, particularly computer generated copies, by placing on record the METADATA of such documents, which contains the complete details of computerised documents from date and time of its origination till taking out the copy thereof, including indication of alteration, modification or addition/subtraction therein and details thereof. In present case, CIPA Certificates placed on record are silent about the same. Relevant witnesses are also silent about timings of origination of these documents. In such a situation METADATA of these documents would have thrown light in regard to authenticity as METADATA of a document speaks itself.

26. As stated supra, production of MATADATA of a document may not be necessary in all cases but where story of prosecution is otherwise doubtful and construction/ preparation of documents has been alleged to be fabricated, production of METADATA by prosecution shall definitely clinch such issues as to our knowledge METADATA of a document cannot be tampered and in case of modification, alteration or tampering, these activities will also be reflected alongwith date and time of origination of document, in METADATA which is not available in present case. Therefore, for want of reliable evidence with respect to Ex.PW-2/A, Ex.PW-2/B and Ex.PW-5/A, the timing of preparation thereof cannot be treated to have been proved beyond reasonable doubt.

27. Each contradiction, discrepancy or embellishment in the prosecution case, if considered singly, may not be fatal, but the cumulative effect of the aforesaid contradictions, discrepancies and embellishments definitely renders the prosecution story to be doubtful as conjunctive reading of the entire evidence creates doubt about the manner of recovery, as claimed by the prosecution. It is cardinal principle of the criminal jurisprudence that where there is a doubt, benefit of the same is to be extended to the accused.

28. Keeping in view the increasing menace of drug addiction, an accused, for transporting the contraband, does not deserve leniency, however, at the same time it is also settled that stringent the punishment, higher the assurance of evidence for conviction and sentencing is required. Therefore, for awarding stringent punishment, strict proof of commission of offence, by leading cogent, reliable, tangible and convincing evidence is necessary, which is lacking in present case for the discussion herein above as we see that the very genesis of the case of prosecution has been shaken and, therefore, the accused deserves benefit of doubt.

29. Accordingly, the appeal is allowed and the impugned judgment is set aside. Consequently, the conviction and sentence imposed upon the accused are also set aside and he is acquitted of the charged offence, by giving him benefit of doubt. The amount of fine, if stands deposited by the accused, be refunded to him. The accused is ordered to be released, if not required in any other case. Release warrants be prepared and issued accordingly.

30. We place on record our appreciation for the assistance rendered by Mr. Dibender Ghosh, learned Legal Aid Counsel.

Appeal stands disposed of, so also pending application(s), if any.

BEFORE HON'BLE MR.JUSTICE ANOOP CHITKARA, J.

Rajiv Jiwan ...Petitioners.

Versus

State of Himachal Pradesh ...Respondent

Cr.MMO No. 51 of 2020
Date of Decision: January 24, 2020.

.**Code of Criminal Procedure, 1973 (Code)-** Section 482- Inherent powers- Exercise of- Quashing of FIR- Circumstances- Petitioner a Senior Advocate seeking quashing of FIR registered against him for being a member of unlawful assembly, assault on public servant, wrongful restraint and criminal intimidation etc., during agitation of Advocates- Held, FIR registered with respect to incident nowhere mentions the role played by petitioner- Portion of video showing petitioner inflicting hurling abuses or fist blows or threatening SHO not shown- No allegation against petitioner of participating in any criminal act- Holding peaceful procession, raising slogans would not and cannot be an offence under any law- Mere presence at spot in such demonstration would not invite criminal act in facts and allegations made in FIR- Petition allowed- FIR and other consequential proceedings quashed. (Para 4 & 8).

Cases referred;

Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786,
Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193),
NripendraBhusan Roy v. GobinaBandhu Majumdar, AIR 1924 Cal 1018
Ramanathan Chettiyar v. SivaramaSubramania, ILR 47 Mad 722 : (AIR 1925 Mad 39).
MadhavraoJiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692,

Whether approved for reporting?[23] ***Yes.***

For the petitioner: Mr. Prashant Sharma, Advocate, for the petitioner.

For the respondent: Mr. Narender Guleria Additional Advocate General, Mr. Bhupinder Thakur Deputy Advocate General, and Mr. Rajat Chauhan, Law Officer, for the respondent-State.

Anoop Chitkara, Vacation Judge.

The Petitioner, who was President of High Court of Himachal Pradesh Bar Association, at the time of lodging of FIR, has come up before this Court seeking quashing of FIR, registered against him for wrongful restraint, forming unlawful assembly, rioting, indulging in criminal force to deter public servants from discharging their duties, intentional insult with intention to breach the peace, and criminal intimidation. It has been averred that the lawyers were protesting peacefully against restricting the entries to the District Court complex Shimla from a shorter route, forcing them to take a longer way, which had traffic jams, resulting in delay in attending to the Courts, because the Police had registered it due to wreaking vengeance with malicious intentions to scuttle the agitation, and the Police arraigned him as the principal accused

because he was supporting their cause, although he was not even present at the spot.

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[23] **Whether reporters of Local Papers may be allowed to see the judgment?**

2. The petitioner is seeking quashing of FIR no. 164, dated 22.07.2019, registered in Police Station (West), Shimla, under sections 341, 143, 147, 149, 353, 504, and 506 IPC, in which the Police has arraigned him as an accused, apart from a large number of Advocates.

FACTS:

3. The gist of the facts apposite to decide the present petition is as follows:

(a) The Police Station West, Shimla, registered the above mentioned FIR on the basis of the complaint of Inspector Dinesh Kumar, SHO of the said Police Station.

(b) Inspector Dinesh Kumar, on July 22, 2019, informed his Police Station that he received telephonic information from ASI Ramesh Chand, who was deputed on Traffic duty, that a large number of Advocates had assembled at Boileauganj bazar, of Shimla town. These Advocates were insisting on taking their vehicles through the restricted road, leading to Boileuganj via Chaura Maidan, though they did not have any valid permits to do so.

(c) On this, the complainant SHO reached the spot of agitation. He noticed a large number of Advocates assembled at the place, and the Petitioner was one of them. The agitated Advocates had blocked the road by stopping their vehicles in the middle of the road.

(d) The SHO asked them the reasons for creating the traffic jam by halting their vehicles. On this, the lawyers asserted to drive their cars through the restricted road itself. After this, the SHO asked the lawyers to show the permits for driving on the restricted road, upon which the lawyers replied that he could not stop them from driving their vehicles, and at the most, he could challan their cars. After that, these lawyers turned very aggressive and started pushing the police officials, inflicted fist blows, and hurled abuses on them. On this, the complainant tried to calm down them, but they kept on hurling abuses, gave pushes, fist blows, and threatened to burn the police station and told the SHO that they would teach him a lesson that he would never forget in his life. After that, these lawyers sat in protest at the spot and raised slogans.

(e) After this, the SHO, Inspector Dinesh Kumar directed the Police Station to register FIR against the lawyers, and named the petitioner as the person present at the spot.

ANALYSIS AND REASONING:

4. The following aspects would be relevant to conclude this petition: -

a) The FIR nowhere mentions the role of the petitioner. Even if this Court presumes the petitioner present at the spot, it would still not lead to an automatic inference of his acting with a common object with those who had inflicted fist blows, hurled abuses, and threatened the SHO and also threatened to burn the Police station.

b) Although the police got video recording of the incident, the State did not bring to the notice of the Court the said portion of the disk where the Petitioner is seen inflicting fist blows, hurling abuses, or threatening the SHO, or threatening to burn the Police station.

c) In the complaint, the SHO did not mention the time, and there is no explanation of the non-mentioning of the time.

d) Even if this Court believes all the allegations in FIR as truthful, still there is no allegation against the petitioner of participating in any criminal act.

e) Mere presence at the spot in the demonstration would not invite criminal act in the facts and nature of allegations made in the present FIR.

f) Holding peaceful processions, raising slogans, would not be and cannot be an offense under any law.

g) Therefore, naming and arraigning the petitioner as an accused is a gross abuse of the process of law. If proceedings are allowed to be continued, it shall amount to the miscarriage of Justice.

h) Given the cumulative effect of all the factors mentioned above, it is one of the exceptional cases, where this Court should exercise its inherent jurisdiction under Section 482 of the Code of Criminal Procedure.

JUDICIAL PRECEDENTS ON JURISPRUDENCE OF QUASHING:

5. The law is almost settled by a larger benches' judgements of Supreme Court that the offences, those are not listed as compoundable, under Section 320 CrPC, can also be compounded, and the procedure to follow would be by quashing the FIR, and consequent proceedings.

a) In *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866, a three-member Bench of Hon'ble Supreme Court holds,

> 6. ....It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such case, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A, the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786, Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), NripendraBhusan Roy v.

GobinaBandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. SivaramaSubramania, ILR 47 Mad 722 : (AIR 1925 Mad 39).

b) In *MadhavraoJiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre*, 1988 (1) SCC 692, a three judges' bench of the Hon'ble Supreme Court holds: -

> 7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

6. Thus, in the peculiar facts and circumstances, this Court is inclined to invoke the inherent jurisdiction under section 482 CrPC to quash the FIR and all subsequent proceedings.

7. In Himachal Pradesh Cricket Association v. State of Himachal Pradesh (SC); 2018 (4) Crimes 324, Hon'ble Supreme Court holds as under: -

> 47. As far as Writ Petition (Criminal) No. 135 of 2017 is concerned, the appellants came to this Court challenging the order of cognizance only because of the reason that matter was already pending as the appellants had filed the Special Leave Petitions against the order of the High Court rejecting their petition for quashing of the FIR/Chargesheet. Having regard to these peculiar facts, writ petition has also been entertained. In any case, once we hold that FIR needs to be quashed, order of cognizance would automatically stands vitiated."

8. Consequently, this petition is allowed, and the FIR no. 164, dated 22.07.2019, registered in Police Station (West), Shimla, under sections 341, 143, 147, 149, 353, 504, and 506 IPC, is quashed. Since FIR has been quashed, all the consequential proceedings are also quashed and set aside. Petition is allowed. All pending application(s), if any, stand closed.

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

Shri Dev Raj ….Petitioner.

Vs.

Shri Bhupender Singh and another …..Respondents.

CMPMO No.: 205 of 2019
Date of Decision: 05.03.2020

Limitation Act, 1963- Section 5- Application for condonation of delay- Mode of disposal- Held, if appeal is not filed within period of limitation as per law, then party is required to explain everyday's delay- Though in interest of justice, Courts do not insist that each and every day's delay should be explained by a party- Yet it is expected that party should approach the Court with clean hands and give some cogent explanation for it- There should not be mechanical disposal of application seeking condonation of delay in filing appeal- Court must assign reasons which are borne out from pleadings as why a particular view has been taken by it. (Para 6 & 7)

Whether approved for reporting?[24] *Yes.*

For the petitioner: Mr. Ajay Kumar, Senior Advocate, with Mr. Gautam Sood, Advocate.

For the respondents: Ms. Ruchika Khachi, Advocate, vice Mr. C.D. Negi, Advocate.

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for the following reliefs:

> *"It is, therefore, prayed that the present petition may very kindly be allowed and order dated 01.04.2019, passed by the learned District Judge, Kinnaur at Rampur Bushahr in case titled CIS No. 180/2018, titled Bhupender Singh Versus Dev Raj and other be quashed and set aside and the application moved by respondent No. 1 for condonation of delay be dismissed and the records of the case be also summoned from the Court below or such other order as this Hon'ble Court deems fit and proper be also passed on this petition."*

2. I have heard learned Senior Counsel for the petitioner and learned counsel for the respondents.

3. By way of impugned order, learned Appellate Court has allowed the application filed under Section 5 of the Indian Limitation Act by respondent No. 1 Shri Bhupender Singh, which was filed by him for condonation of delay in filing the first appeal against the judgment and decree dated 23.09.2017, passed by the Court of learned Senior Civil Judge, Kinnaur at Reckong Peo in Civil Suit No. 32-1 of 2011.

4. As is borne out from the application which was filed under Section 5 of the Limitation Act by respondent No. 1 herein before the learned First Appellate Court, the delay in filing the appeal is of approximately 100 days. Further, the application was filed by the party before the first Appellate Court after legal aid was provided to him on his request.

5. Though there is merit in the contention of learned Senior Counsel for the petitioner that the reasons spelled out in the application for condonation of delay do not inspire confidence and further the rational which has been applied by the learned First Appellate Court in allowing the application is also not too convincing, as is borne out from para-10 thereof, however, in my considered view, as learned First Appellate Court, in exercise of its discretion, has allowed the application for condonation of delay, it will be in the interest of justice in case the order so passed by the learned First Appellate Court is not disturbed with and the appeal now pending adjudication before the learned District Judge, Kinnaur, is permitted to be heard on merit. Ordered accordingly. Order dated 01.04.2019, passed by the learned First Appellate Court condoning the delay in filing the appeal is not disturbed.

6. However, it is observed that the application for condonation of delay should not be disposed of in a mechanical manner and reasons which are mentioned in the order either allowing or dismissing the application, should be borne out from the record. Learned First Appellate Court while allowing the application for condonation of delay, in para-10 of the impugned order, held that in view of the fact that after the decision of the Civil Suit on 23.09.2017, there were Dussehra holidays in the Court and this was followed by Winter Vacations in the months of January and February and thereafter, the applicant applied for legal

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24 Whether the reporters of the local papers may be allowed to see the Judgment?

aid, said reasons were sufficient for condonation of delay, coupled with the fact that the Counsel, who had filed the appeal, earlier refused to prosecute the case on behalf of the said party at Reckong Peo on the ground that he could not do so because of the distance between Rampur Bushahr and Reckong Peo.

7. In my considered view, the factum of the Court being closed for Dussehra holidays and Winter Vacations does not *ipso facto* give right to a party for condonation of delay in filing the appeal. Statute governs the limitation within which an appeal has to be filed by a party. If the appeal is not filed within the period of limitation, then as per law of the land, each and every day's delay has to be explained. Though in the interest of justice, Courts do not insist that each and every day's delay should be explained by a party, however, least that the Courts expect is that the party should approach the Court with clean hands and give some cogent explanation as to why it could not file the appeal either within the period of limitation or within some reasonable time thereafter. This was missing in the application filed for condonation of delay before the First Appellate Court. The reasons given in the application were vague, which could not be termed to be cogent enough to justify the delay in filing the appeal. This extremely important aspect of the matter has not been taken care of by the learned First Appellate Court while passing the impugned order, despite the fact that the application was resisted by the non-applicants before it. There is no discussion on the grounds raised in the application for condonation of delay vis-a-vis the objections raised to the same in the reply filed by the non-applicants. What prevented the appellant/respondent No. 1 herein from filing the appeal after Dussehra holidays were over and before closure of the Court for winter vacations, is not mentioned in the application. This aspect of the matter has not been dealt with by the learned First Appellate Court in its order while condoning the delay in filing the appeal. Similarly, there is no adjudication on the objections raised to the application by the non-applicants. This Court understands that whether or not delay has to be condoned, is the discretion of the Court, however, this discretion cannot be exercised without justifying as to why the plea of the applicant was being accepted and that of the non-applicants was being negated. This is completely missing in the order which has been passed by the learned First Appellate Court. It is in this background that this Court is making the observation that the applications for condonation of delay should be decided by the learned Courts below by assigning reasons which are borne out from the pleadings as to why a particular view has been taken by it. However, as already held hereinabove, in the peculiar facts of this case, the order under challenge is not being disturbed with and with these observations, this petition is closed.

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

Anil Kumar Sharma ….Petitioner.

Versus

Shiv Prashad Kadam Nakate & another …Respondents/Contemnors.

COPC No.18 of 2020
Decided on: 02.03.2020

Contempt of Courts Act, 1971- Sections 2 (b) & 12- Disobedience of Court order- Proof- Held, in previous case, the Court disposed of contempt petition on submission of petitioner's counsel that petitioner intended to avail other remedies available under law qua exchange of land- If petitioner has availed any such remedy and no action is being taken on his representation, then proper course for him is to approach the appropriate court of law for appropriate directions in this regard- In absence of there being a direction issued by the Court which stands willfully disobeyed, the power of contempt cannot be used as a tool either by the party or the Court to force other party to do an act qua which there is no command in the main order- Petition dismissed. (Para 3)

Whether approved for reporting?[25] Yes

For the petitioner : Mr.Sanjay Dutt Vasudeva, Advocate.

For the respondents : Mr. Yash W. Chauhan, Advocate.

Ajay Mohan Goel, Judge (Oral)

Notice. Mr. Yash W. Chauhan, Advocate, accepts notice on behalf of respondents.

Learned counsel appearing for respondents, submits that present Contempt Petition is completely misconceived as there is no disobedience of any direction which has been passed by this Court as alleged in this Contempt Petition. He has drawn the attention of this Court to the order which purportedly stands disobeyed i.e. order dated 28.11.2017, passed in COPC No.204 of 2017, titled as Anil Kumar Sharma Versus Giana Ram and on the strength of the language which has been so used in the said order, he submits that the Contempt Petition was simply disposed of with liberty to the petitioner to take recourse to such remedies as were available to him as the petitioner intended to approach the authority seeking exchange of the land allotted to him.

2. On the other hand, learned counsel for the petitioner states that as the case for exchange of land of the petitioner has not till date been decided by the authority concerned in his favour, therefore, there is a clear contempt made out.

3. Having heard learned counsel for the parties, this Court concurs with the submissions made by learned counsel for the respondents that the present Contempt Petition is completely misconceived. All that this Court observed in its order dated 28.11.2019, when learned counsel for the petitioner stated that though the land stood allotted to the petitioner, however, he intended to approach the authority, seeking exchange thereof was that petitioner can take recourse to such remedies as are available in accordance with law. In case, petitioner has availed any such remedy and no decision is being taken on his representation etc., if any, filed, then the proper course for him to approach the appropriate Court of law, seeking an appropriate direction in this regard. But contempt cannot be alleged as in the absence of there being a direction issued by the Court which stands willfully disobeyed, the power of contempt cannot be used as a tool either by the party or by the Court to force the other party to do an act, qua which there is no command in the main order. Accordingly, as this petition is misconceived, the same is dismissed, at this stage itself. Pending miscellaneous applications, if any, stand disposed of.

BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Rozy @ Seema ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 403 of 2020
Reserved on : March 20, 2020

Date of Decision : March 23 , 2020

Code of Criminal Procedure, 1973 (Code)- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 21- Recovery of 6.14 gms of heroin- Regular bail- Grant of- Held, contraband recovered from accused though falls in intermediate category but it is very close to small quantity- Rigors of Section 37 of the Act not attracted- Investigation is complete and petitioner is in custody since long- She is permanent resident of address given in petition- There is previous criminal history of accused- However, bail granted as a last chance to petitioner to mend her ways and if she repeats the offence, then bail shall be liable to be cancelled- Petition allowed- Conditional bail granted. (Para 8 to 10)

Whether approved for reporting?[26] *Yes.*

For the petitioner : Mr. Rajesh Mandhotra, Advocate, for the petitioner.

For the respondent : Mr. Nand Lal Thakur, Addl. AG. with Mr. Ram Lal Thakur, Asstt. A.G. and Mr. Rajat Chauhan, Law Officer, for the respondent/State.

Anoop Chitkara, Judge.

For possessing 6.14 grams of heroin, the petitioner, who is under arrest, on being arraigned as accused in FIR Number 223 of 2019, dated Dec 12, 2019, registered under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in the file of Police Station Indora, Distt. Kangra,, HP, disclosing non-bailable offences, has come up before this Court under Section 439 CrPC, seeking regular bail.

2. Status report stands filed. I have seen the status report(s) as well as the Police file, to the extent it was necessary for deciding the present petition, and heard learned Counsel for the parties.

3. Prior to the present bail petition, the petitioner had filed a petition under Section 439 CrPC, before Special Judge-II, Kangra at Dharamshala, HP. However, vide order dated Jan 21, 2020, the Court dismissed the petition.

FACTS

4. The gist of the First Information Report and the investigation is that on Dec 12, 2019, police party was present within the jurisdiction of Police Station Indora to conduct crime and for the purpose of patrolling. At about 3.50 p.m., at Meelwan the police party met Lady Constable Rashmi and while they were talking to her in the meantime one lady was noticed coming on a scooty, who on seeking the police officials stopped and started reversing the same. Police found such conduct of the said lady as suspicious. On this Head Constable Vipan Kumar signalled LC Rashmi to nab that lady and within few steps the Lady Constable was able to nab the said lady. On inquiry, the lady revealed her name as Rozy alias Seema, petitioner herein. After that the police conveyed to her that they are suspicious of her selling narcotic substance. She was asked to open the dickey of the scooty from which police recovered a small transparent polythene packet which contained white coloured substance. The recovered substance on checking from the Drug Detection Kit tested positive for Heroin and upon weighment found to be 6.14 grams. Subsequently, the police party also complied with the procedural requirements under the NDPS Act and the CrPC and arrested the petitioner.

PREVIOUS CRIMINAL HISTORY

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[26] **Whether reporters of Local Papers may be allowed to see the judgment?**

5. The following cases are pending against the bail petitioner:

1. FIR No. 02 of 2017 dated Jan 2, 2017, under Section 21 of the NDPS Act, Police Station Indora, Distt. Kangra, HP.

2. FIR No. 215 of 2018, dated Aug 13, 2018, under Section 21 of the NDPS Act, Police Station Indora, Distt. Kangra, HP.

ANALYSIS AND REASONING:

6. Pre-trial incarceration needs to be justified depending upon the heinous nature of the offence, terms of the sentence prescribed in the Statute for such a crime, accused fleeing from justice, hampering the investigation, and doing away with witnesses. The Court is under the Constitutional obligation to safeguard the interests of the victim, the accused, the society, and the State.

7. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

8. Although the substance recovered from the petitioner is just 6.14 grams and very close to small quantity but keeping in view the criminal history, the petitioner is taking undue advantage of the bail already granted to her. While granting bail in earlier FIR, the learned Special Judge did not caution the bail petitioner that in case she repeats the offence then bail granted would cancel and it would have an impact on the subsequent bail applications. However, this Court is inclined to afford last opportunity to the Petitioner to mend her ways, making it very clear that in case, the petitioner repeats the offence, then this bail is liable to be cancelled and the State shall file application for cancellation of the present bail and it shall also be a factor for future bail applications of the petitioner.

9. Given the above reasoning, in my considered opinion, the judicial custody of the petitioner/accused is not going to serve any purpose whatsoever, and I am inclined to grant bail on the following grounds, but subject to stringent conditions:

a) As per the FIR, the substance involved is heroin, mentioned at Sr. No. 56 of the Notification, issued under Section 2(viia) and (xxiiia) of NDPS Act, specifying small and commercial quantities of drugs and psychotropic substances.

b) The quantity of drug involved is less than Commercial Quantity but greater than Small Quantity. As such the rigors of Section 37 of NDPS Act shall not apply in the present case. Resultantly, the present case has to be treated like any other case of grant of bail in a penal offence.

c) The petitioner is in judicial custody since Dec 12, 2019.

d) The investigation in the case is almost complete and challan stands filed in the Court having competent jurisdiction.

e) The petitioner is a permanent resident of address mentioned in the memo of parties; therefore, her presence can always be secured.

10. In the result, the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her furnishing personal bond in the sum of Rs.10,000/- with two sureties in the like amount to the satisfaction of the Trial Court or the Court exercising jurisdiction over the concerned Police Station where FIR is registered.

11. The Court executing the personal and surety bonds shall ascertain the identity of the bail-petitioner, her family members, and of sureties, through AADHAR Card, Pan Card, Ration

Card, etc. The petitioner shall mention phone numbers and other details, on the reverse page of the bonds.

12. The Counsel for the accused and the attesting official shall explain all conditions of this bail to the petitioner.

13. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

a) The petitioner shall appear before the Court which issues the summons or warrants, and shall furnish fresh bail bonds to the satisfaction of such Court, if such Court directs to do so.

b) The petitioner undertakes to attend the trial.

c) The petitioner shall not hamper the investigation.

d) The petitioner undertakes not to contact the complainant and witnesses, to threaten or browbeat them or to use any pressure tactics.

e) The petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any police officer or tamper with the evidence.

f) The petitioner shall neither influence nor try to control the investigating officer in any manner whatsoever.

g) In case, the petitioner is arraigned as an accused of the commission of any offence, prescribing the sentence of imprisonment of more than seven years and in case the bail petitioner is arraigned as an accused in any case, under the provisions of the NDPS Act, irrespective of the quantity, be it a small quantity, then within thirty days of knowledge of such FIR, the petitioner shall intimate the SHO of the present police station, with all the details of the present FIR as well as the new FIR. In such case the State shall apply to this Court or to the Trial Court for cancellation of this bail, if it deems fit and proper.

h) Within 30 days from today, the petitioner shall sell, or surrender, all firearms along with ammunition, and arms licenses, if any, to the authority which had given such permission.

i) Apart from above, in case the Petitioner does not turn up before the Trial Court, then the trial Court may issue Non-Bailable warrants and send the petitioner to the Judicial Custody for the period for which the presence of the petitioner cannot be dispensed with. If the petitioner violates any other condition(s) as stipulated in this bail order, then the Trial Court may direct the Public Prosecutor to file a cancellation application before it and it shall be lawful and permissible for the Trial Court to cancel the bail.

14. This order of bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the petitioner.

15. In case the petitioner finds the bail condition(s) as violating fundamental or other right, or any human right, or faces any other difficulty due to any condition, then, the petitioner may file a reasoned application for modification of such term(s).

16. It is clarified that the present bail order is only with respect to the above-mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, registered against the Petitioner.

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

18. The petition stands allowed in the aforesaid terms.

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

State of Himachal Pradesh. ……Appellant.

Versus

Ashok Kumar & anr. ……Respondents.

Cr. Appeal No. 46 of 2010
Reserved on: 28.02.2020.
Decided on: 29.02.2020.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Sections 20- Recovery of 4.5 Kgs. of charas- Appeal against acquittal recorded by Special Judge- Divergence of opinion between Hon'ble Judges of Division Bench- Reference to Hon'ble Third Judge- Prosecution alleging chance recovery of 4.5 Kgs. of 'charas' from accused while on patrol- Held, judgment of conviction recorded by one of the Hon'ble Judge is totally based on documents like seizure memo and NCB forms- There is no discussion of oral evidence nor any findings that statements of official witnesses are consistent and it would be safe to place reliance upon them- Alleged recovery and seizure of contraband took place on National Highway, admittedly a busy road even during odd hours- No effort was made to join independent person at any stage of apprehension of accused, search, recovery and seizure of alleged contraband- Even 'CK' from whose shop weighing scale and weights were brought for weighing contraband not associated in search and seizure- 'SK' probablising plea of defence that accused were actually travelling in a bus and they were nabbed from Sanwara, where passengers had stopped for tea– Accused belong to distant place and it is difficult to infer that they were present at Kasauli Chowk at 10.45 PM- Evidence regarding recovery of identity card(s) from bag carried by accused contradictory- True genesis of case has been concealed- Recovery of contraband from conscious and exclusive possession of accused is doubtful- Appeal dismissed- Acquittal recorded by Special Judge upheld. (Para 14, 16, 17, 21 & 26)

Cases referred;

Dhan Bahadur versus State of H.P. reported in 2009 (2) Shim. L.C 203.
Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri. L.J. 481),

Gaunter Edwin Kircher Vs. State of Goa, (1993) 3 SCC 145,

Girija Prasad Versus State of M.P. (2007) 7SCC 625'
In Gunwantilal v. State of H.P. (1973) ISCR 508: (1972) Cri. L.J. 1187),
Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri. L..J 300),
Noor Aga Vs. State of Punjab, (2008) 16 SCC 417'
Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri. L.J. 930)).
Ritesh Chakravarty v. State of Madhya Pradesh JT 2006(12)SC 416,
Rubyana alias Smita Sanjib Bali Vs. State of Maharashtra, Crl. L. J. 148,
Sohan Lal Vs. State of H.P., decided on 02.11.2016.
State of H.P. versus Surender Kumar, decided on May 22, 2017
State of Himachal Pradesh versus Naresh Kumar,
Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936 (37) Cri. L.J. 939),
Supdt. and L. R. v. Anil Kumar Bhunja, (1979) 4 SCC 274: (1979) Cri. L. J. 1390)

Whether approved for reporting? Yes.

For the appellant : Mr. Narender Guleria, Addl. AG.

For the respondent s : Mr. Satyen Vaidya, Senior Advocate with Mr. Varun Chauhan, Advocate.

Per Dharam Chand Chaudhary, Judge.

This appeal has been heard by a Division Bench of this Court. Both the Judges constituting the Division Bench are divided in their opinion, hence dissenting judgments came to be delivered on 5.7.2019. As per the order of the same day passed by the Division Bench, the record of the appeal was placed before the Chief Justice of this Court in terms of the provisions contained under Section 392 of the Code of Criminal procedure. The Chief Justice as per order dated 29.7.2019 has ordered to place the same with the opinion of the Judges constituting the Division Bench before this Court for recording its opinion after such hearing as deemed appropriate.

2. The present is a case where the I.O PW10 SI Ram Pal, Additional SHo, Police Station, Dharampur, District Solan accompanied by ASI Jai Gopal PW3, HC Kedar Nath PW1, C. Yash Pal PW2 and C. Kamal Kumar PW11 was patrolling in Kasauli Chowk, Suki Johri, Dharampur Bazar area on 17.12.2008, around 8:00 P.M. Daily diary entry No. 40-A Ext.PW7/F in this regard was entered in the rapat rojnamcha of the police station. Around 10:45 P.M. at Kasauli Chowk the police nabbed two young men (allegedly the accused persons) near rain shelter. On seeing the police, they started running towards Kasauli road by holding one sling each of black duffel type bag with them. Such an unusual conduct on their part resulted in suspicion in the mind of PW10, who nabbed them with other members of the police party. On inquiry, they revealed their names and other antecedents. On checking the bag, besides clothes, a photocopy of voter identity card, contraband allegedly *Charas* weighing 4 K.G. and 500 grams was recovered from a white plastic bag kept in other green colored polythene bag having mark “Amrit Cloth House Bus Stand Nirmand”.

3. There is no need to detail all the facts and also the evidence available on record because the same have been discussed in detail, particularly, in the judgment rendered by bother Anoop Chitkara, J., one of the members constituting the Division Bench. Otherwise also, this Court has to give its opinion about the dissenting view of the matter taken by the Judges constituting the Division Bench to discuss the facts of the case and elaboration of the evidence available on record again would unnecessarily overburdened this judgment, of course, the facts of the case and also the evidence available on record would be referred to hereinafter in this judgment as and where it is required to do so.

4. I have carefully gone through the dissenting judgments rendered in the matter by brother Sureshwar Thakur, *J*, hereinafter referred to as the first judgment and brother Anoop Chitkara, *J*, hereinafter referred to as the second judgment, vis-a-vis the facts of this case and also the evidence available on record.

5. As a matter of fact, learned trial Court on appreciation of the evidence available on record has concluded that inconsistency and infirmity occurred in the prosecution case probabilizes the defence version that none of the accused were apprehended carrying the contraband in the bag and trying to flee away on Kasauli road. The defence version that the contraband allegedly *Charas* was found unclaimed in the bus and the accused who belong to Anni, District Kullu were falsely implicated in this case is nearer to the factual position. The accused, as such, were given the benefit of doubt and consequently, acquitted of the charge under Section 20 of the NDPS Act framed against each of them.

6. In the first Judgment, learned Judge while dis-agreeing with the findings recorded by learned trial Court has accepted the appeal and convicted both the accused for the commission of the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substance Act. The brother Judge in the second judgment has, however, taken a contrary view of the matter and while dismissing the appeal has affirmed the findings of acquittal recorded by learned trial Court.

7. The present is a case where the prosecution case hinges upon the evidence as has come on record by way of the testimony of official witnesses HC Kedar Nath PW1, C. Yash Pal PW2, ASI Jai Gopal PW3, C. Kamal Kumar PW11 and the I.O. ASI Ram Pal PW10. In the first judgment, the documentary evidence i.e. seizure memo Ext.PW1/A has been heavily relied upon to arrive at a conclusion that the contraband alleged *Charas* has been recovered from the conscious and exclusive possession of the accused as this document bears the signature of the witnesses. Therefore, the presumption that the search and seizure has taken place on the spot in the manner as claimed by the prosecution stands satisfactorily established and even a presumption to this effect can also be drawn against the accused persons under Sections 91 and 92 of the Indian Evidence Act. Although the aid of Sections 91 and 92 in the given facts and circumstances of this case cannot be drawn. The NCB form Ext.PW7/D, FIR Ext.PW7/E and the entries in the Malkhanna register Ext.PW7/B qua deposit of the case property have also been relied upon. The R.C. Ext.PW7/C, as per the findings recorded in the first judgment, also provides the link evidence. The report Ext.PW9/A qua the opinion that the recovered contraband when analyzed was found *Charas* has also been relied upon. It has also been noticed in the first judgment that the link evidence is complete and as such in terms of this judgment the prosecution has proved its case against the accused beyond all reasonable doubts.

8. The contradictions and inconsistencies in the prosecution evidence pointed out by learned counsel representing the respondents-accused have been held to be minor as per the first judgment, hence not renders the prosecution case doubtful. The defence version that only 50-50 grams *charas* was separated for the purpose of sample, the entire mass cannot be treated to be *Charas* has also been rejected. The plea raised by the accused persons in their defence has not been discussed nor any opinion formed qua that.

9. Now if coming to the second judgment, the infirmities such as there was no mention in daily diary rapat No. 40-A Ext.PW7/F that the I.O. was having kit when left the police station on patrol duty hence doubtful that the printed NCB proformas, torch, cloth parcels, seal 'N', sealing wax, thread and needle etc. were available with him and the inconsistencies, discrepancies and contradictions in prosecution evidence have also been taken note of in this judgment. Learned Judge at the outset has discussed that the prosecution has examined only official witnesses to prove its case against the accused. In order to prove the link evidence the prosecution has examined MHC Hakam Singh PW7, C. Yash Pal PW2 and HHC Kanshi Ram PW8. Learned Judge who has delivered the second judgment while noticing that PW4Chand Kishore, a Tea Vendor near police station, Dharampur though turned hostile to the prosecution qua its case of bringing weights and scale from him has further observed that had it been so why this witness was not associated as an independent witness also. The defence of the accused that they were travelling in Bus No. HP-03-6080 enroute Shimla to Chandigarh and apprehended at Sanwara where the bus was stopped for having tea etc. by the passengers when an unclaimed bag recovered from the bus and other passengers told the police that they belong to Anni were taken to Police Station and beaten up there has been held to be reasonable and plausible. The recovery of identity card Ext.P-10 and Ext.P-11 of Milap Chand, one of the accused, from the bag has also been held to be false. Sushil Kumar, the Conductor of Bus No. HP-03-6080 was examined as DW1 by them in their defence. He has also supported their version qua both the accused were travelling in the bus from Shimla to Chandigarh and they were apprehended at Sanwara where the bus stopped for having tea by passengers after it was checked in front of Police Station, Dharampur and one unclaimed bag recovered from its rack. HC Praveen Kumar (DW2) was also examined by the accused in their defence. <u>Accordingly learned Judge having rendered the second judgment formed an opinion that the prosecution has failed to prove its case against the accused beyond all reasonable doubts and as such, while dismissing the appeal, impugned judgment has been affirmed.</u>

10. In this backdrop and to form an opinion based upon the given facts and circumstances and also the evidence available on record, Mr. Satyen Vaidya, learned Senior Advocate assisted by Mr. Varun Chandel, Advocate, has vehemently argued that the view of the matter

taken in the second judgment is legally and factually sustainable. On the other hand, Mr. Narender Guleria, learned Additional Advocate General while arguing that learned trial Court has erred legally and factually while acquitting the accused of the charge has further submitted that the view of the matter taken in the first judgment is the only justifiable view which could have been taken in view of the evidence available on record.

11. It is seen that the present is a case where only official witnesses have been associated and examined during the course of trial. In the first judgment, the oral evidence has not been discussed in detail and the findings of conviction have been based upon the documentary evidence i.e. seizure memo Ex.PW1/A and NCB proforma Ext.PW7/D. No doubt, these documents have been witnessed by the official witnesses. They even have admitted their signature also. The testimony of the official witnesses i.e. HC Kedar Nath PW1, C. Yash Pal PW2, ASI Jai Gopal PW3 and C. Kamal Kumar PW11 has, however, not been discussed nor any opinion formed that their statements are consistent and free from any contradiction or in view of other attending circumstance it is safe to place reliance thereon.

12. Be it stated that the testimony of an official witness is as much good as that of an independent person and if the same inspires confidence can be relied upon to record the findings of conviction against an offence. It is held so by this Court in **Criminal Appeal No. 258 of 2011, titled State of H.P. versus Surender Kumar, decided on May 22, 2017** while placing reliance on the judgment of the Apex Court in **Makhan Singh** Versus **State of Haryana (2015) 12 SCC 247.**

13. The Apex Court again has held in **Girija Prasad Versus State of M.P. (2007) 7SCC 625** that it is not possible for the investigating agency to associate the independent witness in each and every case and every time/at each place.

14. The present is, however, a case where the search and seizure has taken place outside the police station, Dharampur on the National Highway. As per the prosecution evidence itself the National Highway is a busy road and the vehicles can be seen plying on this road from Shimla side towards Chandigarh/Delhi and to Shimla side also even during odd hours. It remained unexplained as to why the efforts were not made to associate some independent person to witness the manner in which the accused were nabbed and the contraband allegedly *charas* recovered from them and also the seizure as well as other proceedings having taken place on the spot. In case the scale and weight to weigh the contraband was brought from the tea stall of Chand Kishore PW4 situated nearby Police Station, Dharampur, why this witness was not associated to witness the seizure of the contraband allegedly *charas* recovered from the accused and further proceedings having taken place on the spot? Such acts of omission and commission attributed to the I.O. has caused major dent in the prosecution story and when it is well settled that more heinous the offence committed, the strict is the degree of proof required to record the findings of conviction, no such findings could have been recorded with the help of the evidence as has come on record by way of the testimony of the official witnesses. The law on the issue is also no more *res intergra* as in the judgment authored by a Division Bench of this Court in **Criminal Appeal No. 411 of 2011** on 12th April, 2016, it has been held as under:

> ......Therefore, the proof to connect the accused with the commission of the offence must be beyond all reasonable doubt and the initial burden to bring the guilt home to an accused booked for the commission of an offence under the Act lies on the prosecution. In case the prosecution succeeds to prove the charge beyond all reasonable doubt against the accused, it is only in that situation that the presumption as envisaged under Sections 35 and 54 of the Act can be raised. We are drawing support to substantiate the findings so arrived at form the judgment of Apex Court in ***Noor Aga*** Vs. ***State of Punjab, (2008) 16 SCC 417.*** This judgment reads:

"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., 'proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In <u>State of Punjab v. Baldev Singh,</u> (1999) 3 SCC 977, it was stated:

> "It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarty v. State of Madhya Pradesh JT 2006(12)SC 416].

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

58. <u>Sections 35</u> and <u>54</u> of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the Page 15 foundational facts so as to attract the rigours of <u>Section 35</u> of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

> 59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.
>
> 60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself."

16. Now if coming to the evidence available on record, it has been admitted by PW1 Kedar Nath that road being National Highway remains busy. C. Yash Pal PW2 has also admitted that some shops are in existence on the spot. Though PW3 ASI Jai Gopal has stated that Constable Kamal Kumar (PW11) was deputed in search of the independent witness, however, it is improved version because this was never the case of the prosecution. Therefore, in the second judgment, it has rightly been observed that National Highway,, a busy road, and the time 10.45 P.M., independent witnesses could have been easily associated to witness the search and seizure. Even if it was not possible to do so at least Chand Kishore PW4 who was available there could have been asked to associate with the investigation of the case.

17. Analyzing the given facts and circumstances of this case and also the evidence available on record, it is not proved beyond all reasonable doubt that the police party headed by PW10 SI Ram Pal had nabbed the accused at Kasauli Chowk while on seeing the police they started walking on Kasauli road for the reasons that the plea raised by both the accused in their defence and re-produced in the para-9 of the second judgment coupled with the statement of DW1 Sushil Kumar, the conductor of Bus has has probabilized the defence of the accused.

18. It is worth mentioning that both the accused belongs to Anni, district Kullu. It cannot be imagined by any stretch of imagination that they were standing at Kasauli Chowk, Dharampur that too at 10:45 P.M. The story to this effect has been engineered and fabricated by the police either to save the real culprits or to conceal the true genesis of occurrence. The plea raised by the accused in their defence that they were travelling in Bus No. HP-03-6080 from Shimla to Chandigarh supported by DW1, the conductor of the bus lead to the only conclusion that the search of the bus was conducted by the police outside Police Station, Dharampur. The bag was recovered from its rack. When the police failed to connect the bag from the person who had actually been carrying the same and the same remain unclaimed, the bus was allowed to be taken to its destination. The police nabbed the accused at Sanwara at a stage when it was stopped for having tea by the passengers there.

19. Otherwise also, there is no question of both the accused standing or seeing coming towards Kasauli Chowk, Dharampur as they belong to Anni, District Kullu and there is no link evidence as to why they had come there. It is also worth mentioning that the present is a case of recovery of the contraband allegedly *charas* from the bag which both the accused were carrying by holding its each sling. The charge against them, therefore, could have been framed under Section 20 of the Act read with Section 29 thereof. The charge has, however, been framed only under Section 20 of the Act alone. It is an illegality which could have been cured by amending the charge suitably, however, it has also not been done.

20. It is surprising to note that the bag with 9-10 Kg. weight including the alleged contraband, two persons i.e. the accused that too when they belong to remote area of District Kullu having hilly terrains and normally the people walk on foot carrying considerable weight with them on their back up to a distance of miles together were not required to carry the same. Therefore, it is difficult to believe that when nabbed both the accused were carrying the bag by holding one slings each thereof.

21. An effort has been made by the prosecution to implicate both the accused with the help of the bag they were allegedly carrying together and recovery of photocopy of voter identity card of accused Milap Chand therefrom. The evidence as has been discussed in the second judgment in detail qua this aspect of the matter is, however, contradictory and inconsistent for the reason that as per the seizure memo Ext.PW1/A, Rukka Ext.PW2/A, Special Report Ext.PW5/A and FIR Ext.PW7/E only one photocopy of voter identity card issued by the Election Commission in favour of accused Milap Chand was recovered from the bag. According to PW1 Kedar Nath, it was identity card, recovered from the bag. He has not stated that the photocopy of voter identity card of accused Milap Chand was recovered from the bag. He has not been subjected to cross-examination on behalf of the prosecution. In the parcel containing the case property, however, two photocopies of the voter identity card Ext.P10 and Ext.P11 were recovered. It remained unexplained as to how two photocopies could have been kept in the parcel, particularly when as per the prosecution case only one photocopy was recovered. PW2. C. Yash Pal tells us that one identity certificate was recovered from the bag whereas according to ASI Jai Gopal one photocopy of the identify card issued by the Election Commission in the name of accused Milap Chand was recovered therefrom. The I.O. Ram Pal PW10 has himself contradicted the prosecution case as according to him, two photocopies of Election identity card of accused Milap Chand were recovered from the bag. Such contradictions cannot be said to be minor for the reasons that when only one photocopy of voter identity card was recovered from the bag, how two were taken out when the parcel containing *charas* was opened in the Court. Learned Judge, who has authored the first judgment, has not taken into consideration such inconsistencies and contradictions in the prosecution evidence. On the other hand, on the basis of such evidence only inference which can be drawn would be that the bag was never sealed in the manner as claimed by the prosecution. At a later stage when opened instead of one, two photocopies of Voter Identity Card were found to be kept therein. Otherwise also, the voter identity card was that of accused Milap Chand. How accused Ashok could have been implicated on the basis thereof also remained unexplained.

22. It is significant to note that *Charas* weighing 50 grams each alone was separated out of the recovered bulk for the purposes of sampling. There is no evidence suggesting that I.O. PW10 had right to take representative sample as there is no evidence that he mixed the entire bulk or separated 50 grams *charas* from various parts of the recovered bulk. Even there is no iota of evidence to show that the entire bulk was sent to Laboratory for analysis. Therefore, the remaining bulk i.e. 4 Kg 400 grams cannot be said to be *Charas*. It cannot also be said on the basis of the report Ex.PW9/A received from Forensic Science Laboratory that the remaining substance which was not at all tested is also *charas*. Learned Judge who has rendered the second judgment has placed reliance on the judgment of the Apex Court in **Gaunter Edwin Kircher *Vs.* State of Goa, (1993) 3 SCC 145** and has rightly held that at the most the accused could have been convicted only for having the possession of *Charas* weighing 50 grams, small quantity and maximum punishment therefor as prescribed is six months imprisonment. Such sentence they have already undergone being arrested on 18.12.2008 and released from custody after their acquittal vide impugned judgment dated 20.10.2009.

23. This Court has also held so in judgment rendered in *Criminal Appeal No. 782 of 2008*, titled *State of Himachal Pradesh v*ersus *Naresh Kumar*, decided on June 28, 2019 while placing reliance on the judgment of Single Judge of this Court in **Dhan Bahadur versus State of H.P.** reported in **2009 (2) Shim. L.C 203.**

24. It is worth mentioning that learned Judge who has delivered the second judgment also emphasized that in daily diary No. 40-A, Ex.PW7/F, there is no mention that PW10 had I.O. kit with him when left the police station for patrolling and there being no evidence as to from where the printed NCB proformas, torch, cloth parcels, seal 'N', sealing wax, thread and needles were brought, hence held the sampling and sealing process to be not proved in accordance with law. Also that, there was no occasion to the I.O. to fill-up the relevant columns in NCB proforma on the spot. I am, however, not in agreement with the findings so recorded because taking I.O. kit with him while leaving the police station/police post for patrolling/detection of crime in the area is the routine duty of I.O. It is not required to be recorded any where including the rapat daily diary that the Kit was available with the I.O., PW10. Therefore, it would not be improper to conclude that PW10 the I.O. was having I.O. kit with him. In the kit there use to be kept electronic weighing scale, cloth, thread, needles, wax and also seal as well as the proforma like NCB and also the blank papers. Otherwise also, the place of recovery is on National Highway outside the Police Station, Dharampur at a distance of 100 meters. Even if the seizure has taken place inside the police station, no illegality or irregularity in such process and further investigation conducted by the police can be attached. Therefore, no adverse inference could have been drawn on this score against the prosecution.

25. Even the non-production of seal by PW1 HC Kedar Nath is also not fatal to the prosecution case for the reason that the said witness has not been cross-examined by learned defence counsel as to what prejudice thereby has been caused to the accused. Similar view has been taken by this Court in Criminal Appeal No. 305/2014, titled Sohan Lal Vs. State of H.P., decided on 02.11.2016.

26. True it is that the link evidence i.e. entries in the NCB Proforma Ext.PW7/D, Road Certificate No. 113/08 Ext.PW7/C, the entires in the Maalkhana register Ext. PW7/B is there on record, however, such evidence would have some relevancy had the prosecution been otherwise succeeded to prove beyond all reasonable doubt that the contraband allegedly *Charas* has been recovered from the physical and conscious possession of the accused persons alone. It has been held by the High Court of Bombay in **Rubyana alias Smita Sanjib Bali** Vs. **State of Maharashtra, Crl. L. J. 148** that sine-qua-non for attracting the penal provisions contained under the Act is the recovery of the contraband from conscious and exclusive possession of the accused alone. The relevant portion of this judgment is reproduced here as under:

> "The sine qua non for attracting the penal provisions, viz. Sections 20 and 21 of the N.D.P.S. Act, and Section 25 read with Section 7 of the Arms Act is that the appellant must be found in possession of the contrabands and the fire arms. The term "possession" is not defined in the N.D.P.S. Act. The term "possession" has been judicially construed to mean, in various decisions, as under :-
>
> 'Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.
>
> (See in this connection Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri. L.J. 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri. L..J 300), Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936 (37) Cri. L.J. 939), and Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri. L.J. 930)).

The Apex Court in Supdt. and L. R. v. Anil Kumar Bhunja, (1979) 4 SCC 274: (1979) Cri. L. J. 1390) observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it. "The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri. LJ) :-

"13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes 11th Ed.).

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed. page 52) describes 'possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it'.

16. In Gunwantilal v. State of H.P. (1973) ISCR 508: (1972) Cri. L.J. 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed (at p 1189 of Cri LJ):

In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

27. The net result of the aforesaid discussion, therefore, is that the prosecution has miserably failed to prove its case against the accused persons with the help of cogent and reliable evidence that the contraband allegedly *charas* weighing 4Kg 500 grams has been recovered from the exclusive and conscious possession of the accused persons alone when intercepted on 17.12.2008 on Shimla-Chandigarh National Highway out side Police Station, Dharampur, around 10.45 P.M. The prosecution, as such, has failed to bring the guilt home to the accused beyond all reasonable doubt. Therefore, the view of the matter taken by bother Chitkara J. is legally and factually sustainable. Accordingly the appeal fails and the same is dismissed. The personal bonds executed by each of the accused persons shall stand cancelled and the sureties discharged.

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

Shri Ram Transport Finance Company Ltd. ...Appellant.

Versus

Manju Devi ...Respondent.

Cr.Appeal No. 351 of 2019
Date of Decision: February 24, 2020

Code of Criminal Procedure, 1973- Section 256- Dismissal of complaint for want of prosecution- Justification for dismissal- Circumstances explained- Held, when Court notices that complainant is absent on particular day, it must consider whether personal attendance of complainant is essential on that day for further progress of case- If presence of complainant on that day is quite unnecessary, then resorting to step of axing down the complaint may not be a proper exercise of power envisaged under Section 256 of Code. (Para 16)

Code of Criminal Procedure, 1973- Section 256- On facts, complainant was diligently pursuing its case as it was at the final stage- Even arguments were heard but it could not proceed further in absence of accused- Dismissal of complaint in default of appearance of complainant was unjustified- Complaint ordered to be restored. (Para 16, 23 & 24)

***Cases referred*:**

Associated Cement Co. Ltd. versus Keshvanand, reported in (1998) 1 Supreme Court Cases 687,
Boby versus Vineet Kumar, reported in Latest HLJ 2009 (HP) 723,
Dole Raj Thakur versus Jagdish Shishodia, reported in Latest HLJ 2018 (HP) 296
Dole Raj Thakur versus Pankaj Prashar, reported in Latest HLJ 2018(HP) 266;
Mohd. Azeem versus A. Venkatesh and another, reported in (2002) 7 Supreme Court Cases 726, Anand versus Vasumathi Chandrasekar, reported in (2008) 4 Supreme Court Cases 67,
N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another, reported in 2008 (2)Latest HLJ 1249
Pooja Sharma vs. Suresh Kumar, reported in 2019(1) Him.LR (HC) 495.
Vinay Kumar versus State of U.P. & Anr., reported in 2007 Cri.L.J. 3161,
Vinod Kumar Verma versus Ranjeet Singh Rathore, decided on 6th May,

Whether approved for reporting?[27] *Yes*

For the Appellant: Mr.Ashwani Kaundal, Advocate.

For the Respondent: Nemo.

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27 Whether reporters of the local papers may be allowed to see the judgment?

Vivek Singh Thakur, J (Oral)

This appeal has been preferred against impugned order dated 24.10.2018, passed by learned Chief Judicial Magistrate, Lahaul and Spiti at Kullu, H.P., in Complaint No.1217-1/13, titled as *Shri Ram Transport Finance Company Ltd. vs. Manju Devi,* whereby complaint preferred by the appellant under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act') has been dismissed in default for want of prosecution.

2. In present appeal, respondent has been duly served, but despite that she has not appeared in Court, which indicates that she is not interested to contest the appeal. Perusal of record also reveals that she was not appearing in the trial Court since February 2015. Arguments in the trial Court were heard on 18.02.2015 and thereafter learned counsel representing the respondent was also not turning up and trial Court could not ensure her presence despite issuing warrants against her.

3. Complaint by the appellant, under Section 138 of N.I. Act for dishonouring of cheque issued by respondent, was preferred in the year 2013. After pursuing and contesting the case by the parties, arguments in the complaint were concluded on 18.02.2015 and thereafter case was listed for 26.02.2015 for furnishing of the requisite bonds by the respondent under Section 437-A Cr.P.C., but on that day and dates subsequent thereto i.e. 26.03.2015, 02.04.2015, 30.06.2015 and 03.07.2015, neither respondent nor her counsel had appeared. However, in response to non-bailable warrants issued against the respondent vide order dated 03.07.2015 read with order dated 26.03.2015, respondent had appeared alongwith counsel in the trial Court on 14.08.2015 and whereupon case was listed for arguments on 10.12.2015, on which date, it was again adjourned for 23.02.2016 for arguments. On 23.02.2016, an application for exemption was filed on behalf of the respondent-accused through her counsel, which was allowed and case was adjourned for 04.04.2016.

4. Since 04.04.2016, again, neither respondent nor her counsel had appeared on 04.04.2016, 25.06.2016, 28.09.2016, 23.12.2016 and 27.03.2017 despite issuance of bailable and non-bailable warrants against the respondent.

5. On 27.03.2017 non-bailable warrants were issued against the respondent for 14.06.2017. However the said warrants were not executed and on 14.06.2017 case was transferred from the Court of learned Additional Chief Judicial Magistrate, Kullu to learned Chief Judicial Magistrate, Lahaul and Spiti at Kullu, who again issued non-bailable warrants against respondent, returnable on 02.12.2017.

6. Before next date of hearing i.e. 02.12.2017 case was taken on 27.11.2017 and on that day, date for returning non-bailable warrants issued against the respondent was modified from 02.12.2017 to 28.04.2018, but on that day also, non-bailable warrants were received back unexecuted and thereafter again non-bailable warrants were issued for 24.10.2018, but the same could not be issued for want of filing P.F. for the said purpose.

7. On 24.10.2018, impugned order of dismissing complaint has been passed by trial Court, which reads as under:-

> "24.10.2018:Present:-None for complainant.
>
> It is 12.25 PM.
>
> Be awaited.
>
> Called again:
>
> Present:- None for the complainant.
>
> It is 2.30 pm. Be awaited.
>
> Called again at 4.00 P.M.:-
>
> Present:- None

Case repeatedly called since morning however, none appeared on behalf of complainant. The complainant has also not taken steps i.e. PF & CA for the service of the accused. The present complaint thus is dismissed in default for want of prosecution. File after completion be consigned to record room.

Announced

24.10.2018"

8. 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 or death of complainant.

9. I am in agreement with finding returned 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** with respect toapplicability ofSection 256 CrPC in a complaint filed under Section 138 of the NI Act.

10. 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."*

11. 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.

12. 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."*

13. 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.

14. 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.

15. 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.

16. 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.

17. 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).**

18. 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.

19. The same principle has been reiterated by this Court in cases titled **Dole Raj Thakur versus Pankaj Prashar,** reported in **Latest HLJ 2018(HP) 266; Dole Raj Thakur versus Jagdish Shishodia,** reported in **Latest HLJ 2018 (HP) 296;** in **Cr. Appeal No. 301 of 2018 titled Hemant Kumar vs. Sher Singh** decided on 27.9.2018; and in **Cr.Appeal No.**469 of 2018 titled **Pooja Sharma vs. Suresh Kumar,** reported in **2019(1) Him.LR (HC) 495**.

20. It is true that Magistrate has a discretion to dismiss the complaint for default resulting into acquittal of the accused. However, in present case, for the discussions made hereinafter, I am inclined to set aside the impugned order.

21. 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.

22. In normal circumstances, no complainant will be disinterested in pursuing his complaint without any reason. In the given circumstances, particularly when complainant continued itself to be represented either through counsel or authorized representative and the case was not only at final stage but once arguments were also concluded, it was a fit case for the Magistrate to exercise his discretion to adjourn the case for a subsequent date.

23. In present case complainant was contesting its case with due diligence and in fact trial was almost complete on 18.02.2015 when arguments were heard and case was listed for furnishing requisite bonds by the respondent under Section 437-A Cr.P.C. and final order on 26.02.2015. But final order could not be passed on account of conduct of the respondent as explained hereinabove.

24. In view of the aforesaid facts and circumstances and the ratio of law laid down by the apex Court and High Courts including this Court, I am of the opinion that the Magistrate was not justified in dismissing the complaint in default for absence of authorized person of the complainant coupled with failure of its counsel to attend the case on that date, particularly, when thecomplainant was pursuing its case from 18.10.2013 and was being represented through counsel on numerous dates fixed for service of respondent through bailable and non-bailable warrants. It is also a fact that the date on which the case has been dismissed in default was listed for service of respondent and on that day, personal presence of authorized representative of complainant was not necessary especially when counsel had already been engaged to represent the complainant and the said counsel was regularly appearing before the Magistrate but except the date of passing of impugned order.

25. In aforesaid facts and circumstances and also for the conduct of the respondent before trial Court as well as in response to the warrants issued against her for her appearance in this appeal, her presence is not necessary for passing this order. It is also noticeable that impugned order was also passed in her absence.

26. For aforesaid discussion, I am of the considered opinion that one opportunity should have been provided to the appellant/complainant and accordingly, appeal is allowed and impugned order dated 24.10.2018, passed by learned Chief Judicial Magistrate, Lahaul and Spiti at Kullu, is set aside and the complaint preferred by the petitioner is restored to its original number and position. Appellant is directed to appear before learned Chief Judicial Magistrate, Lahaul and Spiti at Kullu, on 30.03.2020 with a direction to learned Chief Judicial Magistrate to proceed further thereafter in accordance with law after ensuring presence of respondent and decide the complaint expeditiously as possible thereafter preferably within three months.

27. Needless to say for any subsequent default appellant/complainant shall face consequences in accordance with law irrespective of view expressed in this judgment.

Record be sent back.

■■

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

Uttam Chand & another …Petitioners.

Versus

State of Himachal Pradesh ..Respondent

Cr.MMO No. 133 of 2020
Date of Decision: March 6, 2020

Code of Criminal Procedure, 1973- Section 439- Petition in High Court for change and alteration of terms and conditions of bail granted by Sessions Judge- Petition ordered to be dismissed as withdrawn with liberty to petitioner to move Court of Sessions for alteration of terms and conditions of bail granted by it. (Para 2)

Whether approved for reporting?[28]*Yes*

For the Petitioner: Mr. Rajiv Jiwan, Senior Advocate with Mr.Prashant Sharma, Advocate.

For the Respondents: Mr.R.P. Singh, Deputy Advocate General, for the respondent-State.

Vivek Singh Thakur, J (oral)

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28 Whether reporters of the local papers may be allowed to see the judgment?

This petition has been filed for relaxing/waiving off of condition No.10 imposed by learned Sessions Judge, Mandi, at the time of granting bail to the petitioner vide order dated 17.12.2019, passed in bail applications No.280 of 2019, titled as *Uttam Chand vs. State of Himachal Pradesh* and 279 of 2019, titled as *Sonu Parmar vs. State of Himachal Pradesh.*

2. Petitioner has sought waiving off and relaxing the aforesaid condition on the ground that initially co-accused Anil Kumar was enlarged on bail by a Coordinate Bench of this High Court vide order dated 06.12.2019, passed in Cr.M.P.(M) No. 2084 of 2019, titled as *Anil Kumar vs. State of Himachal Pradesh,* imposing similar condition, but later on vide order dated 20.02.2020 passed in Cr.M.P.No. 445 of 2020 in Cr.M.P.(M) No.2084 of 2019, the Coordinate Bench has modified the said order by deleting the said condition substituting by new condition that in case petitioner repeats the offences or indulges in any such behaviour with the victims, then this condition No.(j) shall revive automatically.

3. It is plea of petitioner that learned Sessions Judge had imposed condition No.10 on the basis of condition No.(j) imposed by the High Court in *Anil Kumar's case* and now when the High Court has modified the condition in *Anil Kumar's case,* petitioner is also entitled for the same treatment.

4. I am of considered view that in the aforesaid facts and circumstances, petitioner should have approached the concerned Court i.e. Sessions Judge, Mandi, who has imposed the condition, for deletion/ modification/ relaxing/waiving off thereof.

5. Faced with this situation, at this stage, learned counsel for the petitioner seeks permission to withdraw this petition with liberty to approach learned Sessions Judge, Mandi, with appropriate application for the identical relief sought in the present petition. Accepting prayer, liberty as prayed for, is granted to the petitioner. Petition is dismissed as withdrawn in aforesaid terms.

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, JUDGE AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, JUDGE.

Bhavan Kumar …….Petitioner

Versus

State of H.P. ……Respondent

Cr.M.P(M) No. 613 of 2019
Reserved on: 8.11.2019
Decided on: 29.02.2020

Code of Criminal Procedure, 1973 (Code)- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 25 & 29- Regular bail- Grant of- Whether Hon'ble Singh Bench can direct Sessions Judges/ Special Judges that in future they shall decide bail applications under Section 439 of Code involving cases under Act in accordance with verdict recorded by High Court in Cr.MP No. 138 of 2019 (Nasir Mohammad vs. State of Himachal Pradesh)- Held, Hon'ble Singh Bench relied upon E. Michael Raj for holding that only pure resin contents of contraband are to be seen for determining its quantity- E. Michael Raj was specifically referred to in Mahboob Khan and Hon'ble Full Bench of High Court had held that recovered entire stuff is to be taken as 'charas' not only when it is in purified from but also when it is in crude form or still mixed with other parts of cannabis plant- Hon'ble Single Bench could not have taken a view contrary to one taken by Full Bench in Mahboob Khan's case- In the event of disagreement if any, reasons therefore should have been recorded and matter referred to Larger Bench for consideration- Reference decided accordingly- Copy of judgment ordered to be circulated amongst Sessions Judges/ Special Judges/ Chief Judicial Magistrates/ Judicial Magistrates in the State for compliance. (Para 7, 8 & 16).

Cases referred;

Bhavan Kumar vs. State of Himachal Pradesh, [Cr.M.P(M) No. 613 of 2019]
E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008) 5 SCC 161,
Harinder Singh vs. State of H.P. Cr.M.P(M) No. 77 of 2018,
Hira Singh and another vs. Union of India and another (2017) 8 SCC 162
Jabalpur Bus Operators Association and others vs. State of M.P and others, AIR 2003 Madhya Pradesh 81,
Jasbir Singh vs. State of Punjab (2006) 8 SCC 294,
Manju Bala vs. State of H.P and others, Latest HLJ 2012 (HP) (FB) 687,
Nasir Mohammad vs. State of Himachal Pradesh, Cr.M.P(M) No. 138 of 2019,
Nirmal Singh vs. State of H.P. in Cr.M.P(M) No.1145 of 2014,
Roshan Lal Bhardwaj vs. State of Himachal Pradesh, in Cr.M.P(M) No. 332 of 2019,
S.P. Gupta Vs. Union of India 1981 (Supp.) SCC 87,
State of H.P. vs. Mehboob Khan 2013(3) Him. L.R. (FB) 1834

Whether approved for reporting?[29]Yes.

For the petitioner: **Mr. Ashok Kumar, Advocate.**

For the respondents: **Mr. J.S. Guleria, Dy. A.G for the respondent-State.**

Mr. Divya Raj Singh, Advocate as *Amicus Curiae.*

Dharam Chand Chaudhary, J. (Oral)

A Single Bench of this Court has framed the following question of law during the hearing of this petition [Cr.M.P(M) No. 613 of 2019] titled ***Bhavan Kumar*** vs. ***State of Himachal Pradesh*** and referred the same to Larger Bench for adjudication:

> "Whether Single Bench of this Court while deciding an application for grant of bail can issue a mandate to the Special Courts/Sessions Courts in the State that all applications for grant of bail filed there under Section 439 of the Code of Criminal Procedure in the cases registered under the provisions of Narcotic Drugs and Psychotropic Substances Act be decided as per law laid down by it in Cr.M.P(M) No. 138 of 2019, titled Nasir Mohammad versus State of Himachal Pradesh or not ?

2. Accordingly, the Registry has placed this matter before Hon'ble the Chief Justice which ultimately has been referred to this Bench for adjudication of the question of law hereinabove formulated for adjudication by the Single Bench.

3. The petition has been filed under Section 439 of the Code of Criminal Procedure by the accused-petitioner for grant of bail in a case registered against him under Sections 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act' in short) vide FIR No. 11 of 2019 in Police Station, Jogindernagar, District Mandi, H.P. It is during the course of arguments, learned counsel representing the accused-petitioner has placed reliance on the judgment that it is the resin contents in a sample of charas are relevant to determine the quantity, rendered by another Single Bench of this Court in Cr.M.P(M) No. 332 of 2019 titled ***Roshan Lal Bhardwaj*** vs. ***State of Himachal Pradesh*** decided on 15.03.2019. The operative part of this judgment reads as follows:

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[29] Whether the reporters of Local Papers may be allowed to see the judgment? Yes.

"It is made clear that in future all the Special Courts/Sessions Courts concerned, who deal with an application under Section 439 Cr.P.C., in respect of the offences, constituted, under the Narcotic Drugs and Psychotropic Substances, Act, shall bear in mind, the, verdict recorded by this Court, upon Cr.M.P.(M) No. 138 of 2019, and, pass orders, in accordance with law. No costs."

4. Now if coming to the petition registered as Cr.M.P(M) No. 138 of 2019 titled ***Nasir Mohammad*** vs. ***State of Himachal Pradesh***, referred to in the judgment supra, the same has also been authored by the same Single Bench and pertains to grant of bail in a case registered under Sections 20, 25 and 29 of the NDPS Act vide FIR No. 273 of 2016 in Police Station, Sadar, District Chamba. The Single Bench in *Nasir Mohammad's* case supra has taken the resin content found in the sample of charas during the course of its analysis in the Forensic Science Laboratory to determine its quantity and admitted the accused-petitioner on bail. Such view of the matter has been formed contrary to the view taken by one of us (Justice Vivek Singh Thakur, J.) in Cr.M.P(M) No. 1751 of 2018 titled ***Dilbar Singh*** vs. ***State of H.P.*** decided on 11.1.2019. It has been held in this judgment that to consider the quantity on the basis of purified resin content as less than commercial quantity is contrary to the judgments passed by Full Bench of this Court in ***State of H.P.*** vs. ***Mehboob Khan 2013(3) Him. L.R. (FB) 1834*** and by a Division Bench in Cr.M.P(M) No.1145 of 2014 titled ***Nirmal Singh*** vs. ***State of H.P.*** and also order passed by another Single Bench of this Court in Cr.M.P(M) No. 77 of 2018 titled ***Harinder Singh*** vs. ***State of H.P***. The ratio of the judgment in *Dilbar Singh's* case supra reads as follows:-

"30. As held in Mehboob Khan's case, principle of determination of quantity of recovered contraband, on the basis of pure resin contents, is not applicable in case of 'Charas' for its distinct, well defined and elaborated definition provided in Section 2 (iii) of the NDPS Act. E.Michalraj's case is also not applicable to 'Charas'. For definition of 'Charas' in Section 2 (iii) of NDPS Act, separated resin, in whatever form, whether crude or purified, obtain from cannabis plant is 'Charas' and therefore,prior to insertion of Note-4 on 18.11.2009 and thereafter, situation for 'Charas' remains the same. In case of 'Charas',entire mass is to be treated as 'Charas' because of its definition under Section 2 (iii) of NDPS Act, but neither because of Entry No.239 of the Notification specifying small quantity and commercial quantity nor because of insertion of Note-4 below it,vide Notification dated 18.11.2009. Therefore, reference of E.Michalraj's case along with validity of insertion of Note-4 by the Central Government, by notification SO 2941 (E) dated 18.11.2009 below a notification, specifying small quantity and commercial quantity, to the larger Bench in Hira Singh's case is of no bearing, in case of 'Charas'. Therefore, decision of larger Bench of the Apex Court in Hira Singh's case, in either way will not have any bearing on the cases related to 'Charas'. Therefore,the judgments of the Coordinate Bench, relied upon by learned counsel for the petitioner are of no help to the petitioner.

31. I am bound to follow the former decision of larger Bench of this Court, which in is in consonance with the clarification rendered by the Apex Court in Harjeet Singh's case, with respect to applicability of E.Michalraj's case. These judgments have not been set aside or disturbed or over ruled till date by any subsequent Larger Bench of this Court or by the Apex Court as the case may be.

32. Reference of former decision of the Court, to a larger Bench does not mean that the ratio of law, settled in judgment referred will

ipso-facto becomes, redundant or stands over ruled. Unless a judgment is over ruled, the ratio laid down there has a binding force obviously, subject to principles to be followed for determining the precedent. Hence, I am refrain to accept the plea of the petitioner to concur with the judgments of the Coordinate Bench of this Court for considering the quantity of 'Charas' as less than commercial quantity."

5. The Single Bench which has decided *Nasir Mohammad's* petition has differed with the ratio of the judgment in *Dilbar Singh's* case supra and held that as per the statutory definition of charas, it is the separated resin or resinous substance, the solitary factor or substance being the same within or outside the domain of the statutory definition of charas. Also that only the weight of the recovered substance is a determining factor as to whether the same is in small intermediate or commercial quantity did not accept the view of the matter taken by one of us (Vivek Singh Thakur, J.) in *Dilbar Singh's* case cited supra. The Single Bench which has decided the petition filed by *Nasir Mohammad* though has referred the observations in *Dilbar Singh's* case supra and also noted from the judgment of Full Bench of this Court in *Mehboob Khan's* case that unless the presence of neutral substance is established in the recovered charas the entire mass has to be considered as contraband, however, observed that as per report of the Forensic Science Laboratory, the quantum of resinous substance as carried in the bulk recovered from the conscious and exclusive possession of the accused is the solitary, statutorily recoknable factor in construing whether the quantity of recovered charas is small, intermediate or commercial quantity. Such conclusion drawn by the Single Bench in *Nasir Mohammad's* case now has been sought to be followed by all Special Courts/Sessions Courts dealing with an application under Section 439 of the Code of Criminal Procedure filed for grant of bail in a case registered under the NDPS Act in the State, is contrary to the law laid down by the Full Bench of this Court in *Mehboob Khan's* case supra and also by a Division Bench on a reference made by Single Bench in *Nirmal Singh's* followed by one of us (Vivek Singh Thakur, J.) in *Dilbar Singh's* case supra.

6. It is seen that the judgment rendered in *Nasir Mohammad's* case, the Single Bench has heavily placed reliance on the judgment of the Apex Court in ***E. Micheal Raj*** vs. ***Intelligence Officer, Narcotic Control Bureau, (2008) 5 SCC 161***. The law laid down in *E. Micheal Raj's* case otherwise is referred by a Bench of the Apex Court to a Larger Bench for re-examination in ***Hira Singh and another*** vs. ***Union of India and another (2017) 8 SCC 162***. As a matter of fact, the view of the matter taken by the Apex Court in this judgment is also that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment, it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. Meaning thereby that the content of narcotic drug or psychotropic substance would only be minus neutral substance/s, if any, in the recovered contraband. The Full Bench of this Court in *Mehboob Khan's* case has considered the judgment of the Apex Court in *E. Micheal Raj's* case and taken a similar view that the percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and less than commercial quantity (intermediatory) and the commercial quantity. Rather, if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff has to be taken to determine the quantity i.e. smaller, above smaller, (intermediary) or commercial. Further that separated resin is cannabis resin not only when it is in purified form, but also when in crude form or still mixed with other parts of the plant. Also that the resin mixed with other parts of the plant i.e. in crude form is also charas as legislation in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to have some other neutral

substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as the charas is a resinous mass and after conducting tests if in the opinion of the expert the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert.

6. It has further been held in *Mehboob Khan's* case supra that the neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in crude form or purified form. In common parlance, charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article and no concentration and percentage of resin is prescribed for charas under the Act.

(Emphasis supplied)

7. Such being the legal position, we fail to understand as to how the Single Bench which has decided the petition, registered as Cr.M.P(M) No. 332 of 2019 titled ***Roshan Lal Bhardwaj*** vs. ***State of H.P*** and Cr.M.P(M) No. 138 of 2019 titled ***Nasir Mohammad*** vs. ***State of H.P.*** and also several other petitions cited by learned counsel representing the accused-petitioner in Dilbar Singh' case i.e. Cr.MP(M) No.1328 of 2018, titled as Jaswant Singh v. State of H.P., decided on 25.10.2018,Cr.MP(M) No.1505 of 2018, titled as Sewak Ram vs. State of H.P., decided on 22.11.2018, Cr.MP(M)No.1625 of 2018, titled as Narayan Singh vs. State of H.P. decided on 20.12.2018,Cr.MP(M) Nos. 1777 & 1778 of 2018, titled as Bresati Devi vs. State of H.P. and Pawan Kumar vs. State of H.P. decided on 27.12.2018 and Cr.MP(M) No.1765 of 2018, titled as Nageshwar Dipta vs. State of H.P., decided on 28.12.2018could have taken a view contrary to the one taken by Full Bench of this Court in *Mehboob Khan's* case and Division Bench of this Court in *Nirmal Singh's* case and followed by another Single Bench in *Dilbar Singh's* case referred to hereinabove that it is the resin contents in the recovered charas have to be taken to determine its quantity as small, intermediatory or commercial. In our considered opinion, such a view of the matter has been taken contrary to the judicial precedents and contrary to Article 141 of the Constitution of India, hence against all legal decency and judicial discipline.

8. There is no question of learned Single Judge disagreeing with the law laid down by Full Bench of this Court in *Mehboob Khan's* case and also by Division Bench in *Nirmal Singh's* case cited supra. The view of the matter taken by one of us (Vivek Singh Thakur, J.) in *Dilbar Singh's* case that the ratio laid down by the Division Bench is binding on the Single Bench has been ignored by the Bench, which has decided Nasir Mohammad's petition for grant of bail subsequently. In the event of disagreement, if any, reasons therefor should have been recorded and the matter referred for consideration by a Larger Bench. This alone would have been the only course available to the Single Bench, which has decided the petition filed by *Nasir Mohammad* aforesaid and granted the bail to said Nasir Mohammad and also Roshan Lal Bhardwaj aforesaid as well as to the petitioners in similar petitions referred before one of us (Vivek Singh Thakur, J.) during the course of arguments in *Dilbar Singh's* case. The approach of learned Single Bench, which has decided *Nasir Mohammad's* case is therefore unknown to law, hence cannot be approved in any manner whatsoever.

9. As per the precedent, the earlier decisions of the Benches of equal strength are binding unless explained by the Bench of equal strength in the later decision and in that event the later decision is binding. Our own High Court in ***Manju Bala*** vs. ***State of H.P and others, Latest HLJ 2012 (HP) (FB) 687*** has held as under:-

> "10….That is a power to be exercised on the administrative side. It is not to be invoked on a reference. The plain purpose is only to enable the chief Justice to place any matter before the Full Bench otherwise than on a reference, in the required contingencies like public interest, the interests of administration of justice, the exigencies of administration of the institution etc. It is the absolute prerogative of the Chief Justice to distribute the work in the High Court and post any case before any bench, subject of course to the provisions in the High Court Act. That power cannot be compelled to be invoked on a reference."
>
> 10. The upshot of the above discussion is:
>
> i) The Single Bench of the High Court is ordinarily bound by the decision of another Single Bench. In case it is found necessary in situations like the judgment being rendered per incuriam or subsilentio, the subsequent change in the legal position etc., the only course open to the learned Single Judge is to refer the matter to the Division Bench and not to render another judgment.
>
> ii) A Single Bench is bound by the Division Bench judgment.
>
> iii) When there are two Division Bench decisions, the binding decision ordinarily is the later in point of time unless the former is rendered on the basis of a binding Full Bench decision.
>
> iv) However, in a situation of conflicting binding decisions on the same issue, the attention of the Chief Justice can be invited so that the Chief Justice may, if required, constitute a larger Bench.
>
> 11. The instant case is not one of conflicting bench decision. There is direct Division Bench judgment on the point (in Baldev Singh's case) and hence, the single bench is bound by the same. Thus, the reference made by the learned Single Judge for consideration by a Full Bench is incompetent."

10. It is crystal clear from the ratio of the law laid down by Full Bench of this Court in *Manju Bala's* case supra that not only the judgment rendered by a Single Bench is binding upon other Single Bench but in case of there being a Division Bench judgment, the same is binding on the Single Bench and also the Bench of equal strength. In the case in hand, as noticed supra, not only the judgment of Full Bench in *Mehboob Khan's* case but also the judgment of a Division Bench in *Nirmal Singh's* case though discussed, however, ignored contrary to the well settled legal principles and the Single Bench has formed its own opinion. Such an approach is not legally admissible.

11. The Full Bench of Madhya Pradesh High Court in ***Jabalpur Bus Operators Association and others*** vs. ***State of M.P and others, AIR 2003 Madhya Pradesh 81 Full Bench*** in a detailed judgment authored by the then Chief Justice, Hon'ble Mr. Justice Bhawani Singh, J. has also taken similar view of the matter. This judgment reads as follows:

> "8. Having considered the matter with broader dimensions, we find that various High Courts have given different opinion on the question involved. Some hold that in case of conflict between two judgments on a point of law, later decision should be followed; while

others say that the Court should follow the decision which is correct and accurate whether it is earlier or later. There are High Courts which hold that decision of earlier Bench is binding because of the theory of binding precedent and Article 141 of the Constitution of India. There are also decisions which hold that Single Judge differing from another Single Judge decision should refer the case to Larger Bench, otherwise he is bound by it. Decisions which are rendered without considering the decisions expressing contrary view have no value as a precedent. But in our considered opinion, the position may be stated thus-

> With regard to the High Court, a Single Bench is bound by the decision of another Single Bench. In case, he does not agree with the view of the other Single Bench, he should refer the matter to the Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should refer the matter to Larger Bench. In case of conflict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of later Division Bench shall be binding. The decision of Larger Bench is binding on Smaller Benches.
>
> In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Larger Bench decisions, the decisions of Larger Bench are binding on the High Courts and the Subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision in binding in all circumstances, or the High Courts and Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India but also militate hierarchical supremacy of Courts. The common thread which runs through various decisions of Apex Court seems to be that great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is per incuriam, having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in Balbir Singh's case (supra) which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the

> correct law as to application of precedent and is, therefore, over-ruled on this point.

12. In view of the law so laid down by the Full Bench of our own High Court in *Manju Bala's* case and by the Full Bench of the Madhya Pradesh High Court in *Jabalpur Bus Operators Association's* case, the Single Bench which has decided Nasir Mohammad's bail application and other bail applications including Roshan Lal Bhardwaj vs. State of H.P. could have not formed an opinion that it is the resin contents in a stuff of charas recovered from an accused are determining factors so as to its quantity small, intermediary or commercial is concerned. The judgment rendered by one of us (Vivek Singh Thakur, J.) in *Dilbar Singh's* case supra that ratio of law laid down by the Division Bench is binding on Single Bench has been ignored by the Single Bench which has decided the application filed by *Nasir Mohammad* etc. later on.

13. Now if coming to the directions to all Special Courts/Sessions Courts dealing with an application under Section 439 of the Code of Criminal Procedure in a case registered under the Narcotic Drugs and Psychotropic Substances Act, to bear in mind the verdict recorded in *Nasir Mohammad's* case supra, no such direction could have been issued being legally unsustainable. We are drawing support in this regard from the judgment rendered by the Apex Court in ***Jasbir Singh*** vs. ***State of Punjab (2006) 8 SCC 294***. The relevant extract of this judgment reads as follows:-

> "14. So, even while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants. The independence of the judiciary has been considered as a part of the basic structure of the Constitution and such independence is postulated not only from the Executive, but also from all other sources of pressure. In S.P. Gupta Vs. Union of India 1981 (Supp.) SCC 87, speaking on the independence of the judiciary, a Bench of seven Judges observed as under at page 221-222 :-
>
> > "The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity.. But it is necessary to remind ourselves that the concept of independence of judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong."

15. The counsel appearing for the respondent submitted that the power of superintendence and control over the subordinate courts is conferred on the High Court under Article 235 of the Constitution and therefore the Inspecting Judge was fully justified under certain circumstances to entertain the bail petitions or transfer applications and direct the District Judges or other courts to pass appropriate orders. We find no force in this contention. This plea has been raised without any basis. Article 235 of the Constitution gives power to the High Court to exercise control over the subordinate courts. This power has been specifically described in Article 235 in a comprehensive sense so as to include the powers of general superintendence over the working of the subordinate courts; disciplinary control over the Presiding Judges of the subordinate courts which includes power to make inquiry; and impose punishments other than dismissal, removal or reduction in rank subject, of course, to the rules of services and Article 311(2) of the Constitution. This power also would include the power to order disciplinary inquiry, transfers, promotions of members of subordinate judiciary and confirmation of officers etc. It also includes the power to recall officers of the subordinate courts holding ex cadre posts or to send officers on deputation to other administrative posts or award selection grade or pass orders on any such matters connected with service. The powers of control to be exercised under Article 235 of the Constitution do not extend to interfering with the judicial functions of the subordinate courts. By virtue of the power under Article 235 the High Court cannot direct the presiding officer to pass a judicial order in a particular manner as that would certainly amount to interfering with the independence of the subordinate judiciary.

16. In the course of inspection, the High Court Judge is required to examine whether the courts are functioning within the norms laid down by the High Court. Mostly the inspection is to be confined to the administrative functioning of the courts and its officers. If any member of the administrative staff is not doing the work assigned to him or is causing any delay in the process of administration of justice, the Inspecting Judge can give proper direction and see that the courts function smoothly. But under no circumstances, the Inspecting Judge, as part of his administrative duty enjoys the power to interfere with the judicial functions of the subordinate courts in individual cases. In the course of inspection, a High Court Judge cannot pass any order on interim applications, such as bail petitions or transfer applications or applications for interim injunction, howsoever justified they may be. Orders on bail applications are passed under the provisions of the Code of Criminal Procedure or under various other enactments, which provide for grant of bail and such orders are passed as part of the judicial work. The Inspecting Judge is not supposed to pass any judicial order in individual cases in the course of inspection. Of course, he can give administrative directions to the Presiding Officer or to any of the subordinate staff, if such directions are pertinent in the context of administration of justice. Except giving general directions regarding any matter concerning administration of justice, any interference in the judicial functions of the Presiding Officer would amount to interference with the independence of the subordinate judiciary."

14. After having answered the reference, the petition be placed before the Single Bench for decision on merits.

15. Since the Single Bench, which has decided Cr.M.P (M) No.138 of 2019, titled Nasir Mohammad versus State of Himachal Pradesh has granted bail to Nasir Mohammad and also Roshan Lal Bhardwaj in Cr.M.P(M) No. 332 of 2019 and also to the petitioner in several other petitions mentioned in *Dilbar Singh's* case and also in para 7 of this judgment, while taking a view contrary to the one taken by Full Bench of this Court in Mehboob Khan's case supra and by a Division Bench of this Court in *Nirmal Singh's* case also followed by one of us (Justice Vivek Singh Thakur, J.) in *Dilbar Singh's* case supra, therefore, we will be failing in our duty, if not, pass appropriate directions in this regard. Though show cause notice should have been issued straightway to the accused persons hereinabove, who have been ordered to be admitted on bail by not appreciating the law laid down in Mehboob Khan's case in its right perspective, however, we leave it open to learned Advocate General, State of Himachal Pradesh to consider the desirability of filing of appropriate application(s) for cancellation of the liberty of bail so granted by learned Single Judge by taking a contrary view in Nasir Mohammad's case supra. Similarly, the Additional Chief Secretary (Home) to the Government of Himachal Pradesh also to examine the desirability to consider the filing of application(s) before the Sessions Judges (Special Judges) in the State for cancellation of bail granted to the accused persons in the cases registered under the NDPS Act while placing reliance on the judgment in Nasir Mohammad's case and Roshan Lal Bhardwaj's case referred to hereinabove.

16. Authenticated copy of this judgment be circulated amongst all the Sessions Judges/Special Judges and also the Additional Sessions Judges/Chief Judicial Magistrates/Judicial Magistrates in the State of Himachal Pradesh for compliance. A Copy of this judgment be also supplied to learned Advocate General and Additional Chief Secretary (Home) to the Government of Himachal Pradesh for compliance.

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

Yuv Raj ....Petitioner.

Versus

State of Himachal Pradesh ...Respondents.

Cr.MP(M) NO.2135 of 2019
Decided on: 05.03.2020

Code of Criminal Procedure, 1973 - Section 439- Regular bail- Grant of in a case registered for offences of murder, wrongful confinement and under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Held, accused stands charged for murder- Bail application filed earlier stands dismissed by the Special Judge- Prosecution witnesses are yet to be examined in Court and possibility of their being exposed to inducement, threat or promise still looms large- Petitioner has criminal history and atleast five FIRs were registered against him- Petition dismissed. (Para 7 to 10)

Cases referred;

Sanjay Chandra Versus Central Bureau of Investigation; (2018) 3 Supreme Court Cases 22
Datram Singh Versus State of Uttar Pradesh and Another; and (2018 (2),
Shafi Mohammad Versus State of Himachal Pradesh, Shim LC 933,

Whether approved for reporting? [30] Yes

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Whether reporters of the local papers may be allowed to see the judgment?

For the petitioner Mr. Sanjeev Kuthiala, Sr. Advocate, with Ms. Anaida ,Kuthiala, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Additional Advocate Generals, Mr. Sunny Dhatwalia, Assistant Advocate General.

Inspector/ SHO Ranjan Sharma, P.S. Karsog, District Mandi, H.P.

present in person.

Ajay Mohan Goel, Judge (Oral)

Status report filed, which is ordered to be taken on record.

By way of this petition, filed under Section 439 of Cr.P.C., petitioner has prayed for his enlargement on bail in case FIR No.157 of 2018 dated 23.10.2018, registered under Sections 342, 323 and 302 read with Section 34 of the Indian Penal Code and Section 3 (2) (v) of the Scheduled Caste and Scheduled Tribes, Protection and Atrocities Act, registered at Police Station Karsog, District Mandi, H.P.

2. Record demonstrates that earlier an application filed by present petition under Section 439 of Cr.P.C. i.e. bail application No. 112 of 2018, titled as Yuv Raj Versus State of Himachal Pradesh, was dismissed by the Court of learned Special Judge, Mandi, District Mandi, H.P., vide order dated 05.12.2018, which is appended with this petition as Annexure P-1. Thereafter, petitioner had approached this Court by way of Cr.MP(M) No.817 of 2019, which was dismissed as withdrawn by this Court vide order dated 21.05.2019 by accepting the prayer made by learned counsel for the petitioner in the said petition of grant of liberty to the petitioner to approach the Court again at a subsequent stage.

3. Learned Senior Counsel for the petitioner has argued that a perusal of the investigation would demonstrate that the petitioner has been falsely implicated in this entire episode and he is not at all guilty of the offences alleged against him. He has further argued that it is the co-accused, against whom otherwise also, finger is pointed out as per the investigation carried out by the prosecution. He further submits that bail before jail is the settled principle of law and at this stage, petitioner has a right to be presumed that he is innocent. He submits that in case during the course of trial, petitioner is found to be guilty then the law will take its own course, but simply because a First Information Report stands registered against him, it does not permits the State to curtail his personal liberty. He has relied upon the following judgments in support of his contention: ***(2012) 1 Supreme Court Cases 40*** titled as ***Sanjay Chandra*** Versus ***Central Bureau of Investigation; (2018) 3 Supreme Court Cases 22*** titled as ***Datram Singh*** Versus ***State of Uttar Pradesh and Another***; and ***(2018 (2) Shim LC 933*** titled as ***Shafi Mohammad*** Versus ***State of Himachal Pradesh***.

4. On the other hand, learned Additional Advocate General has argued that primarily there is no change in the factual matrix as it existed at the time when similar applications filed by the present petitioner were dismissed *inter alia* by the Court of learned Special Judge, Mandi, District Mandi, H.P. on merit and by this Court as withdrawn. He has further submitted that petitioner is a habitual offender and more than five FIRs otherwise stood registered against him implicating him of having committed heinous crimes. He has further argued that as of now statements of prosecution witnesses are to be recorded and in case the petitioner is ordered to be released on bail, there is each and every probability that he might influence the witnesses which may hamper the independent advancement of the trial. He has

further argued that undoubtedly bail before the jail is the general principle of law, but taking into consideration the heinousness of the offences which stands alleged against the petitioner in the present case, this case does not deserves grant of bail in favour of the petitioner. He has argued that Hon'ble Supreme Court in more than one pronouncement has from time to time reiterated that at the time of consideration of an application for grant of bail, the Court has to see (a) the gravity of the offence alleged, (b) possibility of the petitioner interfering in the course of investigation/trial in case of release on bail and **(c)** whether there is a possibility that in case of grant of bail the petitioner may again indulge in the kind of offences which are alleged in the F.I.R. On these basis, he submits that keeping the previous track record of the petitioner in mind, this petition deserves dismissal.

5. Learned Senior Counsel for the petitioner while rebutting the submissions so made by learned Additional Advocate General, has argued that the First Information Reports which earlier stood registered against the petitioner, have resulted in his acquittal and petitioner was not charged for having committed heinous offences as was evident from the Sections under which the FIRs were lodged.

6. I have heard learned Senior Counsel for the petitioner and learned Additional Advocate General. I have gone through the status report and have also perused the record which has been produced by the State.

7. Admittedly, the petitioner stands charged for commission of offences under Sections 342, 323 and 302 read with Section 34 of the Indian Penal Code and Section 3 (2) (v) of the Scheduled Caste and Scheduled Tribes, Protection and Atrocities Act. There are two accused in the F.I.R. and the other accused is behind bars. Undoubtedly, whether or not the petitioner is guilty of offences alleged against him is a matter of trial. However, in the case of grant of bail, the Court *inter alia* has to take into consideration the gravity of the offence alleged against the petitioner in the F.I.R as well as the circumstances in which the offence is stated to have been committed. This Court does not wishes to make any comment on the submissions made by learned Senior Counsel for the petitioner that the investigation does not points out any finger with regard to the involvement of the petitioner with the alleged crime or it is borne out from the investigation that it is the other accused who perhaps may be guilty of the alleged offences. The Court is making this observation because any reference made in this regard by the Court on the submissions of learned Senior Counsel for the petitioner may have an effect on the trial.

8. Be that as it may, a perusal of the order passed by the learned Special Judge, Mandi, District Mandi, H.P., who earlier dismissed a similar application filed by the present petitioner on 05.12.2018, demonstrates that the application was rejected by the learned Special Judge *inter alia* on the ground that in the case of release of the petitioner on bail, witnesses acquainted with the fact may be exposed to inducement, threat or promise by the bail petitioner. Learned Court also observed that statement of the witnesses acquainted with the fact were yet to be recorded and taking into consideration the offences alleged against the petitioner, the application was not fit to be allowed.

9. The circumstances which weighed with the learned Special Judge when the said application was dismissed, are existing even today. Though the challan stands filed before the appropriate Court of Law for the purpose of trial, however, statements of the prosecution witnesses are yet to be recorded. Therefore, possibility of the witnesses who are acquainted with the facts being exposed to inducement, threat or promise still looms large. It is a matter of record that there were at least five FIRs registered against him under various Sections of the Indian Penal Code including Section 323, 325, 506, 504, 354 of the Indian Penal Code etc.

10. Therefore, taking a holistic view of the entire factual matrix before this Court at this Stage, this Court is not inclined to grant bail to the petitioner because this Court feels that releasing the petitioner on bail at this stage may act as an impediment in the course of fair trial. Accordingly, this bail petition is dismissed.

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, JUDGE AND HON'BLE MR. JUSTICE ANOOP CHITKARA, JUDGE.

1. CWP No. 2067 of 2019

State of Himachal Pradesh & ors. ...Petitioners/applicants.

Versus

Bhag Singh & others. ...Respondents

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2. CWP No. 4342 of 2019

M/s Jai Mateshwari Stone Crusher ...Petitioner/applicant.

Versus

State of Himachal Pradesh & ors. ...Respondents

CMP No. 8459 of 2019 in
CWP No. 2067 of 2019 alongwith
CMP No. 15351 of 2019 in
CWP No. 4342 of 2019.
Order reserved on : January 03, 2020

Date of Decision: March 11, 2020

Constitution of India, 1950 - Article 226- Jurisdiction of High Court- Extent and scope vis-à-vis orders passed by National Green Tribunal- Held, jurisdiction conferred under Article 226 of the Constitution is a part of basic structure and can neither be tampered with nor diluted- High Court has jurisdiction to examine the decision of all Tribunals including National Green Tribunal. (Para 4 to 6)

Constitution of India, 1950 - Article 226- Setting up of stone crushers on rivers and rivulets – National Green Tribunal vide order dated 29.10.2018 cancelling licence(s) granted to such stone crushers who were operating within 100 Mtrs. of water bodies and directing H.P. State Pollution Control Board to stop any such stone crusher- State of Himachal Pradesh and Stone Crushers filing writ and seeking review/modification of order of National Green Tribunal dated 29.10.2018- Held, non-perennial rivers may have different characteristics and may function very differently in maintaining hydrological and ecological balance- Non-perennial river is relatively sensitive to change and can easily lead to degradation of the river system- However, in order to exploit the natural resources without damaging the earth, ecology, environment and for overall sustainable development interim order dated 29.8.2019 that limit of 100 Mtrs., as directed by National Green Tribunal, may not be applied to non-perennial rivulets made absolute but subject to conditions to be followed by State/ Stone Crushers. (Para 9, 10, 17 & 18)

Cases referred;

M/s. Embassy Property Developments Pvt. Ltd. vs. State of Karnataka & others, 2019 (17) SCALE 37 `in Civil Appeal No. 9170 of 2019],
Madras Bar Association vs. Union of India & another, (2014) 10 SCC 1,
Mafatlal Industries Ltd. vs. Union of India (1997) 5 SCC 536,
Sangram Singh vs. Election Tribunal, (1955) 2 SCR 1,
Tamil Nadu Pollution Control Board vs. Sterlite Industries (I) Ltd. & others, 2019 (3) SCALE 721,

Whether approved for reporting?[31] *Yes.*

For the petitioner : Mr. Ashok Sharma, Advocate General with Mr. Ashwani K. Sharma, Addl. A.G. and Mr. R.R. Rahi & Mr. Yudhbir Singh Thakur, Dy.AGs for the applicant/State in CWP No. 2067 of 2019 and for respondent/State in CWP No. 4342 of 2019.

For the respondents : Mr. Lokender Paul Thakur, Senior Panel Counsel for respondent(s)/UOI.

Mr. Maan Singh, Advocate, for respondent(s)/Pollution Control Board.

***Per:* Anoop Chitkara, Judge**

CMP No. 8459 of 2019 in CWP No. 2067 of 2019

As a sequel to order dated Jan 3, 2020, the present order is confined to the jurisdiction of the Division Bench of this Court under Article 226 of the Constitution of India over the order passed by the Ld. National Green Tribunal and modification of the interim order passed in this matter by this Court on Aug 29, 2019 (wrongly typed as 29.08.2018). Given this, no other aspect, of this writ petition, at this stage, is required to be gone through, and any observations made in this order shall be confined only to the above two issues.

JURISDICTION OF HIGH COURTS UNDER ARTICLE 226 OF THE CONSTITUTION OVER THE ORDERS PASSED BY THE LD. NATIONAL GREEN TRIBUNAL.

2. The issue is no more *res integra* in view of the pronouncement of the Hon'ble Supreme Court in *Tamil Nadu Pollution Control Board vs. Sterlite Industries (I) Ltd. & others,* 2019 (3) SCALE 721, [Judgment dated Feb 18, 2019 in Civil Appeal Nos. 4763-4764 of 2013] where in paragraphs No. 31, 40 and 42 the Court observed as follows:

> "31. From the above authorities, it is clear that an appeal is a creature of statute and an appellate tribunal has to act strictly within the domain prescribed by statute. It is obvious that an appeal would lie from an order or decision of the appellate authority under Section 28 of the Water Act to the NGT only under Section 33B(a) of the Water Act read with Section 16(a) of the NGT Act. Similarly, an appeal would lie from an order or decision of the appellate authority under Section 31 of the Air Act to the NGT only under Section 31B of the Air Act read with Section 16(f) of the NGT Act. Obviously, since no order or decision had been made by the appellate authority under either the Water Act or the Air Act, any direct appeal against an original order to the NGT would be incompetent. NGT's jurisdiction being strictly circumscribed by Section 33B of the Water Act, read with Section 31B of the Air Act, read with Section 16(a) and (f) of the NGT Act, would make it clear that it is only orders or decisions of the appellate authority that are appealable, and not original orders. On the facts of the present case, it is clear that an appeal was pending before the appellate authority when the NGT set aside the original order dated 09.04.2018. This being the case, the NGT's order being clearly outside its statutory powers conferred by the Water Act, the Air Act, and the NGT Act, would be an order passed without jurisdiction.
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> 40. Shri Sundaram then argued that this Court in L. Chandra Kumar (supra) made it clear that Tribunals that are set up, generally have the

[31] **Whether reporters of Local Papers may be allowed to see the order?**

power of judicial review, save and except a challenge to the vires of the legislation under which such Tribunals are themselves set up. For this, he relied strongly upon paragraphs 90 and 93 of the judgment in L. Chandra Kumar (supra). It is important to notice that L. Chandra Kumar (supra) pertained to a Tribunal that was set up under Article 323A of the Constitution of India. Under Article 323A(2)(d), the Administrative Tribunal so set up would be able to exercise the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136 of the Constitution. This would mean that the Administrative Tribunal so set up could exercise the jurisdiction of all High Courts when it came to the matters specified in Article 323A. This is further made clear by a conjoint reading of Section 14 and Section 28 of the Administrative Tribunals Act, 1985, which read as follows:

"14. Jurisdiction, powers and authority of the Central Administrative Tribunal.-(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to-

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all service matters concerning-

(i) a member of any All-India Service; or

(ii) a person not being a member of an All-India Service or a person referred to in clause (c) appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian not being a member of an All-India Service or a person referred to in clause (c) appointed to any defence services or a post connected with defence,

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or subclause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation or society or other body, at the disposal of the Central Government for such appointment.

Explanation.-For the removal of doubts, it is hereby declared that references to "Union" in this sub-section shall be construed as including references also to a Union Territory.

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of India or under the control of the Government of India and to corporations or societies owned or controlled by Government, not being a local or other

authority or corporation or society controlled or owned by a State Government:

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this subsection in respect of different classes of, or different categories under any class of, local or other authorities or corporations or societies.

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation or society, all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to-

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and

(b) all service matters concerning a person other than a person referred to in clause (a) or clause (b) of sub-section (1) appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs."

xxx xxx xxx

"28. Exclusion of jurisdiction of courts except the Supreme Court under Article 136 of the Constitution.-On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except-

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,

shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or matters concerning such recruitment or such service matters."

Article 323B of the Constitution of India also provides for Tribunals for certain other matters which are specified by sub-clause (2) thereof. Suffice it to say that the NGT is not a Tribunal set up either under Article 323A or Article 323B of the Constitution, but is a statutory Tribunal set up under the NGT Act. That such a Tribunal does not exercise the jurisdiction of all courts except the Supreme Court is clear from a reading of Section 29 of the NGT Act (supra). Thus, a conjoint reading of Section 14 and Section 29 of the NGT Act must be contrasted with a conjoint reading of Section 14 and Section 28 of the Administrative Tribunal Act, 1985."

… …

"42. … …

In the present case, it is clear that Section 16 of the NGT Act is cast in terms that are similar to Section 14(b) of the Telecom Regulatory Authority of India Act, 1997, in that appeals are against the orders, decisions, directions, or determinations made under the various Acts mentioned in Section 16. It is clear, therefore, that under the NGT Act, the Tribunal exercising appellate jurisdiction cannot strike down rules or regulations made under this Act. Therefore, it would be fallacious to state that the Tribunal has powers of judicial review akin to that of a High Court exercising constitutional powers under Article 226 of the Constitution of India. We must never forget the distinction between a superior court of record and courts of limited jurisdiction that was, in the felicitous language of Gajendragadkar, C.J., in Re: *Special Reference,* (1965) 1 SCR 413, made in the following words:

> "We ought to make it clear that we are dealing with the question of jurisdiction and are not concerned with the propriety of reasonableness of the exercise of such jurisdiction. Besides, in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court [Halsbury's Laws of England, vol. 9, p. 349]"

For this reason also, we are of the view that the State Government order made under Section 18 of the Water Act, not being the subject matter of any appeal under Section 16 of the NGT Act, cannot be 'judicially reviewed' by the NGT. Following the judgment in BSNL (supra), we are of the view that the NGT has no general power of judicial review akin to that vested under Article 226 of the Constitution of India possessed by the High Courts of this country. Shri Sundaram's strong reliance on the NGT judgment dated 17.07.2014 in Wilfred vs. Ministry of Environment and Forests must also be rejected as this NGT judgment does not state the law on this aspect correctly. This contention is also without merit, and therefore, rejected."

3. In *M/s. Embassy Property Developments Pvt. Ltd. vs. State of Karnataka & others,* 2019 (17) SCALE 37 [Judgment dated Dec 3, 2019 in Civil Appeal No. 9170 of 2019] the larger Bench of the Hon'ble Supreme Court holds as follows:

> "Jurisdiction and the powers of the High Court under Article 226
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> 13. What is recognized by Article 226(1) is the power of every High Court to issue (i) directions, (ii) orders or (iii) writs. They can be issued to (i) any person or (ii) authority including the Government. They may be issued (i) for the enforcement of any of the rights conferred by Part III and (ii) for any other purpose. But the exercise of the power recognized by Clause (1) of Article 226, is restricted by the territorial jurisdiction of the High Court, determined either by its geographical location or by the place where the cause of action, in whole or in part, arose. While the nature of the power exercised by the High Court is delineated in Clause (1) of Article 226, the jurisdiction of the High Court for the exercise of such power, is spelt out in both Clauses (1) and (2) of Article 226."

4. Another Constitution Bench of the Hon'ble Supreme Court in *Rojer Mathew vs. South Indian Bank Ltd. & others,* 2019 (15) SCALE 615 [Judgment dated Nov 13, 2019 in Civil Appeal No. 8588 of 2019] holds:

> "220. It is hence clear post *L Chandrakumar (supra)* that writ jurisdiction under Article 226 does not limit the powers of High Courts expressly or by implication against military or armed forces disputes. The limited ouster made by Article 227 (4) only operates qua administrative supervision by the High Court and not judicial review. Article 136(2) prohibits direct appeals before the Supreme Court from an order of armed forces tribunals, but would not prohibit an appeal to the Supreme Court against the judicial review exercised by the High Court under Article 226.
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> 221. However, it is essential that High Courts use such powers of judicial review restrictively and on limited grounds, similar to the concept of 'regulatory deference' which has evolved in the United States. Such a need was also noted by a nine-judge bench in *Mafatlal Industries Ltd. vs. Union of India* (1997) 5 SCC 536 which held that:
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>> "... While the jurisdiction of the High Courts under Article 226 – and of this Court under Article 32 – cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it."
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> 222. The jurisdiction under Article 226, being part of the basis structure, can neither be tampered with nor diluted. Instead, it has to be zealously protected and cannot be circumscribed by the provisions of any enactment, even if it be formulated for expeditious disposal and early finality of disputes. Further, High Courts are conscious enough to understand that such power must be exercised sparingly by them to ensure that they do not become alternate forums of appeal. A five-judge bench in *Sangram Singh vs. Election Tribunal,* (1955) 2 SCR 1 whilst reiterating that jurisdiction under Article 226 could not be ousted, laid down certain guidelines for exercise of such power:
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>> "13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exits outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under articles 226 and 136. Therefore, the jurisdiction of

the High Courts under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105."

223. It is apparent that the Legislature has not been provided with desired assistance so that it may rectify the anomalies which arise from provisions of direct appeal to the Supreme Court. Considering that such direct appeals have become serious impediments in the discharge of Constitutional functions by this Court and also affects access to justice for citizens, it is high time that the Union of India, in consultation with either the Law Commission or any other expert body, revisit such provisions under various enactments providing for direct appeals to the Supreme Court against orders of Tribunals, and instead provide appeals to Division Benches of High Courts, if at all necessary. Doing so would have myriad benefits. In addition to increasing affordability of justice and more effective Constitutional adjudication by this Court, it would also provide an avenue for High Courts Judges to keep face with contemporaneous evolutions in law, and hence enrich them with adequate experience before they come to this Court. We direct that the Union undertake such an exercise expeditiously, preferably within a period of six months at the maximum and place the findings before Parliament for appropriate action as may be deemed fit."

5. In *Madras Bar Association vs. Union of India & another,* (2014) 10 SCC 1, the Hon'ble Supreme Court holds as follows:

"175. It is well settled that an appeal is a creature of statute and can be done away by statute. The question posed here is completely different and the answer to that question is fundamental to our jurisprudence: that a jurisdiction to decide substantial questions of law vests under our constitution, only with the High Courts and the Supreme Court, and cannot be vested in any other body as a core constitutional value would be impaired thereby."

6. In view of the above judicial precedents, this Court has jurisdiction to adjudicate the next issue which is jurisdiction of this Court to pass interim order dated Aug 29, 2019 and to modify such order.

7. Interim order dated Aug 29, 2019 passed by the Principal Bench of this Court reads as follows:

"Notice. Mr. Rajesh K. Sharma, learned Assistant Solicitor General of India, takes notice for respondent No. 2/Union of India. Issue notice to respondents No. 1,3 and 4, returnable in two weeks, on taking steps within two days. Personal notice permitted.

In the meanwhile, there will be a limited interim order to the effect that this prohibition of 100 meters, may not be applied to non perennial rivulets. Post on 12.9.2019."

8. This Court had passed this order in CMP No. 8459 of 2019 (in CWP No. 2067 of 2019). The prayer clause of CMP No. 8459 of 2019 reads as follows:

"It is, therefore, in view of the submission made herein above, most respectfully prayed that the present application may kindly be allowed and the operation & execution of impugned orders dated 29.10.2018 and 10.7.2019 passed by the Ld. NGT, Principal Bench New Delhi in O.A. No. 358 of 2016 may very kindly be stayed and Respondent No. 3 i.e. Himachal Pradesh Pollution Control Board may be restrained from taking any action in pursuance to said orders, in the interest of justice and fair play."

9. Impugned order dated Oct 29, 2018 (Annexure P-5), reads as follows:

"1. This is the second round of proceedings on the issue of legality of operations of the stone crushers in State of Himachal Pradesh. The objection of the applicant is that the stone crushers are in the forest area and located very close to water bodies, thereby affecting the ecology. Distance of location of crushers from water bodies is said to be less than 100 meters. It is also alleged that there is violation of the Environment (Protection) Act, 1986, the Water (Prevention and Control of Pollution) Act, 1974, and Air (Prevention and Control of Pollution) Act, 1981 and the Forest Conservation Act, 1980.

2. Vide order dated 13.01.2015 in Original Application No. 27/2014, *Prem Chand Guleria vs. Union of India,* the question of operation of stone crushers as well as mining operations was examined. The area in question in this particular application is Village Parchhu, P.O. Sajaopiplu, Tehsil Sarkaghat, District Mandi, Himachal Pradesh. There are other similar cases where location is different in different districts in Himachal Pradesh. The Tribunal noticed that stone crushers were operating without the requisite consents and illegal mining was also taking place. Accordingly, the Tribunal directed a joint inspection to verify whether there was any valid and operative consent for operation of the stone crushers, whether any valid mining lease has been given and whether location of the stone crushers was within permissible sites.

3. This application was filed on 13.07.2016 alleging that *M/s Ruma Stone Crusher* is continuing illegal mining and operating illegal stone crusher. The stone crusher has damaged the entire river/*Khad "Balyana".* Mining area is adjacent to cremation ground and a temple. There is a bridge 300 meter down stream and 100 meter upstream of the mining lease area on National Highway-17. No mining is allowed within 200 meter upstream and 200 to 500 meters down stream. The stone crusher was being operating without any valid permission. Notice was given by the Mining Department to *M/s Ruma Stone Crusher* requiring payment of outstanding amount of Rs. 2,22,48,155/- (Rupees Two crore Twenty Two Lac Forty Eight Thousand One Hundred Fifty Five only). The mining officer also wrote a letter dated 01.06.2016 that the stone crusher was being run without registration and consent to operate. Accordingly, the applicant seeks directions to stop the stone crusher on Khasra No. 752/3 Mahal Lougni Tehsil Sarkaghat, District Mandi.

4. The applicant has relied upon a report of the Special Committee dated 04.04.215 in respect of *M/s Ruma Stone Crusher* to the effect that the crusher unit had obtained consent to establish but did not have a valid renewal. Mining lease was operative upto 09.03.2025 but there was no environmental clearance. Forest Clearance expired on 23.10.2013. Notice for penalty for illegal mining was issued.

5. The Himachal Pradesh State Pollution Control Board in its reply has submitted that there is a Policy Guideline for location of the stone crusher. The site is required to be approved by the State Appraisal Committee. In the present case, consent to establish was given on 01.11.2004 upto 31.03.2005 and renewed on 23.03.2006. The Environmental Clearance was granted on 09.03.2016. However, there was no permanent registration with the Industries Department. Renewal of consent was valid upto 23.12.2014 under the Water (Prevention and Control of Pollution) Act, 1974 and thereafter expired. Vide letter dated 24.08.2016, the Himachal Pradesh State Pollution Control Board, directed the unit to stop down its operation. The power supply was directed to be disconnected. However, consent to operate was again granted on 08.05.2017. The State Level Environment Impact Assessment Authority (SEIAA) granted Environmental Clearance on 09.03.2016 for the mining of stone and bajri. The stone crusher could be set up beyond 100 meters of a perennial rivulet. In the

present case, the joint inspection report found the location of the stone crusher within 100 meters of water edge of *Balyana Khad*. However, the *Balyana Khad* was not at par with a perennial rivulet. Notification dated 29.05.2014 of the Environment Department of the State of Himachal Pradesh has been referred to. The Notification is under Section 5 of the Environment (Protection) Act, 1986 in compliance of directions of the Himachal Pradesh High Court vide judgment dated 01.06.2012 in *CWP No. 7949/2011 and 7951, Desh Raj v/s State of HP & others and Yog Raj v/s State of H.P. & others.* The High Court required that restriction for the site of stone crusher must refer to 'perennial rivulets'. The said judgment dealt with the challenge to a site as being violative of norms of ecological balance contemplated under the Environment (Protection) Act, 1986. The Notification before the High Court is dated 29.04.2003 which specified distance of 100 meters from 'springs, canals, reservoirs and functional water supply schemes" which was sought to be read as not including perennial rivulet. The said Notification was modified on 10.09.2004 and under Entry 7 no distance was specified.

6. The High Court observed the Chief Secretary of the State to constitute a Committee to examine whether there was need to amend or clarify the above notifications and till such exercise was undertaken, it was directed that springs, canals, reservoirs or functional water supply schemes and natural water spring must include rivulets of perennial in nature to regulate location of such sites.

7. Stand on behalf of the respondents is that the 2014 Notification which uses the expression "rivulets which are perennial in nature include" will not include any *khad* and, therefore, the site of the stone crusher was not prohibited. The entry is as follows:

Sr. No.	*Criteria*	*Distance norms for existing stone crushers (crow flight, distance in meters) set up prior to year 2004*	*Distance norms for existing stone crushers (crow flight, distance in meters) set up after year 2004 to May, 2014*	*Distance for the stone crusher to be set up in future, (crow flight, distance in meters) from the issuance of Notification.*
8.	*a. Minimum distance from spring, canal, functional water supply scheme including its reservoir*	*100*	-	*100 (excluding spring canal)"*

8. A reference to above Entry shows that there is prohibition for location of a stone crusher within 100 meters from springs, canals, reservoirs or functional water supply schemes and natural water schemes. The rivulets of perennial nature are specifically included in the said expression but it cannot be read as excluding non-perennial water bodies. The object of the regulatory notification issued under the Environment (Protection) Act, 1986 is to protect the ecology from the adverse impact of location of a stone crusher nearby. The intention is not to permit a stone crusher within 100 meters of a water body. Importance of protection of water bodies can hardly be over-emphasized. Interpretation of a regulatory provision must be consistent with the 'precautionary principle' and 'sustainable development principle'. Location of a

stone crusher very close to a water body is against the principle of 'sustainable development' as well as the 'precautionary principle'. The above Notification cannot be read as meaning that stone crushers can be allowed to be located just on the edge of a water body even if such water body is not perennial. Thus, the stone crushers set up within 100 meters of a water body will be illegal and in violation of Environment (Protection) Act, 1986 and the Notification issued thereunder.

9. Accordingly, the consent to operate granted to any stone crusher in the State of Himachal Pradesh within 100 meters of a water body will stand quashed. The Himachal Pradesh State Pollution Control Board will take steps to stop operation of any such stone crusher and furnish a report to this Tribunal within two month.

10. The application is disposed of.

List for consideration of report on 14.02.2019."

10. Feeling aggrieved the State had filed Review petition against this order and vide order dated Jul 10, 2019 (Anneuxre P-17) the Ld. National Green Tribunal passed the following order:

1. This order may be read in continuation of order dated 02.04.2019. The question for consideration is whether a case is made out to review/modify order of this Tribunal dated 29.10.2018 dealing with the subject of the precautionary measures to be adopted in permitting setting up of stone crushers close to the water bodies.

2. We may note the factual background. As per siting criteria laid down by the Himachal Pradesh Government vide Notification dated 29.05.2014, distance of 100 meters is required to be maintained from the water bodies specified in the said Notification. The relevant extract from the said Notification is as follows:

"Sr. No.	Criteria	Distance norms for existing stone crushers (crow flight, distance in meters) set up prior to year 2004	Distance norms for existing stone crushers (crow flight, distance in meters) set up after year 2004 to May, 2014	Distance for the stone crusher to be set up in future, (crow flight, distance in meters) from the issuance of Notification.
8.	a. Minimum distance from spring, canal, functional water supply scheme including its reservoir.	100	-	100 (excluding spring canal)"
	b. Minimum distance from a percolation well, sewerage treatment plant, water infiltration galleries.	-	-	100

9.	Minimum distance from lakes, wetlands and reservoir of irrigation scheme, hydro power projects.	500	500	500
10.	Minimum distance from natural water spring	-	500	100 (as at Sr. No. 8(a)
14.	Minimum distance from the canal and perennial revulets	(100 for canal)	-	100

3. The Tribunal was called upon to consider the question whether 'non-perennial' water bodies are to be excluded from the subject matter of regulatory regime under the Notification. Answering the said question in the negative, vide order dated 29.10.2018, this Tribunal held:

> "8. A reference to above Entry shows that there is prohibition for location of a stone crusher within 100 meters from springs, canals, reservoirs or functional water supply schemes and natural water schemes. The rivulets of perennial nature are specifically included in the said expression but it cannot be read as excluding non-perennial water bodies. The object of the regulatory notification issued under the Environment (Protection) Act, 1986 is to protect the ecology from the adverse impact of location of a stone crusher nearby. The intention is not to permit a stone crusher within 100 meters of a water body. Importance of protection of water bodies can hardly be over-emphasized. Interpretation of a regulatory provision must be consistent with the 'precautionary principle' and 'sustainable development principle'. Location of a stone crusher very close to a water body is against the principle of 'sustainable development' as well as the 'precautionary principle'. The above Notification cannot be read as meaning that stone crushers can be allowed to be located just on the edge of a water body even if such water body is not perennial. Thus, the stone crushers set up within 100 meters of a water body will be illegal and in violation of Environment (Protection) Act, 1986 and the Notification issued thereunder."

4. On Appeal, the Hon'ble Supreme Court, vide order dated 07.01.2019 in Civil Appeal No. 94/2019,Himachal Grit Udyog & Ors v. U.O.I & Ors, observed that grievances put forward before the Hon'ble Supreme Court could be addressed before this Tribunal at the first instance for which the State could place before the Tribunal 'unimpeachable scientific material' which may provide objective basis to consider a case for modification. The operative part of the order is extracted below:

> "The Solicitor General, in support of the appeal filed by the State of Himachal Pradesh, has urged that the notification which was issued by the State on 29 May, 2014 specifically provides for a distance from perennial

rivulets of 100 meters and, the order of the Tribunal amounts to an amendment of the notification. The Solicitor General has fairly urged that the State does not construe the expression "perennial rivulets" to mean a rivulet or water body which is functional every day of the year. *The difficulty, in his submission, lies in the minimum distance which is required to be maintained for non-perennial water bodies.* The Solicitor General submits that the direction which has been issued by the Tribunal would cause dislocation and if the State was made aware of the direction which the Tribunal was proposing to pass in the above terms, it could have rendered assistance in placing the ramifications for being considered.

In our view, the nature of the grievance which has been urged before this Court, in the present civil appeals, is such as should be addressed before the Tribunal in the first instance. The State Government must base its submissions before the Tribunal on scientific data, as opposed to an ipse dixit or a priori considerations. *It would be necessary for the State to place on the record before the Tribunal clear and unimpeachable scientific material which will provide an objective basis for the Tribunal to consider any case made out for modification.*

In the circumstances, we are of the view that it would be appropriate to grant liberty to both the private parties represented in the appeals as well as the State Government to move the Tribunal either by way of review or for a suitable modification of the order on the merits on which we express no opinion.

In the meantime, we defer the enforcement of the directions which have been issued by the Tribunal by a period of three months from today so as to enable all the parties to move the Tribunal in appropriate proceedings.

We grant liberty to the parties to move this Court afresh after the disposal of the proceedings before the Tribunal. The parties can also raise the grounds which have been raised in the present proceedings."

(emphasis added)

5. In pursuance of above, the State of Himachal Pradesh and representative of Stone Crushers moved this Tribunal with the plea that the distance of 100 meters from the 'non-perennial rivulets' should not be made applicable in the same manner in which it is applicable to the 'perennial rivers' or other water bodies mentioned in the above Notification.

6. The Tribunal considered the matter on 02.04.2019 and found it difficult to accept the submission but instead of straightway rejecting the review application, the Tribunal sought an expert opinion from a Joint Committee comprising representatives of the Central Pollution Control Board (CPCB), IIT Roorkee, Indian Institute of Soil and Water Conservation, Dehradun. It was observed:

"9. We do not find any merit in the submission that there can be no regulation of location of stone crushers with reference to 'non-perennial'

water bodies and distance is required to be maintained only for 'perennial water bodies'. Adverse impact of stone crushing activity on the environment is well acknowledged. [(1985) 2 SCC 431] Water bodies are to be conserved for protection of environment. [(2001) 6 SCC 496] Non-perennial water bodies also need to be protected for purposes such as water harvesting, ground water recharge. Location of stone crushers too close to such water bodies certainly impacts such water bodies which need to be prevented.

10. River bed mining for raw material for stone crushers and dumping of waste mined material back into the river affects water quality and flow of the river by adding pollutants to the river.

11. Consent to operate is to be renewed annually and mere fact that a stone crusher is set up earlier can be no ground to allow it to continue even if it has adverse impact on environment. Moreover, the Tribunal has only interpreted the criteria laid down in the notification by an interpretation consistent with environmental norms.

12. Thus, it may be difficult to accept the review petition in absence of any scientific material to show that location of stone crushers within 100 meters, of 'non perennial' water bodies will have no adverse impact on environment."

7. Accordingly, a report dated 19.06.2019 has been filed before this Tribunal suggesting that the distance of 100 meters prescribed for location of stone crushers should be uniformly applied to all the streams irrespectiveof perenniality. It will be appropriate to quote relevant observations which are as follows:

"i) The Joint Expert Committee is of the opinion that the distance norm of 100 m prescribed for locating crushers should be uniformly applied to all the streams irrespective of perenniality. As these areas are zones of water flow, any changes to or dumping of crusher waste is likely to badly impact the quality of water for the downstream stream reaches during monsoon season."

8. The Committee also observed :

"It was observed and understood that the first order streams are very small streams having very steep slope, abundant flora and fauna and are non-perennial in nature. These streams feed the larger streams during monsoon period. Some of these streams may have springs with very low to low discharge. These headwater streams flow swiftly down steep slopes with narrow V-shaped valleys eroding the stream beds and banks, in the process incurring loss of natural resources in terms of forest and fertile soil along with fauna, while providing eroded material to the depositional environments found downstream. Ecological balance may be maintained by conserving such ephemeral, mostly first order streams.

Material Eroded from the hilly areas i.e. from headwork zone carried by the first and second order streams are transferred to the deposition zone where the slope of stream is gentle. This zone is suitable and sustainable for scientific mining of river bed material."

Recommendations of the Joint Expert Committee:

In the light of the above observations, the views and recommendations of the Joint Expert Committee are as follows:

i) The Joint Expert Committee is of the opinion that the distance norm of 100 m prescribed for locating crushers should be uniformly applied to all the streams irrespective of perenniality. As these areas are zones of water flow, any changes to or dumping of crusher waste is likely to badly impact the quality of water for the downstream stream reaches during monsoon season.

ii) No mining/extraction activities shouldbe carried out on first order non-perennial streams and they should be conserved with appropriate measures.

iii) However, if small first order streams having steep gradients are levelling out on upstream side of proposed site (Plate 6) for stone crusher units, such units may be exempted from the 100 m distance norm, subject to having additional precautionary measures in place to tackle air pollution. Due to topography of the area, effluents may not enter the stream pre-empting water pollution of stream. The suggested additional precautionary measures in such cases are: i) The stone crusher units should be installed in the covered shed with proper air emission suppressing system ii) Liability of application of soil conservation measures should be with stone crusher unit holder. Sample site for demonstration of the above explanation is shown in Plate 6.

iv) The Expert Committee is of the opinion that, in general, the following additional precautions may be taken to ensure minimal impact of operating stone crushing units irrespective of location of Stone Crusher Units· near perennial or nonperennial streams

a) Area near deposition zone i.e. near third order stream or tail end of the second order stream should be considered for installation of stone crusher unit.

b) Effluent generated by the unit should be clarified in lined stilling chambers constructed with in the premises of unit. The recovered silty effluent needs to be disposed off regularly at suitable site and at a safe distance to prevent its entry in the nearby streams. This material may be used for filling up of depressions, filling of pits for plantation or for dispersal in agriculture fields.

c) Location of crushers must be decided after a detailed study covering hydrological, soil & water conservation environmental aspects to avoid sensitive locations, since impact of crushers is likely to affect air, water, flora and fauna.

d) The material in streams is received from the upstream catchment area and depends on the catchment characteristics, flow pattern, rainfall distribution, and land use. Hence each river is unique in its feature and quantum of material that can be extracted will vary year to year and river/stream to stream. The committee is therefore of the opinion that distance restriction should not be the only criteria for granting the permission for locating crushers. The quantum and nature of river bed material should also be assessed for availability pre and post monsoon and quantity restriction should be applied to the identified river beds to pre-empt overexploitation for short-term economic benefit.”

9. We have heard learned Advocate General for the State of Himachal Pradesh and learned Counsel for the stone crushers seeking review/modification of order of the Tribunal dated 29.10.2018. Learned Counsel for the CPCB has opposed the said prayer. In absence of any unimpeachable scientific material placed on record by the State of Himachal Pradesh or the stone crushers in pursuance of order of Hon'ble Supreme Court dated 15.03.2019 though a period of more than three months has gone, after hearing learned Advocate General for the State and for the stone crushers, we are unable to review or modify the earlier view that non-perennial water bodies are not covered by the prohibition of location of stone crushes within 100 meters of such bodies. Moreover, the expert opinion furnished by the Committee in pursuance of order of the Tribunal dated 02.04.2019 also suggests that restriction of distance for location of stone crushers should universally apply for 'perennial' as well as 'non-perennial' water bodies. It is not in our purview to go into the issue of exemption in certain situations subject to conditions as we are not sure whether such conditions or their enforcement is environmentally viable at any particular location.

10. Non-perennial rivers may have different characteristics and may function very differently in maintaining hydrological and ecological balance. Non-perennial rivers is relatively sensitive to change and can easily lead to degradation of the river system. Degradation of such non perennial rivers caused by man through development and use of the river as a water source can result inwater scarcity and climate change. All such rivers are hydrologically and ecologically sensitive and changes to their hydrological regime can have far reaching effects on the river flow and the biota that can cause dramatic negative changes.

11. In the end, we may note that learned Counsel for the stone crushers relied upon the judgment of the Hon'ble Supreme in Tamil Nadu Pollution Control Board vs. Sterlite Industries (I) Ltd. & Ors., 2019 SCC Online SC 221 to submit that this Tribunal has no jurisdiction to deal with the matter. We do not find applicability of the said judgment in dealing with an application under Sections 14 and 15 of the National Green Tribunal Act, 2010. This contention is rejected. We also do not find any merit in contention that the prohibition does not apply to the units already set up. As observed in order dated 02.04.2019, in view of 'Precautionary' and 'Sustainable Development' principles of environment law and the statutory scheme providing that consent to operate or consent to establish is required to be renewed every year in the light of situation which may prevail. It is difficult to hold that a vested right to continue any activities accrues irrespective of impact on environment. The applications are dismissed."

11. What primarily weighed with the Ld. National Green Tribunal is revealed from para 10 of the order dated Jul 10, 2019, whereby the Ld. National Green Tribunal relying upon the study of Seely, M., Henderson, J., Heyns, P., Jacobson, P., Nakale, T., Nantanga, K. and Schachtschneider, K. 2002, Ephemeral and endorheic river systems: Their relevance and management challenges. Determining the water quality ecological Reserve for non-perennial rivers: A prototype environmental water Assessment methodology, available at https://pdfs.semanticscholar.org/9dbf/e35a37671873a1db404c dda4759273706b3e.pdf, has observed as follows:

"10. Non-perennial rivers may have different characteristics and may function very differently in maintaining hydrological and ecological balance. Non-perennial rivers is relatively sensitive to change and can easily lead to degradation of the river system. Degradation of such non perennial rivers caused by man through development and use of the river as a water source can result in water scarcity and climate change. All such rivers are hydrologically and ecologically sensitive and changes to their hydrological regime can have far reaching effects on the river flow and the biota that can cause dramatic negative changes.

12. Mr. Ashok Sharma, learned Advocate General, appearing for the writ petitioner contends that the main petition filed before the Ld. National Green Tribunal was never, in fact, a Public Interest Litigation. Still, they have sufficient information to state that such a petition was filed at the behest of the stone crusher units and people involved in illegal mining in the neighboring areas of Punjab. They had vested interest to file this petition because if the stones are not collected in Himachal Pradesh, then due to the gush of water during a torrential downpour, especially in monsoons, small stones flow along with the flow of water and cross the borders of Himachal Pradesh. As such, they extract it from Punjab and Haryana. Learned Advocate General further contended that water also carries with itself stones is apparent from bare eyes when we notice huge boulders along with river beds on almost the entire river length. The counsel for the Public Interest Litigant, could not place on single record evidence to confront this argument.

13. Learned Advocate General further contended that the other evidence to prove that Bhag Singh never filed a petition in public interest but for the benefit of the likely beneficiaries of Punjab is revealed from the fact that if they were so much concerned with the cause in question, then they would have filed a similar petition in Punjab. The Counsel for the public interest litigant could not deny and refute this averment and did not place on record any copy of a similar writ petition filed by Bhag Singh either in Punjab, Haryana or any other place. Learned Advocate General further states that Himachal Pradesh is incurring revenue loss of crores of rupees and Himachal Pradesh, which is a state of stones that has to buy stones from its neighboring states.

14. With this background, it would be appropriate to refer to the history of the entire controversy.

15. The Government of Himachal Pradesh framed guidelines relating to stone crushing units, and a notification was issued on dated 10.9.2004. In 2011 CWP No. 7949 of 2011 and CWP No. 7951 of 2011 were filed challenging the said notification and relating to the location of stone crushers. In the year 2012 vide judgments dated June 1, 2012, passed by this Court, the Court issued directions to the Government. In the year 2014, as a consequence of such guidelines, the State of Himachal Pradesh issued notification dated May 29, 2014, and it prescribed the distance of stone crushers from perennial riverbeds. In the year 2016, respondent Bhag Singh filed Original Application No. 358 of 2016 before the Ld. National Green Tribunal against the operation of the stone crusher unit of Ruma Devi in forest land without prior approval. Consequently, a joint inspection was carried out, and in 2018 the Joint Inspection Report was filed. After that vide impugned order, the Ld. National Green Tribunal ordered that perennial water bodies will include non-perennial water bodies as well and consequently quashed the consent to operate given to the stone crushers, which were within 100 meters from non-perennial rivulets.

16. The State has placed on record report of the "Joint Committee in the Matter of M.A. No. 93/2019, M.A. No. 94/2019, M.A. No. 95/2019, M.A. No. 96/2019 & M.A. No. 97/2019 in Original Application No. 358 of 2016; Bhag Singh vs. Union of India & Ors, in compliance of Hon'ble National Green Tribunal (NGT) Order dated April 2, 2019". The Joint Committee gave the following recommendations:

> "Recommendations of the Joint Expert Committee:
>
> In the light of the above observations, the views and recomkmendations of the Jint Expert Cokmmittee are as follows:
>
> > i) The joint expert committee is of the opinion that the distance norm of 100 m prescribed for locating crushers should be uniformly applied to all the streams irrespective of perenniality. As these areas are zones of water flow, any changes to or dumping of crusher waste is likely to badly impact the quality of water for the downstream reaches during monsoon season.
> >
> > ii) No mining/extraction activities should be carried out on first order non-perennial streams and they should be conserved with appropriate measures.
> >
> > Iii) However, if small first order streams having steep gradients are levelling out on upstream side of proposed site (Plate 6) for stone crusher

units, such units may be exempted from the 100m distance norm, subject to having additional precautionary measures in place to tackle air pollution. Due to topography of the area, effluents may not enter the stream pre-empting water pollution of stream. The suggested additional precautionary measures in such cases are : i) the stone crusher units should be installed in the covered shed with proper air emission suppressing system ii) liability of application of soil conservation measures should be with stone crusher unit holder.

iv) The Expert Committee is of the opinion that, in general, the following additional precautions may be taken to ensure minimal impact of operating stone crushing units irrespective of location of Stone Crusher Units near perennial or non-perennial streams.

a) Area near deposition zone i.e. near third order stream or tail end of the second order stream should be considered for installation of stone crusher unit.

b) Effluent generated by the unit should be clarified in lined stilling chambers constructed within the premises of unit. The recovered silt the effluent needs to be disposed off regularly at suitable site and at a safe distance to prevent its entry in the nearby streams. This material may be used for filling up of depressions, filling of pits for plantation or for dispersal in agriculture fields.

c) Location of crushers must be decided after a detailed study covering hydrological, soil & water conservation environmental aspects to avoid sensitive locations, since impact of crushers is likely to affect air, water, flora and fauna.

d) The material in streams is received from the upstream catchment area and depends on the catchment characteristics, flow pattern, rainfall distribution and land use. Hence each river is unique in its feature and quantum of material that can be extracted will vary year to year and river/stream to stream. The committee is therefore of the opinion that distance restriction should not be the only criteria for granting the permission for locating crushers. The quantum and nature of river bed material should also be assessed for availability pre and post monsoon and quantity restriction should be applied to the identified river beds to pre-empt over exploitation for short term economic benefit.

17. Although the study conducted by the Committee was limited, still in the areas of identical topography, it would be quite relevant. Furthermore, the suggestions given by the Committee are general, which must be followed in almost every stone crusher as far as possible.

18. After considering the matter in its entirety and keeping in view the fact that this order is confined to CMP No. 8459 of 2019, for stay, and has nothing to do with the disposal of the main petition, therefore, to exploit the natural resources without damaging the earth, ecology, environment and for overall sustainable development, the interim order dated 29.8.2019 passed in CMP No. 8459 of 2019 is made absolute subject to the following directions:-

(1) Area near deposition zone i.e. near third order stream or tail end of the second order stream should be considered for installation of stone crusher unit.

(2) Effluent generated by the unit should be clarified in lined stilling chambers constructed within the premises of unit. The recovered silt the effluent needs to be disposed off regularly at suitable site and at a safe distance to prevent its entry in the nearby streams. This material may be used for filling up of depressions, filling of pits for plantation or for dispersal in agriculture fields.

(3) Location of crushers must be decided after a detailed study covering hydrological, soil & water conservation environmental aspects to avoid sensitive locations, since impact of crushers is likely to affect air, water, flora and fauna.

(4) The material in streams is received from the upstream catchment area and depends on the catchment characteristics, flow pattern, rainfall distribution and land use. Hence each river is unique in its feature and quantum of material that can be extracted will vary year to year and river/stream to stream. Distance restriction should not be the only criteria for granting the permission for locating crushers. The quantum and nature of river bed material should also be assessed for availability pre and post monsoon and quantity restriction should be applied to the identified river beds to pre-empt over exploitation for short term economic benefit.

(5) Subject to the condition that all the new units adhere to the word class technology, use state of the art machinery, and the sanctioning authority adhere to the international protocols relating to sanctioning and running of stone crushers.

(6) While sanctioning the unit, the concerned official must inspect the road and its capacity to ensure that it caters to the increased traffic, and should not lead to harassment to the residents of the area, flow of traffic, and must not result in traffic jams. There must be ample parking space for trucks used in ferrying the material..

19. In view of the above observations, the CMP No. 8459 of 2019 is disposed of.

CMP No. 15351 of 2019 in CWP No. 4342 of 2019

20. In view of the order passed in CMP No. 8459 of 2019 in CWP No. 2067 of 2019 above, no separate order is required to be passed in this application and the same is closed.

21. In case the petitioners/applicants seeks further relief, it shall be open for them to file appropriate application in this regard.

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

Iqbal Singh ….Petitioner.

Versus

Kamal Dev & another …Respondents.

CMPMO No.176 of 2020
Decided on: 27.02.2020

Code of Civil Procedure, 1908 - Order XVIII Rule 3A- Examination of party after examination of his witnesses- Leave of Court- Held, a party who wishes to appear as witness must so appear before any other witness on his behalf has been examined unless the Court for reasons to be recorded permits him to appear as his own witness at a later stage- But the party must file such application for leave of Court at the first available instance on the date when matter is listed for recording of his witnesses. (Para 14 & 15)

Whether approved for reporting?[32] Yes

For the petitioner : Mr. Neel Kamal Sharma, Advocate.

[32] *Whether reporters of the local papers may be allowed to see the judgment?*

For the respondents : None.

Ajay Mohan Goel, Judge (Oral)

By way of this petition filed under Article 227 of the Constitution of India, petitioner/plaintiff assails the order which has been passed by the Court of learned District Judge Hamirpur, H.P. in C.M.A. No.887 of 2019, in Civil Suit No.1 of 2019, titled as Ikwal Singh Versus Kamaldev & Anr, vide which an application filed by present petitioner/plaintiff before the learned Court below, under Section 151 of the Code of Civil Procedure, for granting permission to the applicant/ plaintiff to have his statement recorded after recording statements of other plaintiff's witnesses, being rejected.

2. The matter was initially listed before Hon'ble Vacation Judge on 23.01.2020. On said date, Hon'ble Vacation Judge had stayed further proceedings pending before the learned Court below and had ordered issuance of notice to the respondents for today i.e. 27.02.2020, on steps being taken by the petitioner within two days. As per report of the Registry, this order was not complied with by the petitioner as no steps were taken for the service respondents for today within two days and steps were taken as far back as on 24.02.2020.

3. In order to ascertain as to whether there is any merit in the present petition, this Court had requested learned counsel for the petitioner to make his submission on merit viz-a-viz the order under challenge.

4. I have heard learned counsel for the petitioner and have also gone through the impugned order.

5. Learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law, as in case the same is permitted to remain on record, the suit of the plaintiff would be rendered infructuous. He has further argued that the learned Court below has erred in not appreciating that plaintiff could not earlier get his statement record for the reasons which was beyond his control. No other point was urged.

6. A perusal of the impugned order demonstrates that the matter was listed before the learned Court below for recording statement of plaintiff's witnesses for the first time on 14.06.2019. Admittedly, on the said date, neither plaintiff appeared before the Court for the purpose of recording statement of his witnesses nor any request was made on his behalf by his counsel to the effect that recording of the statements of the plaintiff's witnesses be deferred as there was some causality in the family.

7. Be that as it may, thereafter again the matter was listed for the purpose of recording statements of the plaintiff's witnesses on 25.09.2019, 06.11.2019 and 03.12.2019. It is also borne out from the impugned order that affidavits of two witnesses were tendered on 03.12.2019 and they were also cross-examined on 06.12.2019.

8. Not only this, during the course of listing of the case on earlier occasions for the purpose of recording statements of plaintiff's witnesses, five witnesses were examined. It is only thereafter, that the application stood filed on 05.12.2019, under Section 151 of the Code of Civil Procedure by the petitioner/plaintiff, seeking permission to have his statement recorded after the statements of all the witnesses.

9. The application which was so filed by present petitioner before the learned Court below is appended with the petition as Annexure P-3. While dismissing this application, learned Court below has held that the averments which were made in the said application especially para 4 thereof were highly vague and a generalized statement stood made therein explaining as to why the plaintiff could not depose before the Court earlier which could not be termed to be a sufficient cause.

10. Learned Court below has observed in its order that the least that was expected from the plaintiff was that he should have had given some details as to what incident actually

took place in the family. It observed that in the absence thereof, said plea of the plaintiff could not be accepted. Learned Court also held that even if plaintiff was unable to appear before the learned Court below for the purpose of recording his statements on 14.06.2019, he in fact did not appear for the said purpose in the Court on subsequent dates nor any application was filed by him on the dates so fixed. This, as per the learned trial Court below demonstrated that plaintiff had deliberately not stepped into the witness box to fill up the gaps left by the statements of his witnesses.

11. Learned Court below also held that Order 18, Rule 3 (A) of the Code of Civil Procedure was enacted to prevent the party from appearing after examination of other witnesses and in case said provisions are construed liberally then the purpose of enacting said provision would be defeated.

12. In my considered view, there is no infirmity in the order which has been so passed by the learned trial Court, while dismissing the application filed by present petitioner, under Section 151 of the Code of Civil Procedure, for grant of permission in his favour to give statement after the statements of other witnesses recorded.

13. Order 18, Rule 3(A) of the Civil Procedure Code provides that where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for the reasons to be recorded, permits him to appear as his own witness at a later stage.

14. Coming to the facts of the present case, admittedly, the case was listed for the purpose of recording of the statements of plaintiff's witnesses on 14.06.2019, 25.09.2019, 06.11.2019 and 03.12.2019. On the following dates, about five witnesses on behalf of the plaintiff were examined. Plaintiff himself did not appear as a witness before the learned Court below. It is thereafter, that an application stood filed by him under Section 151 of the Code of Civil Procedure on 05.12.2019, to the effect that he should be permitted to have his statement recorded after the statements of other witnesses were recorded.

15. In my considered view, this application filed by the petitioner before the learned Court below was nothing but an afterthought and was not in sync with the statutory provisions of Order 18, Rule 3 (A) of the Code of Civil Procedure. Said provision of the Code does allows a party to appear as a witness at a later stage subject to permission of the Court, but then obviously such prayer has to be made by the party before the Court at the first available instance. Meaning thereby, that an application has to be filed by the party concerned on the date when the matter is listed for recording of the statements of said party seeking liberty of the Court to have his statement recorded after recording of the statements of other witnesses. If any such application is filed before the Court at that stage, then the Court has to apply its judicial mind on the reasons mentioned in the said application and subject to what the other party would have to say with regard to the application so filed by the first party, pass appropriate orders. These provisions cannot be permitted to be abused by a party by first not appearing as its own witness and thereafter seeking liberty to appear as a witness after recording of the statements of the other witnesses. This is not the spirit of Order 18, Rule 3 (A) of the Code of Civil Procedure.

16. Not only this, a perusal of the application which was filed by the petitioner before the learned trial Court (Annexure P-3) demonstrates that same is vague and cryptic. No plausible reason has been mentioned therein as to why petitioner could not earlier appear before the Court as his witness and why no such application has been filed at an earlier stage. Learned Court below is right in its observations that the averments made in para 4 that the petitioner could not appear before the Court as a witness due to some causality in the family were extremely vague and cryptic, because there is no mention therein as to what actually happened, on account of which the petitioner/ plaintiff could not appear before the Court, to have his statement recorded.

17. Accordingly, as this Court does not finds any merit in the present petition and further as this Court does not finds any infirmity in the order impugned by way of the present petition, the same is dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Dharam Vir Sharma ....Petitioner.

Versus

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

CWPOA No. 60 of 2019
Date of decision: 2.3.2020

Constitution of India, 1950 - Articles 14 & 226- Regularization of services- Writ jurisdiction- Petitioner claiming regularization of services on completing 10 years on and w.e.f. August, 1996- Held, petitioner remained absent on medical grounds from 19.12.1987 to 06.03.1990- No material on record that he had claimed condonation of aforesaid entire period- Petition disposed of with direction that if petitioner had also sought condonation of absence period from 19.12.1987 to 6.3.1990 and same stood allowed, then said period is to be counted for benefit of regularization of service. (Para 2 & 3)

Whether approved for reporting?[33] Yes

For the petitioner: Mr. Onkar Jairath, Advocate.

For the respondents: Mr. Hemant Vaid Addl. A.G. with Mr. Gaurav Sharma, Dy. A.G.

Sureshwar Thakur, Judge (oral):

The writ petitioner, through, the instant petition, has, claimed the hereinafter extracted reliefs:-

> "i) That the respondents may be directed to regularize the services of the applicant on and w.e.f. August 1996 i.e. on the completion of 10 years of service with all consequential benefits or in alternate notionally without any financial benefits.
>
> ii) The respondents may be further directed to grant him the consequential benefits consequent upon his regularization w.e.f. August 1996 and may be held entitled for pension etc. also."

2. The writ petitioner, as displayed, in Annexure A-16, holds, a, diploma in Mechanical Engineering, from, Punjab State Board of Technical Education. The learned Additional Advocate General, resists the claim of the writ petitioner, by placing reliance, upon, Annexure R-1, wherein he is echoed, to, work, in, three different categories i.e. as Helper w.e.f. 7.3.1990 to 31.12.1990, Mechanic w.e.f. 1.1.1991 to 31.5.1995, and, as Junior Engineer w.e.f. 1.6.1995, under, the respondents, hence, on a daily rated basis. He further makes, a, contention, that, since the writ petitioner, has rendered service, as, revealed in Annexure R-1, as, a, Junior Engineer (Mechanical), w.e.f. 1.6.1995 to 1.1.2005, hence on a daily rated basis, (i) thereupon the regularzation, of, the services of the writ petitioner, in, the year 2005, as, a Junior Engineer (Mechanical), is, valid. He also proceeds to make, a, further contention, that, assumingly, if, the service(s), on, daily wage basis, became rendered by the

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33 Whether reporters of the local papers may be allowed to see the judgment?

writ petitioner, as, a Junior Engineer (Mechanical), under, the respondents concerned, and, if assumingly they commenced, from, the year 1986, and, ended in the year 1995, (ii) and even if, assumingly, the, displays in Annexure R-1, are, inadvertently made, (iii) thereupon the claim reared, by the writ petitioner, that, he had remained absent from duty, from 19.12.1987, upto 6.3.1990, purportedly on medical grounds, is, fallaciously reared, given the afore period, of, his absence from duty rather remaining uncondoned, (iv) consequently, when he also has failed to complete, the, requisite period, of, 240 days, of, continuous service, in each calendar year, (iv) thereupon the afore period w.e.f. 19.12.1987 upto 6.3.1990, cannot be construed, to be a period, wherein he rendered, the, requisite continuous service, under the respondents nor it can be totaled hence, for, completing or computing the requisite period, of, 10 years, of, qualifying service, by the petitioner, (v) rather assumingly commencing from the afore date, rather whereat, he became initially engaged, on a daily rated basis, as a Junior Engineer (Mechanical), under, the respondents, nor he can make any valid claim, that, his services be regularized, in, the year 1995.

3. However, displays are yet made in Annexure R-1, vis-a-vis, his rendering service, on a daily wage basis, from 19.12.1987 upto 6.3.1990, and, also echoings are made therein, vis-a-vis, within the afore period, the, petitioner performing supervisory duties. Moreover the afore echoings, are, also unfolded in Annexure A-2, qua, the petitioner performing the afore duties, in a supervisory capacity, from the year 1991 to 1994, under, the respondents. Consequently, the afore made echoings, benumb, all the efficacies, of, the afore made submission(s), hence anvilled, upon, Annexure R-1. Moreover, further contentions, are also made, in the reply, filed by the respondents, that, the petitioner has failed to render, the, requisite period, of, continuous service, in each calendar years concerned, for, ten years, given his remaining absent from duties w.e.f. 19.12.1987 upto 6.3.1990, and, his afore absence, purportedly, on, medical ground(s), for the afore period remaining not condoned, (ii) thereupon the writ petitioner, cannot claim the benefit, of, regularization, in, service, as a Junior Engineer (Mechanical), from, the year 1986. However, the afore contention also appears to be made, by the learned Additional Advocate General, with his being unmindful, vis-a-vis, the echoings made in Annexure A-7, wherein, the period, of, his absence, has been condoned, for the period, as, claimed by the petitioner, in his application. However, the afore application, is, not placed on record. Consequently, if the application whereon, Annexure A-7 was rendered, the petitioner hence claimed condonation, of, the entire period, of, his absence from duties, hence, from 19.12.1987, upto, 6.3.1990, (iii) thereupon only Annexure A-7 shall fully operate, and, otherwise it shall operate only, vis-a-vis, the period(s), as, are mentioned, in, the application, whereon Annexure A-7, become drawn.

3. In aftermath, the writ petition is allowed, and, if the application, seeking condonation, of, the period of absence, from duty hence of the petitioner, on medical grounds, and, whereon Annexure A-7, was drawn, also covers, the entire period, from, 19.12.1987 upto 6.3.1990, (i) thereupon, the, afore entire period, be borne in mind, while, offering, vis-a-vis, the writ petitioner, the benefit of regularization in service, along with, all consequential benefits, significantly, on, completion of the requisite 10 years, of continuous service, as claimed, by him. However, in case the afore entire period, of, absence, from, duty hence has remained unclaimed, in, the apposite application, thereupon the respondents, may not release the afore benefits, to, him, but shall recalculate, in the light, of, the afore observations, rather, his apposite qualifying period of service, and, thereafter shall afford qua him, all, the requisite benefits.

4. In view of the above observation(s), the, instant writ petition, is, disposed of. All pending applications, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, JUDGE AND HON'BLE MR. JUSTICE ANOOP CHITKARA, JUDGE.

Roshani Devi ....Appellant.

Versus

State of Himachal Pradesh & others ...Respondents

Rita Sharma ....Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents

LPA No. 60 of 2015 alongwith
CWP No. 1400 of 2016.
Date of Decision : December 11 , 2019

Letters Patent Appeal- Constitution of India, 1950 - Articles 14 & 226- **Guidelines for engagement of Anganwari Workers, 2009**- Clause 7(1)(b)- Award of marks qua past experience- Challenge thereto- Selection of appellant based on award of additional marks for rendering service in private institution- Quasi-judicial Authorities holding award of such marks contrary to provisions of the Scheme pursuant to letter dated 1.12.2006 of Director, Social Justice & Women Empowerment and ordering redrawing of seniority list- High Court allowing writ and remanding matter to Appellate Authority- Appellate Authority again dismissing appeal of appellant and holding that experience certificate obtained from private institution could not have been considered for grant of additional marks- Hon'ble Single Bench upholding order of Appellate Authority- Letters Patent Appeal- Held, by virtue of latest Notification, previous Schemes were superseded- New Scheme does not discriminate between whether experience is from private institute or government or semi-government institution- Quasi-judicial Authorities were wrong to set aside selection/ appointment of appellant by ordering deduction of two marks given for past experience- LPA allowed – Judgment of Hon'ble Singh Bench set aside. (Para 13 to 18)

Whether approved for reporting?[34] *Yes.*

For the appellant : Mr. B.L. Soni and Mr. Neel Kamal Sood, Advocates, for the appellant in LPA No. 60 of 2015.

Ms. Kiran Kanwar, Advocate, vice counsel for the petitioner in CWP No. 1400 of 2016.

For the respondents : Mr. Narender Guleria & Mr. Ashwani K. Sharma, Additional Advocates General with Mr. Yudhbir Singh Thakur & Mr. Raju Ram Rahi, Deputy Advocates General, for respondents No. 1 to 5 and 7/State in LPA No. 60 of 2015 and for respondents No. 1 to 4/State in CWP No. 1400 of 2016.

Mr. B.L. Soni and Mr. Neel Kamal Sood, Advocates, for respondent No. 5 in CWP No. 1400 of 2016.

Mr. G.R. Palsra, Advocate, for respondent No. 6 in LPA No. 60 of 2015.

Anoop Chitkara, Judge

Smt. Roshani Devi (appellant in LPA No. 60 of 2015), who continues to perform her duties as Anganwari worker, under Child Development Project Officer, Karsog, District Mandi, HP, has come up before this Court by way of the instant Letters Patent Appeal, against dismissal of her writ petition by Single Judge of this Court, affirming the order passed by Divisional Commissioner, passed in her appeal under Clause 12 of the Scheme for the

[34] **Whether reporters of Local Papers may be allowed to see the judgment?**

engagement of Anganwari workers/helpers, holding therein that the experience certificate granted to her by a private institution would not entitle her for two marks, and thus upholding the order passed by the Deputy Commissioner, setting aside her appointment, and directing the preparation of fresh merits list after deducting two marks allotted to her.

2. Smt. Rita Sharma (private respondent in LPA No. 60 of 2015) also filed writ petition (CWP No. 1400 of 2016) asking for inquiry against the erring officials and seeking recovery of the wages paid to Roshani Devi, the selected candidate, and also seeking issuance of appropriate directions for appointing her being the securer of the highest marks.

3. The LPA is being taken up as the main case and all references are in its context. The original petitioner Roshani Devi after qualifying for the post of Anganwari Worker/Helper joined at the Anganwari Centre, Baajhu under the Integrated Child Development Scheme (ICDS) Project, Karsog, Distt. Mandi, HP on Aug 10, 2007. Feeling aggrieved by her selection the private respondent Rita Sharma filed an appeal against her appointment under the Scheme/Guidelines for the engagement before Anganwari Workers/Helpers before the Deputy Commissioner, Mandi. The private respondent filed the said appeal on the grounds that petitioner Roshani Devi was given two marks for experience, however, the experience certificate was procured from a private institute, whereas as per Clause 7(1) of the Scheme the said two marks could have been awarded only if the experience was for working in a Government/Semi Government School.

4. Vide order dated Jan 4, 2008 the Deputy Commissioner, Mandi, accepted the appeal filed by the private respondent Rita Sharma and ordered that two marks awarded to petitioner Roshani Devi be deducted and fresh merit list be prepared and after that the candidate securing the highest marks in merit be offered appointment.

5. The present appellant Roshani Devi challenged the said order before the Divisional Commissioner, Mandi Division, Mandi, who vide order dated May 19, 2008, upheld the previous order dated Jan 4, 2008, passed by the Deputy Commissioner, dismissed the appeal.

6. Against the dismissal of her appeal by the Divisional Commissioner, Roshani Devi filed a writ petition in this Court which was registered as CWP No. 946 of 2008. Vide order dated May 17, 2010, a Division Bench of this Court disposed of the said writ petition with a direction to the Appellate Authority to consider the case afresh in the light of the clarification/ directions given in the said order.

7. After that, the private respondent Rita Sharma, filed a fresh appeal before the Additional District Magistrate, Mandi, who, vide order dated Aug 27, 2011, accepted the appeal ordered that two additional marks awarded to Roshani Devi be deducted and fresh merit list be prepared and thereafter the candidate scoring the highest marks in merit be offered appointment.

8. Again feeling aggrieved, Roshani Devi, appellant herein, challenged the said order dated Aug 27, 2011, by filing an appeal before the Divisional Commissioner, Mandi Division, Mandi, who vide order dated May 10, 2013, upheld the same, dismissing the appeal.

9. Roshani Devi, again challenged the said order by filing a writ petition before this Court which was registered as CWP No. 4873 of 2013. Vide judgment dated Nov 8, 2013 the Principal Division Bench of this Court disposed of the writ petition with a direction to the Divisional Commissioner, Mandi to hear the matter afresh. While disposing the writ petition the Principal Division Bench observed as follows:

> "3. The petitioner was appointed as Anganwari Worker in Anganwari Centre run by respondent No. 5. Her appointment was challenged by respondent No. 6, inter alia, on the ground that the Selecting Authority wrongly gave two additional marks to the petitioner, notwithstanding the fact that the experience certificate produced by the petitioner pertain to private institution. The Additional District Magistrate, Mandi who heard the said complaint, accepted the said challenge and in his order dated 27th August, 2011 noted that the provisions of Clause 7(2) (b) & (c) of the Scheme/guidelines for appointment of Anganwari Worker and Helper, two additional marks could not be given on the basis of the experience certificate obtained from a private institution.

4. It is common ground that the Authority adverted to incorrect provisions of the Scheme, i.e., 7(2). That provision pertains to Anganwari Helpers whereas post in question, against which the petitioner has been appointed is Anganwari Worker. That is governed by clause 7 (1) of the Scheme and in particular clause (b) thereof, which reads thus:-

"Maximum 2 marks for experience to be given as under:-

One mark for candidates having experience as Anganwadi Helper/ Balsevika/ Balwadi Teacher/ Nursery Teacher for one year or Shishu Palak of ECCE center for 10 months. Or

Two marks for candidates having experience as Anganwadi Helper/ Balsevika/ Balwadi Teacher/Nursery Teacher for two or more years."

5. This Scheme nowhere mentions that the experience certificate must necessarily pertain to Government/semi Government institution. In other words, the experience certificate produced by the petitioner given by the private institution could not have been ignored in terms of this provision.

6. The decision of the Additional District Magistrate came to be confirmed by the Divisional Commissioner, Mandi vide order dated 10th May, 2013. Both these decisions are subject matter of challenge in the present petition. The respondents, however, in addition to clause 7 (1) of the Scheme have placed reliance on the communication issued under the signatures of the Director, Social Justice & Empowerment (HP) dated 1st December, 2006 to buttress reason recorded by the two Authorities, referred to above, at page 148, which reads thus:-

"No.14-29/87-ICDS

Directorate of Social Justice & Empowerment

Himachal Pradesh.

To

1. All the District Programme Officers in Himachal Pradesh.

2. All the Child Development Project Officers in Himachal Pradesh (through DPOs).

Dated Shimla-9 1-Dec-2006.

Subject: Guidelines for the appointment of Anganwari Workers/ Helpers clarification thereof.

Sir,

With regard to marks to be given for Nursery Teachers experience, clarifications are being sought by most of the CDPO through respective DPOs. In this regard it is clarified that candidates having DIPLOMA of Nursery teacher and on the basis of that diploma having experience of teaching in any Govenemnt/semi Government School may be given experience marks.

Yours faithfully,

Sd-

Director Social Justice & Empowerment,

(Himachal Pradesh)"

7. However, this communication has not been adverted to, either by the first Authority, or for that matter, by the Divisional Commissioner. They have decided the issue purely on the basis of provisions contained in clause 7(2) of the Scheme and nothing more.

8. As a result, we are inclined to set aside the order passed by the Divisional Commissioner and relegate the private parties once again before the Divisional Commissioner, Mandi for reconsideration of the matter. It will be open to the Divisional Commissioner to examine whether the communication issued by the Director dated 1stDecvember, 2006 is still holding the field and also whether the Director had authority to issue such instructions which are not part of the Scheme concerning appointment of the Anganwari Workers. All questions in that behalf are left open to be decided by the Divisional Commissioner. We are not expressing any opinion either way in that behalf."

10. Vide order dated Nov 26, 2013 the Divisional Commissioner, Mandi Division, Mandi again dismissed the appeal filed by Roshani Devi, appellant herein, holding that the experience certificate issued in favour of Roshani Devi was by the Samaj Kalwan Avem Vikas Mandal, which is not a Government/Semi Government Institution/School. He also held that the appellant did not produce the Diploma of Nursery Teacher. The order further reads that the clarification issued by the Director, Social Justice and Empowerment, HP, was justifiable because it was issued by the head of the Department who was empowered to do so. A bare reading of this order reveals that the Divisional Commissioner, Mandi did not specifically give a finding that whether communication issued by the Director dated Dec 1, 2006, still holds the field or not. All that the Divisional Commissioner decided was that the Director had the authority to issue such instructions. Furthermore, there is no finding that whether this clarification could have been issued or not.

11. Feeling aggrieved, Roshani Devi, appellant herein, again came to this Court by filing writ petition No. 9338 of 2013. Vide impugned judgment dated May 4, 2015, a Single Bench of this Court upheld the order dated Nov 26, 2013, passed by the Divisional Commissioner, Mandi Division, and dismissed the writ petition.

12. The judgment dated Nov 8, 2013, rendered by the Principal Division Bench of this Court in CWP No. 4873 of 2013 virtually gave binding guidelines to the Divisional Commissioner, Mandi to decide the matter. The Principal Bench had specifically stated that the directions issued by the Department of Social Justice & Empowerment, restricting the issuance of experience certificate to Government/Semi Government Institutes was still in force or not.

13. This matter has become a tennis ball swinging from one Court to another. Perusal of the income certificate of Roshani Devi (Annexure P-5) gives a painful reading wherein it is mentioned that the income of the appellant from all sources does not exceed Rs. 7500/- per annum as on May 15, 2007.

14. To adjudicate this matter the controversy narrows down to the restriction imposed upon the experience certificate issued by a non-government institute. Clause 7 (1) of the Scheme deals with this question. This Scheme which is annexed as Annexure P-4 is dated Oct 5, 2009, and the Notification reads that it is in supersession of earlier notifications dated 11.4.2007, 6.7.2007, 20.9.2007, 17.6.2008, 18.11.2008 and 7.1.2009 and for the appointment of Anganwari Workers/Helpers under ICDS Programme in Himachal Pradesh. Clause 7 (1)(B) of the Scheme which mentions about two marks to be given for experience, reads as follows:

"B) Maximum 2 marks for experience to be given as under:-

One mark for candidates having experience as Anganwadi Helper/ Balsevika/Balwadi Teacher/ Nursery Teacher for one year or Shishu Palak of ECCE center for 10 months. Or

Two marks for candidates having experience as Anganwadi Helper/ Balsevika/ Balwadi Teacher/Nursery Teacher for two or more years."

15. Such Scheme does not discriminate between Government/Semi Government/Private Institute. In fact the Appellate Authority, that is, the Divisional Commissioner, Mandi Division had placed reliance on communication dated Dec 1, 2006 which had restricted the issuance of experience certificate only to Government/Semi Government School. The said communication reads as follows:

"No.14-29/87-ICDS

Directorate of Social Justice & Empowerment

Himachal Pradesh.

To

1. All the District Programme Officers in Himachal Pradesh.

2. All the Child Development Project Officers in Himachal Pradesh (through DPOs).

Dated Shimla-9 1-Dec-2006.

Subject: Guidelines for the appointment of Anganwari Workers/ Helpers clarification thereof.

Sir,

With regard to marks to be given for Nursery Teachers experience, clarifications are being sought by most of the CDPO through respective DPOs. In this regard it is clarified that candidates having DIPLOMA of Nursery teacher and on the basis of that diploma having experience of teaching in any Govenemnt/semi Government School may be given experience marks.

Yours faithfully,

Sd-

Director Social Justice & Empowerment,

(Himachal Pradesh)"

16. Because of the latest notification superseding all earlier schemes wherein reference was not made to this communication dated Dec 1, 2006, and when revised scheme/guidelines were framed, no such restrictions were placed as already mentioned above.

17. In view of the fact that the new Scheme did not discriminate between experience from private institute or not, as such, it was wrong on the part of the Deputy Commissioner as well as the Divisional Commissioner to set aside the appointment by ordering deduction of two marks which were given to appellant Roshani Devi on the basis of experience certificate given by a private institute.

18. Furthermore, Annexure P-11, which is issued by the concerned Agency which had issued the experience certificate (Annexure P-3) to appellant Roshani Devi, reads as follows:

"... In connection with experience certificate which has given to Mrs. Roshani Devi w/o Sh. Daulat Ram R/o Vill. Baju, P.O. Bakhrot, Teh. Karsog, Distt. Mandi, (H.P.) worked in our creche Centre Mandhel Patla as teacher for three years. It has Govt. sponsored programme and it has been supported by Central Social Welfare Board through State Social Welfare Board under Ministry of Women and Child Development, Govt of

India. In this regard sanction order and bond signed by us enclosed herewith.”

It was also clarified that the work was of Government sponsored programme and supported by Central Social Welfare Board through State Social Welfare Board. As such, the appellant Roshani Devi was entitled for two marks on the basis of her experience certificate.

19. Consequently, the judgment dated May 4, 2015, passed by the learned Single Judge in CWP No. 9338 of 2013, is set aside. Order dated Nov 26, 2013, passed by the Divisional Commissioner, Mandi Division, Mandi in Case No. 54 of 2011 is also set aside and order dated Aug 27, 2011, passed by Additional District Magistrate, Mandi, in Appeal file No. 62 of 2011 is also set aside and initial appeal filed by private respondent Rita Sharma fails.

20. Resultantly, the present LPA No. 60 of 2015 is allowed in the aforesaid terms by holding that there is no error in the initial appointment of appellant Roshani Devi as Anganwari Worker/Helper. Also in view of the aforesaid discussions, the connected writ petition being CWP No. 1400 of 2016 fails being devoid of any merits, and is accordingly dismissed.

21. No order as to costs.

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

The Land Acquisition Collector(Central Zone) HP. PWD, I&PH and another ...Appellants.

Versus

Narotam Singh, deceased through his LRs ...Respondents.

RFA No. 232 of 2016
Date of Decision: March 5, 2020

Land Acquisition Act, 1894- Sections 11 & 25- Acquisition of land for public purpose- Reference- Held, Court cannot award compensation lesser than the compensation awarded by the Land Acquisition Collector under Section 11 of Act. (Para 4)

Land Acquisition Act, 1894 - Sections 18 & 23 - Acquisition of land for public purpose- Reference- Market value of land- Determination- Held, for determining market value of acquired land, it is the purpose of acquisition and not its nature and classification which is relevant- Where nature and classification of land has no relevance for purpose of acquisition, the market value is to be determined as a single unit irrespective of nature and classification of land- Uniform rate to all kinds of land under acquisition as a single unit is to be awarded. (Para 5)

Cases referred;

Executive Engineer and another vs. Dilla Ram, Latest HLJ (2008)2 HP 1007
Gulabi vs. State of H.P., 1998(1) Shim.LC 41;
H.P. Housing Board vs. Ram Lal 2003(3) Shim.LC (64),
Himmat Singh and others vs. State of Madhya Pradesh, (2013)16 SCC 392,
HPSEB Ltd. vs. Amar Singh and connected matter, 2017(4) Him.LR 2467).
Peerappa Hanmantha Harijan (Dead) by Legal Representatives and others vs. State of Karnataka and another (2015)10 SCC 469).
Union of India vs. Harinder Pal Singh (2005)12 SCC 564,
Viluben Jhalejar Contractor (Dead) by LRs vs. State of Gujarat (2005)4 SCC 789,
Whether approved for reporting?[35]*Yes*

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[35] Whether reporters of the local papers may be allowed to see the judgment?

For the Appellants:	M/s Kuldeep Singh Thakur and Kamal Kant, Deputy Advocate Generals.
For the Respondents:	Mr. Mukesh Sharma, Advocate, vice Mr.Rajiv Rai, Advocate, for respondents No.1(a) to 1(c) and 2 to 7.

Vivek Singh Thakur, J. (oral)

This appeal has been filed against the award passed by learned District Judge (hereinafter referred to as the Reference Court). Land Reference Petition No.3/4 of 2014, titled as *Narotam Singh & others vs. The Land Acquisition Collector (Central Zone) HP. PWD, I&PH & another* was decided by the Reference Court alongwith a bunch of Land Reference Petitions, wherein Land Reference Petition No.10/4 of 2014, titled as *Swaroop & others vs. The Land Acquisition Collector (Central Zone) HP. PWD, I&PH & another,* was a lead case and the evidence was led in the said case.

2. Appeal preferred by the appellants-State, against the award passed in RFA No. 114 of 2016, titled as *Land Acquisition Collector and another vs. Swaroop and others,* alongwith connected appeals RFA Nos.115 to 122 of 2016, has been dismissed by this Court vide judgment dated 19.09.2018.

3. In present case also State of H.P. has acquired the land of respondents/land owners/claimants alongwith others, including land involved in RFA No. 114 of 2016, for the purpose of construction of Bamta-Ali Khad-ChandpurKandraur road in village Kandraur, Pargana and Tehsil Sadar, District Bilaspur after undertaking the process under the Land Acquisition Act, 1894 (hereinafter referred to as the Act), by passing a common award i.e. award No. 2, dated 28.5.2010 under Section 11 of the Act wherein the Collector had awarded following market value of acquired land according to classification of land:-

Kohali Dom	@ Rs. 9.81,094/-	per Bigha
Andarli Abbal	@ Rs. 9.81,094/-	-do-
Andarli Dom	@ Rs. 8,81,563/-	-do-
Baharli Abbal	@ Rs. 5,68,750/-	-do-
Baharli Dom	@ Rs. 3,55,469/-	-do-
Banjar & Khadyater	@ Rs. 1,27,969/-	-do-

4. Section 25 of the Act provides that the Court cannot award the compensation lesser than the compensation awarded by the Land Acquisition Collector under Section 11 of the Act.

5. It is well settled that at the time of determining market value of land for acquisition, the purpose for which the land is acquired is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, the market value of the land is to be determined as a single unit irrespective of nature and classification of the land. In such a case, uniform rate to all kinds of land under acquisition as a single unit irrespective or their nature and classification is to be awarded. ***(See H.P. Housing Board vs. Ram Lal 2003(3) Shim.LC (64), Union of India vs. Harinder Pal Singh (2005)12 SCC 564, Gulabi vs. State of H.P., 1998(1) Shim.LC 41; Executive Engineer and another vs. Dilla Ram, Latest HLJ (2008)2 HP 1007 and HPSEB Ltd. vs. Amar Singh and connected matter, 2017(4) Him.LR 2467)***.

6. Further, it is also settled that when the purpose of acquisition is common and no developmental activity is required to be carried out, compensation is to be awarded at uniform rate. ***(See: Viluben Jhalejar Contractor (Dead) by LRs vs. State of Gujarat (2005)4 SCC 789, Himmat Singh and others vs. State of Madhya Pradesh and another (2013)16 SCC 392, and Peerappa Hanmantha Harijan (Dead) by Legal Representatives and others vs. State of Karnataka and another (2015)10 SCC 469).***

7. Like RFA No. 114 of 2016, in present case also, it is undisputed that highest rate awarded by the Collector was Rs. 9,81,094/- per bigha. The appellant/State has itself placed on record the award passed by the Collector is Ext.RW2/A indicating highest rate awarded by the Land Acquisition Collector at the rate of Rs.9,81,094/- per bigha.

8. In the lead case, land owners/claimants have examined six witnesses and have also relied upon sale deeds Ext.PW4/A, Ext.PW5/B, Ext.PW5/C and award Ext.PW5/D, whereas, the appellant/State has examined two witnesses and has relied upon the impugned award passed by the Collector placed on record as Ext.RW2/A and standing order No. 28 Ext.RW2/B along with market value of land Ext.RW2/C.

9. Learned District Judge has not found favour to consider the sale deeds and award relied upon by land owners for the reason that land involved in sale deeds Ext.PW5/B and Ext.PW5/C was too small i.e. one biswa each dis-entitling these sale deeds from considering as exemplar sale deeds. Award Ext.PW5/D has also rightly been discarded by learned District Judge on the ground that, though, same is related to acquisition of land for the same purpose i.e. construction of road as in the present cases, however, land involved therein was of village Benla Brahmna and there is no evidence on record to establish the equivalence of nature and potential of land of both villages i.e. Benla Brahmna and Kandraur. Now only sale deed Ext.PW4/A relied upon by land owners remains for consideration. On the basis of it, value of land becomes Rs 8 lac per bigha. However, the said amount is lesser than the highest rate awarded by the Land Acquisition Collector. The land owners/claimants are entitled for uniform rate in the present case and said rate cannot be lesser than the rate awarded by the Land Acquisition Collector. In case value of land is determined on the basis of Ext.PW4/A, the same will be lesser than the highest rate determined by the Land Acquisition Collector. Therefore, learned District Judge has rightly ignored the said sale deeds also.

10. Learned District Judge has determined the value of acquired land on the basis of award approved and relied by the appellant(s)/State. There is no other evidence on record to evaluate the value of land and there is no illegality or perversity in awarding the compensation on the basis of rate determined by the Land Acquisition Collector. Therefore, I find no ground for interference in the impugned award passed by learned District Judge.

11. Accordingly, in view of above discussion and particularly judgment passed in RFA No.114 of 2016, respondents/land owners are held entitled to compensation of acquired land at uniform rate of Rs 9,81,094/- per bigha irrespective of nature, classification and category of land along with all consequential statutory benefits including interest and solatium under the Act.

12. Resultantly, appeal is dismissed. Record of the lower Court be sent back forthwith.

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

Varun Khari .....petitioner.

Versus

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

CWP No.570 of 2018.
Judgment reserved on: 03.01.2020.
Date of decision: 10.01.2020.

Himachal Pradesh State Commission for Women Act, 1996 – Section 10 – Functions of Commission – Explained – In a matter pending before it, State Commission directing employer of employee not to transfer him from that place or get his official accommodation vacated till matter between employee and his wife is finalized by it – Also directing employer to enter name of wife in the official record of employee – Held, Commission is a creation of Statute and thus it is bound to act within the forecorners of Statute that created it – Commission had no authority to give declaration qua marital status of parties – Over accommodation in question,

Commission had no jurisdiction as to how it is to be utilized nor it had any jurisdiction to request that employee is not transferred from the station till finalization of proceedings before it – What the Commission could not directly exercise under powers vested with it under Section 10 of Act, cannot be permitted to be done under garb of so called 'request' – Petition allowed – Orders of Commiossion set aside. (Para 10 to 12 , 16 & 19)

Cases referred;

Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another (2010) 8 SCC 633,
Bhupinder Singh vs. Delhi Commission for Women and others 2007, 94 DRJ 487,
Dr. Anil Seth vs. Delhi Commission for Women and others (2010) 119 DRJ 87,
KPMG India Private Limited vs. NCW (2014) Labour Industrial Cases 4311,
Munshi Ram vs. Dr.Y.S. Parmar University and others 2006 (3) Shim. LC 36,
U.S. Verma, Principal, DPS and another versus NCW 2009, 163 DLT 57,
Vikram Singh and others vs. Union of India and others 2010, 171 DLT 671,

Whether approved for reporting?[36] ***Yes***

For the Petitioner : **Mr. Anshul Attri and Ms. Manju Dhatwalia, Advocates.**

For the Respondents: **Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Additional Advocate General, Ms. Svaneel Jaswal, Mr. Narender Singh Thakur and Ms. Divya Sood, Deputy Advocate Generals, for respondent No.1.**

Ms. Vidushi Sharma, Advocate, for respondent No.2.

Mr.Rakesh Manta, Advocate, for respondent No.3.

Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala, Advocate, for respondent No.4.

Tarlok Singh Chauhan, Judge

In this writ petition, we are primarily concerned with the order passed by respondent No.2 i.e. The Himachal Pradesh State Commission for Women on 30.01.2018 (Annexure P-3), which has been questioned in this petition, and the same reads as under:

"No. HPSCW-SML-Shashi-Varun-N. Delhi-3564

H.P. State Commission for Women, Shimla-1, H.P.

From:

The Member Secretary,
H.P. State Commission for Women,
Shimla-1, H.P.

To

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36 ***Whether the reporters of the local papers may be allowed to see the Judgment?Yes***

The Chief Commissioner,
Shimla, Railway Board Building, The Mall Road, Shimla, Himachal Pradesh 171003, H.P.
Shimla-1 dated 30 Jan.2018.

Subject: Regarding complaint of Ms. Shashi against her husband, Sh. Varun Khari, Income Tax Inspector.

Sir/Madam,

The H.P. State Commission for Women, Shimla-1, H.P. has received a complaint against Shri Varun Khari, Inspector of your office in which she has alleged domestic violence and harassment/cruelty etc.

You are, therefore, requested to kindly not to transfer him from Shimla, till finalization of this case and further it has also been informed by the complainant that Sh. Varun Khari, Inspector, has submitted an application for surrendering Government Accommodation, allotted to him at New Shimla, therefore, till finalization the said case, the accommodation may not be vacated, please, as the complainant is residing in this accommodation.

The copy of the summon dated 23.1.2018 to Sh. Varun Khari, Inspector, for appearing before the Commission on 15.2.2018, is attached with this letter. You are requested to kindly serve this Summon to him under intimation to this Commission, please.

Yours faithfully,

sd/-

Member Secretary,
H.P. State Commission for Women,
Shimla-1, H.P.
comshimlahp_1972@hotmail.com

Endst. No. HPSCW-SML-Shashi Varun-N Delhi- Jan.2018

Copy to :

The Principal Chief Commissioner, IT-North West Region, Sector 17, Chandigarh, for information and similar action pl.

Member Secretary,
H.P. State Commission for Women,
Shimla-1, H.P.
comshimlahp_1972@hotmail.com"

2. In addition, we are also concerned with the another order passed by the Commission on 24.02.2018 (Annexure P-6) which reads as under:

"No. HPSCW-SML-Shashi-Varun-N. Delhi-3958
H.P. State Commission for Women, Shimla-1, H.P.
From:

The Member Secretary,
H.P. State Commission for Women,
Shimla-1, H.P.

To

The Chief Commissioner,
Shimla, Railway Board Building, The Mall
Road, Shimla, Himachal Pradesh 171003, H.P.
Shimla-1 dated 24 Feb.,2018.

Subject: Regarding complaint of Ms. Shashi against her husband, Sh. Varun Khari, Income Tax Inspector-Inquiry Report thereof for taking necessary cognizance in the matter.

Madam,

In continuation of this Commission letter of even number dated 30th Jan. 2018;

The H.P. State Commission for Women, Shimla-1, H.P. has got inquired this matter through Superintendent of Police, Shimla, H.P. in which it has proved that Sh. Varun Khari, Inspector, has solemnized his marriage with Ms. Shashi at New Delhi in 2009.

The Photocopy of the said Inquiry Report is attached herewith for favour of your kind information and taking further necessary cognizance in the matter to enter her name in the Service Book and other related records of Sh. Varun Khari, Inspector, as his first legal wedded wife.

This matter is being fixed for personal hearing on 16/17.3.2018 in the Commission, therefore, you are requested to kindly ensure to send action taken report to this Commission on or before 16/17.3.2018.

Yours faithfully,

sd/-
(Sandeep Negi)
Member Secretary,
H.P. State Commission for Women,
Shimla-1, H.P.
comshimlahp_1972 @ hotmail. com"

3. At the outset, we need to clarify that we are not going into the question regarding inter se relationship and the alleged discord between the private parties and are only concerned with the legality and propriety of the aforesaid orders.

4. The Himachal Pradesh State Commission for Women (for short 'the Commission') has been constituted under Section 3 of the Himachal Pradesh State Commission for Women Act, 1996, (for short 'the Act') which reads as under:

> *"**3. Constitution of Commission.**- (1) The State Government shall, by notification in the Official Gazette, constitute a body to be know as the Himachal Pradesh State Commission for Women to exercise the powers conferred on, and to perform the functions assigned to it under this Act.*
>
> *(2) The Commission shall consist of-*

(a) a Chairperson, who shall be an eminent woman committed to the cause of women;

(b) "not more than four non-official members preferably women, to be nominated by the State Government from amongst the persons of ability, integrity and standing who have served the cause of women or have had sufficient knowledge and experience in law or legislation, administration of matters concerning the advancement of the women or leadership of any trade union or voluntary organization for women for protection, upliftment and promotion of common interests of women:

Provided that, at least one member each shall be from amongst persons belonging to the Scheduled Castes and the Scheduled Tribes, respectively;

(c) the Commissioner-cum-Secretary (Welfare) and the Director General of Police shall be the ex-officio members of the Commission;

(d) One Member-Secretary, to be appointed by the State Government, shall be any officer, who is or has been a member of the Civil Services of the State or of an all India Service or holds a civil post under the State."

5. The functions of the Commission have been enumerated under Section 10 of the Act which reads as under:

*"**10. Functions of Commission.**- (1) The Commission shall perform all or any of following functions, namely :-*

(a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;

(b) present to the State Government, annually and at such other times, as the Commission may deem fit. Reports upon the working of those safeguards ;

(c) make in such reports recommendations for the effective implementation of those safeguards for improving the condition of women by the State;

(d) review, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcoming in such legislations ;

(e) take up the cases of violation of the provisions of the Constitution and of other laws relating to women with the State Government or a appropriate authorities ;

(f) entertain complaints and take suo-moto notice of matters relating to,-

(i) deprivation of women's rights ;

(ii) non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;

(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and development and providing relief to women, and to take up the issues arising out of such matters with the State Government or appropriate authorities ;

(g) render guidance and advice to needy women in instituting proceedings in any judicial forum or tribunal for violation of constitutional provisions or any other laws relating to women ;

(h) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategics for their removal ;

(i) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards ;

(j) participate and advice on the planning process of socio-economic development of women ;

(k) evaluate the progress of the development of women in the State ;

(l) inspect or cause to be inspected a jail, remand home. women's institution or other places of custody where women are kept as prisoners or otherwise, and take up with the concerned authorities such matters for remedial action as found necessary ;

(m) fund litigation including police complaints involving issues affecting a large body of women or the interpretation of any provision of the Constitution or any other laws affecting women, and present to the State Government, every six months, report relating to such matters ;

(n) make periodical reports to the State Government or any matter pertaining to women and, in particular, various difficulties under which women toil ;

(o) co-operate with and assist and seek co-operation and assistance of the National Commission for Women and other Commissions for Women set up by different State Governments and also the Commission for Scheduled Castes and Scheduled Tribes and the Minorities Commission ;

(p) frame schemes for the consideration of the State Government or any other appropriate authority for more effective implementation of this Act and, in particular, frame schemes for more effective implementation of laws relating to payment of maintenance to deserted women, payment of minimum wages, ensuring equal pay for equal work, housing and shelter for women, prevention of domestic violence, prevention of sexual harassment at work, prevention of illegal traffic in women, improvement of the health and safety in women and legal aid for women ; and

(q) any other matter which may be referred to it by the State Government or by the National Commission for Women.

(2) The State Commission shall, while investigating any matter referred to in clause (a) or sub-clauses (i) and (ii) of clause (f) of sub-section (1), have all the powers of a civil court trying a suit, and in particular, in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person from any part in the State and examining him on oath ;

(b) requiring the discovery and production of any document ;

(c) receiving evidence on affidavits ;

(d) requisitioning any public record or copy thereof from any court or office ;

(e) issuing commissions for the examination of witnesses and documents ; and

(f) any other matter which may be prescribed.

(3)(a) On any investigation mentioned in clause (a) or sub-clauses (i) and (ii) of clause (f) of sub-section (1) being completed the Commission on taking up the matter with the State Government or the appropriate authority under clause (e) or (f) of sub-section (1) may, recommend to the State Government or the appropriate authority, as the case may be, to institute legal proceedings or prosecution in the matter and may also recommend to the State Government or the appropriate authority, to appoint a counsel or a special prosecutor for the conduct of any such legal proceedings or prosecution; and the State Government may, having regard to the nature of the case and on being satisfied that it is necessary, in its opinion, to appoint a counsel or special prosecutor, do so.

(b) The State Government or the appropriate authority, as the case may be, shall communicate in writing to the Commission, from time to time, the progress of any such legal proceeding or prosecution filed on the recommendation of the Commission.

(4) the State Government or the appropriate authority shall not apply for withdrawal of any such case or proceedings instituted under sub-section (3), without the prior consultation, in writing, with the Commission."

6. Now, therefore, the moot question is whether the orders in question have in fact been passed within the purview and ambit of Section 10 of the Act.

7. In the reply filed to the petition, respondent No.2 has categorically stated that the aforesaid orders (Annexures P-3 and P-6) are neither judicial nor quasi-judicial and are only in the form of request made to respondent No.4 i.e. the Chief Commissioner of Income Tax on the basis of the complaint and evidence submitted before the Commission. In addition to the aforesaid, it has been averred that the intention of the replying respondent (respondent No.2) was to get the the dispute amicably settled between the parties and it is in this background that a request was made to respondent No.4 vide Annexure P-3 to make it convenient to the parties to appear before the Commission for reaching at some amicable settlement.

8. In this background, the moot question is whether the impugned orders (Annexures P-3 and P-6) even if taken to be in the form of request could have been passed by the Commission.

9. As observed above, the functions of the Commission have been enumerated in Section 10 (supra) and the same nowhere authorizes the Commission to pass orders of the nature as have been passed in Annexures P-3 and P-6, respectively.

10. That apart, the Commission is a creation of the statute and, therefore, is bound to act within the fourcorners of the statute that created it.

11. Adverting to the letter dated 30.01.2018 (Annexure P-3), respondent No.2 had no jurisdiction or authority to even request respondent No.4 not to transfer the petitioner

from Shimla till the finalization of this case and asking respondent No.4 not to permit the petitioner to vacate the premises in question. This is clearly beyond the powers vested with respondent No.2 under the Act. The premises in question belongs to respondent No.4 over whom respondent No.2 had no jurisdiction or authority as it was for respondent No.4 to decide how and in what manner it wants to utilize its premises.

12. Now, adverting to the other letter dated 24.02.2018 (Annexure P-6), it would be noticed that respondent No.2 has specifically held it to be proved that respondent No.3 had solemnized marriage with the petitioner. To say the least, granting of such declaration is beyond the scope and ambit of Section 10 of the Act and, therefore, respondent No.2 had no such powers to have granted such declaration.

13. What would be the scope and ambit of Section 10 of the Act was a question that came up for consideration before the learned Division Bench of this Court in ***Munshi Ram*** *vs.* ***Dr.Y.S. Parmar University and others 2006 (3) Shim. LC 36*** wherein it was held that the functions of the Commission are social or charitable and there is no provision of the Act that confers jurisdiction or authority on the authority to pass orders of maintenance. It was further held that while doing so the Commission had patently transgressed its limits and committed a patent illegality and violated the provisions of the Act.

14. It shall be apposite to refer to the necessary observations as contained in para-6 which reads as under:

> *"6. For deciding the first issue we have to have a bare look at the provisions of The Himachal Pradesh State Commission for Women Act, 1996 (1996 Act, for short) under which respondent No.2 Commission has been constituted. Section 10 of 1996 Act deals with the functions of the Commission. Section 11 stipulates that the State Government shall consult the Commission on all major policy matters affecting women. Section 12 lays down, while vesting in the Commission certain powers, that for the purpose of conducting investigations under the 1996 Act it may utilize the services of any officer or investigation agency or any other person. Apart from these Sections, no other provision of 1996 Act deals with or relates to the exercise of any power or the performance of any function by the Commission. Actually Sections 11 and 12, even though have been noticed by us are not relevant for our purpose at all. As far as our purpose is concerned, we have only to examine Section 10 of 1996 Act, which specifically deals with the functions of the Commission. A very close look at Section 10 clearly informs us that most of the functions of the Commission are either social or charitable or at best advisory in nature. In addition to submitting reports to the State Government annually, other functions of the Commission include the tasks of undertaking promotional and educational research, render guidance and advice to needy women, monitor the progress of the development of women in the State, fund litigation, including police complaints, make periodical reports to the State Government and finance schemes for the consideration of the State Government for more effective implementation of the provisions of the 1996 Act etc. etc. This Section also lays down that the Commission may investigate and examine all matters relating to the safeguards respecting the women as provided under the Constitution of India and other laws, review from time to time the existing provisions of the Constitution and other laws affecting women and make recommendations to suggest remedial measures and take up the cases of violation of the provisions of the Constitution and other laws relating to women with the Government or appropriate authorities. Clause (f) of sub-section (1) of Section 10 specifically lays down that the Commission may entertain complaints and take suo moto notice of matters relating to the deprivation of women's rights, non-implementation of laws with respect to the protection of women, and non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships concerning the women etc. etc.*

Clause (f), therefore, merely empowers the Commission to entertain complaints and to take suo-moto notice with respect to the matters concerning the aforesaid subjects. Neither Clause (f) of sub-section (1) of Section 10 nor any other provision contained in Section 10 or elsewhere in 1996 Act suggests that apart from entertaining complaints and taking suo-moto notice of the aforesaid matters the Commission has any jurisdiction or power or authority to pass any order or to issue any direction, much less passing an order which would be in the nature of determining civil rights of the parties or visiting any party with any civil wrong. In other words it can safely be said that no provision of the aforesaid Act clothe the commission with any power nor does it vest in it any jurisdiction or authority to issue any direction to any one or to pass any order against any one which will have the effect of causing any prejudice to any such person or visiting him with any civil wrong. The legislature has rightly not clothed the Commission with any such power because passing of any such order is in the exclusive domain of the civil and criminal Courts constituted and created under the relevant laws of the land, to name a few, Code of Civil Procedure, Code of Criminal Procedure and laws relating to maintenance etc. etc. and is in the realm of judicial exercise of power as well as judicial adjudication of such disputes and conflicting claim as well as counter claims of parties. The respondent No.2 Commission therefore has no jurisdiction and did not have any jurisdiction or authority to pass any such order. In passing the order dated 17.11.2003 and in issuing a direction qua respondent No.1 through the demi official letter dated 27.1.2004 respondent No.2 Commission has patently transgressed the limits imposed upon it by the aforesaid 1996 Act and has committed a patent illegality in violating the very basic right vested in the petitioner. Similarly, it also violated the provisions of 1996 Act by issuing the aforesaid uncalled for direction qua respondent No.1."

15. At this stage, it needs to be noticed that while construing Section 10 of the Orissa State Commission for Women, 1993, which specifies the functions of the Commission, the Hon'ble Supreme Court in ***Bhabani Prasad Jena*** *vs.* ***Convenor Secretary, Orissa State Commission for Women and another (2010) 8 SCC 633*** held that there was no power or authority given to the State Commission to adjudicate or determine the rights of the parties. The Act in fact had not vested the Commission with the power to take up the role of the Court or an Adjudicatory Tribunal and determine the rights of the parties. It was further held that the State Commission is not a Tribunal discharging the functions of a judicial character or a Court. Here, it shall be apposite to reproduce the relevant observations as contained in paras 9 to 11 which read as under:

"9. It would be seen from Section 10 of the 1993 Act that the State Commission has been authorized to take up studies in respect of economic, educational and health situation of the women of the State and also the working conditions of women in the factories, establishments, construction sites and make its recommendations to the State Government. The State Commission is empowered to compile information in respect of the offences against women and to coordinate with the State Cell and District Cells for atrocities against women. Further, the State Commission is competent to receive complaints in respect of the matters specified in Section 10(1)(d) and take up the grievances raised in the complaint/s with the concerned authorities for appropriate remedial measures. The State Commission is also given role of assisting, training and orienting the non-Government organization in the State in legal counseling of poor women and enabling such women to get legal aid. Under clause (f) of Section 10(1), the State Commission is authorized to inspect or cause to be inspected, a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities these matters for remedial action.

10. In other words, the State Commission is broadly assigned to take up studies on issues of economic, educational and health care that may help in overall development of the women of the State; gather statistics concerning offences against women; probe into the complaints relating to atrocities on women, deprivation of women of their rights in respect of minimum wages, basic health, maternity rights, etc. and upon ascertainment of facts take up the matter with the concerned authorities for remedial measures; help women in distress as a friend, philosopher and guide in enforcement of their legal rights. However, no power or authority has been given to the State Commission to adjudicate or determine the rights of the parties.

11. Mr. Ranjan Mukherjee, learned counsel for respondent 2 submitted that once a power has been given to the State Commission to receive complaints including the matter concerning deprivation of women of their rights, it is implied that the State Commission is authorized to decide these complaints. We are afraid, no such implied power can be read into Section 10(1)(d) as suggested by the learned counsel. The provision contained in Section 10(1)(d) is expressly clear that the State Commission may receive complaints in relation to the matters specified therein and on receipt of such complaints take up the matter with the authorities concerned for appropriate remedial measures. The 1993 Act has not entrusted the State Commission with the power to take up the role of a court or an adjudicatory tribunal and determine the rights of the parties. The State Commission is not a tribunal discharging the functions of a judicial character or a court."

16. Therefore, what the Commission could not directly exercise under the powers vested with it under Section 10, cannot be permitted to be done under the garb of so-called "request" or else the same would defeat the very provisions of the Act.

17. Before parting, we may note that the provisions as contained in Section 10 (1) regarding functions of the State Commission of the Act are somewhat *pari materia* with the functions of the National Commission for Women Act, 1990 and while construing the same, the Delhi High Court in ***(i) U.S. Verma, Principal, DPS and another versus NCW 2009, 163 DLT 57, (ii) Vikram Singh and others vs. Union of India and others 2010, 171 DLT 671***, ***(iii)Bhupinder Singh vs. Delhi Commission for Women and others 2007, 94 DRJ 487, (iv) Dr. Anil Seth vs. Delhi Commission for Women and others (2010) 119 DRJ 87*** and the Bombay High Court in ***KPMG India Private Limited vs. NCW (2014) Labour Industrial Cases 4311***, have clearly held that the Commission has no powers whatsoever to adjudicate or determine the rights of the parties.

18. We may at the same time enter a caveat that no doubt the Commission is empowered to look into the complaints and take suo moto notice of the matters pertaining to deprivation of the rights of the women. However, the impugned orders (Annexures P-3 and P-6) are not in the form of advisories and, therefore, we have no hesitation to conclude that the procedure adopted by the State Commission i.e. respondent No.2 is without any authority as the Commission is not entitled to issue the impugned advisories to the employer of the writ petitioner that too without any information to him.

19. In the result, the writ petition is allowed and the impugned orders dated 30.01.2018 (Annexure P-3) and 24.02.2018(Annexure P-6) are quashed and set aside, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Himachal Pradesh Cricket Associate and Anr. ....Petitioners

Versus

State of Himachal Pradesh & Others ....Respondents

Cr.MMO No. 70 of 2015

Date of Decision: 19.12.2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of FIR – Scope of Court's interference – Held, High Court is empowered to quash a proceeding if it comes to conclusion that allowing proceeding to continue would be an abuse of process of Court or that ends of justice require that proceeding ought to be quashed – Where a criminal proceeding is manifestly attended with malafides and /or where proceeding is maliciously instituted with ulterior motive to wreak vengeance on accused and with a view to spite him due to private and personal grudge, High Court may quash it. (Para 10 & 11).

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers – Quashing of FIR – Scope of – Held, where discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on material which are wholly irrelevant or inadmissible and where complaint suffers from fundamental legal defects, High Court would be justified in exercise of power under Section 482 of Code. (Para 14).

Code of Criminal Procedure, 1973 - Section 482 – Inherent powers – Exercise of – Quashing of FIR – Held, different FIRs were registered against Himachal Pradesh Cricket Association and other public servants regarding construction of Cricket Stadium Club House etc. – Main FIR was quashed by the Hon'ble Apex Court – In FIR which is subject matter of petition, prosecution sanction was withdrawn by the State Cabinet – No prima facie evidence qua allegations of uprooting of trees by petitioners from land used for construction of Hotel Pavilion – Continuation of proceedings would be an abuse of process of Court – Petition allowed – FIR and consequential proceedings quashed. (Para 21 to 24.

Whether approved for reporting1? Yes.

For the Petitioners: Mr. P.S.Patwalia,Senior Advocate with Mr. Vikrant Thakur, Advocate.
For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Kunal Thakur, Deputy Advocate General.

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioners for quashing of FIR No.17/2013, dated 29.11.2013 under Sections 406, 447, 201 and 120B of IPC, registered by the Anti Corruption Unit at Dharamshala, District Kangra H.P., as well as consequent proceedings pending

1Whether reporters of the Local papers are allowed to see the judgment? 2
adjudication in the Court of learned Special Judge, Kangra, at Dharamshala.

2. For having bird's eye view, certain undisputed facts which may be relevant for adjudication of the case at hand are that on 15th September, 2001, petitioner No.1, which was originally registered as a Society under the Societies Registration Act, 1860 vide Registration Certificate dated 8th June, 1990, made an application for allotment of land to develop and construct the world class cricket stadium at Dharamshala, District Kangra, Himachal Pradesh. The commissionercumSecretary (Education) granted permission for transfer of land to the Himachal Pradesh Youth Services and Sports Department. A lease deed dated 29th July, 2002 was executed between petitioner No.1 and State of Himachal Pradesh through Director Himachal Pradesh Youth Services and Sports Department for the land situate at Village Mouja and Tehsil Dharamshala, District Kangra, H.P., whereafter an international cricket stadium came to be constructed on the aforesaid land. On 14th July, 2005, a not for profit 3 1956, however subsequently on 31.8.2005 name of aforesaid company was changed to Himachal Pradesh Cricket Association. Since observers appointed by International Cricket Council after having inspected the cricket stadium at Dharamshala stressed for more

facilities and hotel to construct a club house on the aforesaid leased land. Petitioner No.1 made a request to the Director, Youth Services and Sports for allotment of additional land adjacent July, 2008. Proposal of petitioner No.1 for allotment of additional land was duly processed with the authorities. Besides above, proposal also came to be placed before ACScumFC Revenue to the Government of Himachal Pradesh, for approval to lease out a Government land in Mohal Kand, Mauja Khanyara, Tehsil, favour of petitioner No.1 vide letter dated 16November, company in the name of Himachal Players Cricket Association was incorporated under Section 25 of the Companies Act, accommodation of desired quality, petitioner No.1 also decided to the stadium vide letter dated 3rd Dharamshala, District Kangra, measuring 32806 hectare in 4th

November, 2009, approval to lease out the aforesaid land in favour of petitioner No.1 was conveyed, whereafter lease deed was executed inter se parties for lease of the said land situated at Mohal Kand, Mauza Khanyara, Tehsil, Dharamshala, District Kangra, Himachal premises at Dharamshala under the name and style of "Aveda HPCA Club House".2009. Vide letter dated 18th Pradesh. The club house was constructed at the stadium

3.Apart from above, petitioner No.1 also constructed a hotel under the name and style of " The Pavilion" on the land allotted in its favour at Mohal Kand, Mauja Khanyara, Tehsil, Dharamshala, District Kangra, H.P. Aforesaid hotel also obtained registration with the Tourism Department of the State and Tariffs etc. were also fixed by the said department on 26th September, 2012. In the meantime, on 22nd September, 2012 a resolution was passed by petitioner No.1,company to take over the assets and liabilities of the society. Agreement dated 1st October, 2012 was also executed between the Himachal Pradesh Cricket Association(the 5 society) and Himachal Pradesh Cricket Association (the company) to enable the society to convert itself into a Company. Aforesaid society was converted into a company and the Himachal Pradesh Cricket Association stood converted from a society to a not for profit company registered under the Companies Act, 1956.

4.Averments contained in the petition further reveal that after aforesaid developments, as have been taken note in paras (supra), there was change of guard in the State of Himachal Pradesh on account of the elections of legislative assembly. Petitioners have alleged that with the change of political power, new Government immediately after taking charge, started tirade against them and lodged formal FIR No.12 of 2013, dated 1st August, 2013 against the petitioners and others. Apart from above, a complaint under Section 156(3) Cr.P.C was also instituted by one Sh. Vinay Sharma against petitioner No.1 and its office bearers, wherein Special Judge, Kangra vide order dated 2nd July, 2013 directed the police authorities to investigate the said case and submit the report to it. 6

5.Pursuant to aforesaid, FIR No.12 of 2013, dated 1st August, 2013, under Sections 406, 420, 120B of IPC and Section 13(2) of the Prevention of Corruption Act, 1988, FIR No.14 of 2013, dated 3rd October, 2013, under Section 447 read with Section 120B of IPC, Section 3 of the Prevention of Damage to Public Property Act, 1984 and Section 13(2) of the PC Act, came to be registered against the petitioners and others. FIR No.17 of 2013, dated 29.11.2013 sought to be quashed in the instant proceedings is also a offshoot of FIR No.12/2013, dated 1st August, 2013. In FIR No.17 of 2013, dated 29.11.2013, the precise allegation against the petitioners herein is with regard to felling of trees without having obtained necessary permission from the Forest Department for construction of hotel, "The Pavilion". As per the allegations contained in the FIR, sought to be quashed in the instant proceedings, the Revenue officials while preparing Tatima of the land allotted to petitioner No.1 for construction of hotel purposely and willfully not shown the trees standing on the land. As per the allegations contained in the FIR a "Van Mahotsav' was organized on the one part/parcel of the 7 land allotted for the purpose of hotel, "The Pavilion' in JulyAugust, 2009 under the chairmanship of the then Industrial were planted by spending sum of Rs.18100/. After completion of the investigation in the aforesaid FIR, challan stands filed in the Court of learned Special Judge, Kangra at Dharamshala, H.P., and same is still pending adjudication.Minister, wherein allegedly 1500 plants of different varieties

6.Petitioners herein by way of two separate petitions (Cr.MMO No.6 of 2014 and Cr.MMO No. 285 of 2015) filed under Section 482 Cr.P.C, approached this Court, praying therein to quash the FIR No.12 of 2013, dated 1.8.2013 and FIR No.14 of 2013 dated 3.10.2013. However, fact remains that aforesaid petitions, having been filed by the petitioners herein were dismissed by this Court vide judgments dated 25.4.2014 and 6.4.2017, respectively.

7.Being aggrieved and dissatisfied with the aforesaid judgments passed by this Court, petitioners approached the Hon'ble Apex Court by way of Special Leave Petitions, which ultimately came to be registered as Criminal Appeal Nos. 12581259 of 2018 and Criminal Appeal Nos. 15701572 of 8 2018, titled as ***Himachal Pradesh Cricket Association and another versus State of Himachal Pradesh and others.*** Hon'ble Apex Court vide judgments dated 2.11.2018 and 6.12.2018 allowed the aforesaid appeals having been filed by the petitioners herein and quashed the FIR No.12 of 2013, dated 1.8.2013 under Sections 406, 420, 120B of the IPC, Section 13(2) of the PC Act and FIR No.14 of 2013 dated 3.10.2013, under Section 447 read with Section 120B of the IPC, Section 3 of the Prevention of Damage to Public Property Act, 1984 and Section 13(2) of the PC Act as well as consequent proceedings pending in the competent courts of law.

8.In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein to quash the FIR No.17 of 2013, dated 29.11.2013 registered against them under Sections 406, 447, 201, 120B of IPC and Section 13(2) of the Prevention of Corruption Act, 1998.

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

10.Before ascertaining the correctness of the submissions/ grounds having been made/raised by learned counsel representing the parties visavis prayer made in the instant petition for quashment of FIR, this Court at the first instance deems it necessary to elaborate upon the scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC. Hon'ble Apex Court in judgment titled **State of Haryana and others vs. Bhajan Lal and others,** 1992 Supp (1) SCC 335 has laid down several principles, which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. Before pronouncement of aforesaid judgment rendered by the Hon'ble Apex Court, a threeJudge Bench of Hon'ble Court in **State of Karnataka** vs. **L. Muniswamy and others**, 1977 (2) SCC 699, held that the High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. Relevant para is being reproduced herein below:10

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

11.Subsequently, Hon'ble Apex Court in **Bhajan Lal** (supra), has elaborately considered the scope and ambit of Section 482 Cr.P.C. Subsequently, Hon'ble Apex Court in **Vineet Kumar and Ors.** v. **State of U.P. and Anr**., while considering the scope of interference under Sections 397 11 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 Cr.PC, as enumerated in **Bhajan Lal** (supra), i.e. where a criminal proceeding is manifestly attended with malafides and/or where the proceeding is maliciously instituted with an ulterior motive

for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings 12

12.Hon'ble Apex Court in **Prashant Bharti** v. **State (NCT of Delhi)**, (2013) 9 SCC 293, while drawing strength from its earlier judgment titled as **Rajiv Thapar and Ors** v. **Madan Lal Kapoor**, (2013) 3 SCC 330, reiterated that High Court has inherent power under Section 482 Cr.PC., to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. While invoking its inherent jurisdiction under Section 482 of the Cr.P.C., the High Court has to be fully satisfied that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrules the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would 13 persuade it to exercise its power under Section 482 Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled **Prashant Bharti** v. **State (NCT of Delhi)**, (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:

> "22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 2930)
> 29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the 14 accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording

any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

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

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

30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice? 15

30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

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

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

then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

13. The law has been crystallized more than half a century ago in the case of R.P. Kapur v. State of Punjab AIR 1960 SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:
(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;
(ii) where the allegations in the first information report or complaint taken at their face value and
16 accepted in their entirety do not constitute the offence alleged;
(iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."
14.In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :
"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".

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

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

15. Mr. P.S. Patwalia, learned Senior Counsel representing the petitioners before making his submissions on merits invited attention of this Court to the decision taken by the Cabinet on 10.1.2018, whereby it decided to withdraw all the cases initiated against the petitioners by the previous Government. Aforesaid decision taken by the Cabinet is taken on record, perusal whereof reveals that State of Himachal Pradesh after having received representation dated 3.1.2018 made by Sh. Prem Kumar Dhumal, former Chief Minister of Himachal Pradesh, for withdrawal of prosecution sanction 18 granted in FIR No.12/13, dated 1.8.2013 registered in police Station, SV&ACB, Dharamshala, decided to withdraw all politically motivated cases instituted by the previous government.

16.It would be apt to take note of letter dated 21st March, 2018, issued from the Office of the Chief Secretary to the Government of Himachal Pradesh and addressed to the Advocate General, Himachal Pradesh herein:

"From Chief Secretary to the
Government of Himachal Pradesh

To

The Ld. Advocate General,
Himachal Pradesh, Shimla1

Dated, Shimla171002, the 21st March, 2018

Subject: Regarding withdrawal of prosecution sanction in respect of Sh. Prem Kumar Dhumal, Ex. Chief Minister in case FIR No.12/13 dated 01.08.2013, Police Station SV& ACB, Dharamshala.

Sir,

I am directed to refer to the subject cited above and to say that Sh. Prem Kumar Dhumal, former Chief Minister has represented on 03.01.2018 in General Administration Department for withdrawal of his prosecution sanction granted in FIR No.12/13 dated 01.08.2013 registered in PS, SV & ACB, Dharamshala against him & others., the brief/present status of the said FIR is as under:19

- After conducting an enquiry on complaint in pursuance to the directions of Court of Ld. Special Judge, Kangra at Dharamshala, u/s 202 of Cr.P.C, FIR No.12/13 dated 01.08.2013 was registered in PS, SV &ACB, Dharamshala against Sh. P.K.Dhumal, former Chief Minister & Ors.

- After completion of investigation, it was found that Sh.Prem Kumar Dhumal, former Chief Minister had misused his official authority and transferred the land of Education Department to Y.S.S. Department & later to HPCA and being patroninchief of HPCA & father of the main accused, Sh. Anurag Thakur, chaired the State Cabinet meeting & decided that he land so allotted to HPCA on lease of token amount

of Rs.1/only, whereas the market value of the said land was approximately Rs.5,24,00,000/.

●Accordingly, final report(Challan) u/s 173 Cr.P.C was prepared and was presented in the Court of learned Special Judge, Dharamshala after obtaining the Prosecution sanction u/s 197 Cr.P.C from the competent authority.

●In the meantime, the HPCA had approached the Hon'ble High Court of H.P. for quashing the FIR, which was dismissed by the Hon'ble High Court and has further been challenged by the HPCA in the Hon'ble Apex Court by filing SLP(Cr.) No.128129 of 2015 which is still pending. In this SLP, the State Government has been arrayed as respondent through Secretary (Cooperation). ADG, SV&ACB and others were also made respondents in said SLP.

●An application/representation was made by Sh. Prem Kumar Dhumal, Former Chief Minister, H.P., to the Secretary (GAD) on 03012018 for withdrawal of his Prosecution Sanction in said FIR.

The above representation of the applicant was examined in General Administration Department of their departmental file No.GADC(D)73/2014 and it has been 20 decided to bring the following facts/developments to the notice of Hon'ble Apex Court through your office:

1.State Government has decided to withdraw all politically motivated cases. (copy of Letter No. HomeE(B)162/2017 dated 24.01.2018 is enclosed at AnnexureA).
2.The Lease deeds with HPCA were restored by the State Government on 18.11.2013 (Copy of letter No.Rev. D(G)636/2009loose dated 19.11.2013 issued by revenue Department consequent upon CMM decision dated 18.11.2013 is enclosed at AnnexureB)
3.The Sate Government has accepted the lease amount due from 2013 to 2018(copy of letter NO.302/ Hkw0lq0"kkk0yht536 Mha. ,p dated 23.02.2018 alongwith its enclosures from the Deputy Commissioner Kangra is enclosed at Annexure AC).

Your are, therefore, requested to take appropriate action in the matter accordingly.
Yours faithfully,
s/d
(R.D.Dhiman)
Principal Secretary(Cooperation) to the
Government of Himachal Pradesh."

17.During the hearing of the case, Mr. Ashok Sharma, learned Advocate General, fairly acknowledged the factum with regard to aforesaid decision taken by the cabinet. It is also not in dispute that aforesaid decision of the Government has been taken note of by the Hon'ble Apex Court in its judgment dated 2.11.2018 , passed in Criminal Appeal Nos.12581259 of 2018, wherein FIR No.12 of 2013, dated 1.8.2013 and FIR No.14 of 21 2013, dated 3.10.2013 lodged against the petitioners herein and others came to be quashed.

18.Since there is no dispute inter se parties that FIR sought to be quashed in the instant proceedings arises out of the investigation conducted in FIR No.12 of 2013, which otherwise

stands quashed by the Hon'ble Apex Court, there appears to be no necessity for this Court to state the facts as well as contentions in detail.

19.Issue with regard to construction of hotel, "The Pavilion", which was otherwise subject matter of FIR No.12 of 2013 stands elaborately dealt in judgment dated 2.11.2018 passed by the Hon'ble Apex Court in Criminal Appeal Nos.12581259 of 2018. Careful perusal of aforesaid judgment rendered by Hon'ble Apex Court, clearly reveals that it after having scanned the entire material placed before it arrived at a definite conclusion that the elements of criminal intent or criminal acts are lacking. Hon'ble Apex Court has categorically held in the aforesaid judgment that assets which are subject matter of the FIR bearing No. 12 of 2013, dated 1.8.2013 and FIR No.14 of 22 available to it has observed in its judgment that State Government intend to grab the control of the Cricket Association and such tendency on the part of the State authorities is condemned by a Committee headed by former Chief Justice R.M.Lodha and approved by this Court. Hon'ble Apex Court has further held that when State Government failed to achieve the aforesaid purpose, it went after the petitioners and otherwise also, subject matter is/was a civil dispute between the petitioners and the respondents.2013, dated 3.10.2013**,** are for the use of public of the State and are being used. In the aforesaid background, Hon'ble Apex Court has further held that State Government continues to remain owner of the land which is on lease and on which the petitioners have constructed assets worth crores. Most importantly, Hon'ble Apex Court having taken note of the material made
20.At this stage, it would be profitable to reproduce para Nos.24, 33 to 43 of the aforesaid judgment hereinbelow:

> "24. Insofar as respondent No. 1 i.e. State of Himachal Pradesh is concerned, learned Advocate General submitted that State has already taken a decision not to continue with these criminal proceedings. He, in fact, supported the case of the appellants and submitted that State has no 23 objection if these proceedings are quashed. However, there was a strong opposition on behalf of respondent No. 2 to the relief sought by the appellants and refutation of the arguments advanced by the appellants.
> 33) After the allotment of the land to appellant No. 1, it constructed cricket stadium thereupon. Appellant was desirous of making a worldclass cricket stadium which could host international cricket matches as well. For this purpose, it submitted proposal to the ICC. The ICC got the stadium and playground inspected through Mr. Alan Hurst, it's match referee. He inspected the stadium and submitted his report dated September 20, 2007. The venue was not approved, at that stage, for hosting international matches. A perusal of the report submitted by the said referee would disclose that there were no adequate hotel facilities in the area and, therefore, 'tour support was lacking'. Two hotels were shown to Mr. Hurst and it was found by him that each of them were at substantial distance from the ground. Moreover, the facilities in the said hotels were also not adequate. Notwithstanding the same, insofar as the cricket ground is concerned, the match referee had lauded it for its quality and settings. It can be seen from the general comments/ recommendations/ conclusions in his report and the relevant portion whereof reads as under:
>
> > "This ground has one of the best settings imaginable. The people involved in its

> development have been innovative and are passionate and visionary. They have done a great job so far in getting this ground to where it is and should be congratulated and encouraged. I have no doubt that with adequate finances, in the near future, this ground can become one of the best in the country. The idea of having a 'hotel' as an integral part of the ground with dual use as corporate boxes during games is not new, however, the circular restaurant planned for the top, with 360 deg views of the Himalayas and surrounding area will make it unique.
> Having said this, I believe that at this stage there is still a lot of work to be done that relates to its suitability for staging International cricket. I am informed that sufficient finance has recently been 24 obtained to complete everything, and further work is now underway. I have listed below the issues I still have concerns with and things that need to be changed. If all of these things are addressed, I would have no hesitation in recommending this ground as suitable as an International ODI venue. The administrators have ensured me that all of these things will be addressed with urgency. They are extremely keen to get into the BCCI ground rotation system as soon as possible.

34) It is clear from the above that Mr. Hurst was of the view that the cricket ground at this picturesque place with scenic beauty can be transformed into one of the best cricket grounds in the country, which would be suitable for international events if the deficiencies pointed out therein are taken care of. Apart from providing other facilities to improve the infrastructure (which could be easily taken care of), main concern was to have a hotel as an integral part of the ground with the dual use as corporate boxes during the game. Because of the above, appellant No.1 felt need to construct a club house on the lease land and also seek allotment of some other land for the purpose of construction of a hotel, keeping in view the observations contained in the aforesaid inspection report. Accordingly, it sent request for promotion to construct a club house on the lease land which was accorded by respondent No.1 through Directorate of Youth Services and Sports on June 23, 2008 subject to completing all the formalities.

35) As far as construction of hotel is concerned, the case of the appellants is that there was a parcel of idle land in the middle of the land alloted for the stadium and for allotment of this land, request was made to the

25 Director, Youth Services and Sports. This land belongs to Gram Panchayat. Gram Panchayat issued no objection for the allotment of land on September 14, 2009 pursuant to which respondent No.1 granted approval to lease out this land in favour of appellant No.1 on November 16, 2009 and the lease deed was also executed on December 14, 2009. Thereafter, for the purpose of hotel, additional land was given.

36) Pertinently, insofar as this lease deed is concerned, since the land was to be used for commercial purpose, namely, the club house, it provided rental at commercial rate i.e. the market rate which the appellant No.1 was supposed to pay. After the execution of the lease, club house was constructed and the Town and Country Planning Department, Dharamshala also issued No Objection Certificate for the use of part of infrastructure of cricket stadium as club house for cricket activities. It is also pertinent to mention that Principal Secretary (Revenue), Government of Himachal Pradesh issued no objection for execution of supplementary lease enabling commercial activities on additional land provided that lease money was charged in accordance with the Lease Rules, 2011. This led to execution of supplementary lease deed dated June 23, 2012 on which commercial hotel was constructed after obtaining requisite permissions.

37) From the aforesaid events, following aspects can be culled out:

Appellant No.1 has been given lease of land on which cricket stadium was constructed and thereafter lease

26 for additional land meant for club house and also supplementary lease for commercial activity i.e. the hotel. It is only in respect of the land which is meant for cricket stadium that rental of Re.1/per month was agreed to be charged by invoking proviso to Rule 8. Thus, it is not contrary to law. State of Himachal did not have any cricket ground, much less State of art cricket ground. It is, for this reason, that the land was given on lease for the purpose of constructing the cricket ground, which may become pride of Himachal Pradesh, at nominal rental. Insofar as lease in respect of club house and supplementary lease for commercial activity (i.e. hotel) is concerned, the lease money has been fixed in accordance with Lease Rules, 2011, namely, at commercial rates. There can hardly be any element of criminality in the afofresaid allotments inasmuch as six very senior officers in the State Government (four of them of IAS Cadre and one belongs to Himachal Pradesh Administrative Service) who had examined the matter and only after their approval, the allotments were made. There is no culpability attributed to them, which is a very crucial factor.

38) What is more important is that the matter was looked into by DirectorcumSpecial Secretary, Youth Services and Sports Department as well as Secretary, Youth Services and Sports Department and it is only after the examination of the proposal by them and their final approval, lands in question were allotted.

39) The respondents have submitted status report before the High Court, pursuant to the directions issued by

27 it. As per the said status report as well as the FIRs, allegations against the appellants and others who are arrayed as accused persons are that appellant No.2 along with other accused indulged in illegal activities. It is alleged that Shri R.S. Gupta, the then Deputy Commissioner, had prepared report ignoring the report of Divisional Forest Officer who had assessed the value of trees at Rs.50 lakhs at that time, thereby causing wrongful loss to the Government. Further, one Shri Deepak Sanan, the then Revenue Secretary, provided a helping hand to the accused persons for granting permission to set up and run a commercial hotel and the matter was not taken to the Cabinet which was in violation of Schedule 20 of H.P. Rules of Business. It is also alleged that Himachal Pradesh Cricket Association Society was merged into a company just to prevent the State Government from controlling it. These are the main allegations.

40) Insofar as other allegations are concerned, two Officers, namely, Shri R.S. Gupta and Shri Deepak Sanan are implicated. While doing so, other senior Officers who took active part in decision making have not been touched.

41) In the two FIRs, seven IAS Officers, one Officer belonging to Himachal Pradesh Administrative Service and one Executive Engineer, Dharamshala Division in Himachal Pradesh PWD Department played their significant role at one stage or the other. Interstingly, in the FIRs, these nine Officers were also implicated and specific role attributed to them which has been already mentioned in the tabulated format while recording the

28 Sanan. Mr. Gopi Chand, who belongs to HPAS, though the prosecution sanction was granted earlier, in his case also, not only prosecution sanction was withdrawn by the State Government, he has even been promoted to IAS Cadre. In case of Mr. K.K. Pant and Mr. P.C. Dhiman, other IAS Officers, prosecution sanction is declined. This leaves us only Mr. Devi Chand Chauhan, Executive Engineer, arguments of Mr. Patwalia. This would demonstrate that insofar as Mr. Subhash Ahluwalia (IAS), DirectorcumSpecial Secretary, Youth Services and Sports Department is concerned, allegation against him was that he ignored the rules and did not mention the provisions of Lease Rules, 1993. He was also signatory to lease deed dated July 29, 2002. It is important to mention that entire FIRs proceed on

the basis that appellants conspired with these Officers, among others. The imputation against Mr. Subhash Ahluwalia is that in fixing the rent at Re.1/per month, he not only ignored the rules and did not even mention in his noting thereby implying that he was party to the alleged conspiracy. Similar allegations are against other eight persons as well alleging their role at different stages. Notwithstanding the same, three Officers, namely, Subhash Ahluwalia, Subhash Negi and T.G. Negi were not even charged on the purported ground that there were not enough evidence and mala fide intention. In respect of Mr. Ajay Sharma, Central Government had declined the sanction. Though, State Government had accorded the sanction for prosecution earlier but it has also later withdrawn. Same is the position in respect of Deepak

29 Dharamshala Division in PWD, though in his case also, prosecution sanction was earlier rejected but subsequently granted on the recommendation of the then Chief Minister. There are two Gram Panchayat members, who had issued no objection for allotment of land for club house, who have been prosecuted. These three Officers are public servants who remain as accused persons. This Court gets an impression that in the entire conspiracy story put up by the prosecution, high Government officials are deliberately let off and very junior Officers were become scapegoat in order to ensure that a case under PC Act survives in respect of appellants as well who are not public servants. Even otherwise, when the aforesaid eight persons are not charged or proceeded against for want of prosecution, this lends support to the allegations of the appellants in imputing motives for their prosecution.

42) This Court, on a 360° scanning of the matter, arrives at the conclusion that the elements of criminal intent or criminal acts are lacking. Following factors do stand established from record:

(i) there is no criminal act on their part and the facts do not disclose any offence;
(ii) none of the officers who processed the case of the appellants are not prosecuted;
(iii) two Officers Subhash Ahluwalia and T.G. Negi who took active part in the decision making were made Principal Secretary to CM and Advisor to CM, respectively, by respondent No. 2 and were not prosecuted;

(iv) As per the prosecution, there is no criminal act on the part of the officers and they performed their appropriate administrative duties due to which sanction stands declined by the Central

(v) 30Government and the CVC. That itself is sufficient to absolve others from any criminal prosecution; (x) even otherwise the State Government continues to remain owner of the land which is on lease and on which the appellants have constructed assets worth above 150 crores;

(xi) these assets are for use of the public of the State and are being used as such. Further, filing of chargesheet and an order taking cognizance is not a final judicial order. It is a preliminary process in criminal law and is open to challenge in higher judicial fora such as this Court.

43) Insofar as conversion of Society into not for profit company under Section 25 of the Companies Act, 1956 is concerned, it was obviously done as per the mandate of BCCI. There can hardly be an element of criminality therein. This Court fails to understand as to how any criminal intent can be attributed in merging the said society into a company, that too, to prevent the State Government from controlling it, which is the motive attributed by the respondents themselves. It rather shows the intent of the State Government which wanted to grab the control of the Cricket Association. Such a tendency on the part of the State authorities is condemned by a Committee headed by former Chief Justice R.M. Lodha and approved by this Court. If at all, this is a reflection upon the State Government. It also lends credence to the submission of the appellants that when the State Government fail to achieve the aforesaid purpose, it went after the appellants. If at all, the subject matter was a civil dispute between the appellants and the respondents.”31

21.Leaving everything aside, careful perusal of FIR No.17 of 2013, which is sought to be quashed in the instant proceedings, nowhere reveals primafacie case, if any, against the petitioners and other persons named in the FIR. There is no specific allegations, if any, with regard to uprooting/felling of tress, if any, standing on the land used by the petitioner for construction of the hotel, The Pavilion, rather allegations contained in the FIR is that in JulyAugust, 2009, Van Mahotsav was organized under the chairmanship of Industry Minister, wherein 1500 trees were planted by spending sum of Rs.18100/. Interestingly, it stands mentioned in the FIR that during investigation, DFO Dharamshala got the trees standing on the land in question counted and found that there are 2023 trees standing on the land leased out in favour of the Himachal Pradesh Cricket Association. Though, as per Investigating Agency, the age of the trees standing in and around the building constructed by petitioner No.1 on the land alloted in its favour has been found between 48 to 50 years,but definitely there appears to be no evidence, if any, with regard to

32 illegal felling of tress on the land by the petitioners where hotel “The Pavilion”, came to be constructed.

22.The judgment dated 2.11.2018 passed by the Hon’ble Apex Court, which has been otherwise taken note hereinabove, reveals that respondents had filed status report before the High Court , wherein it was alleged that Shri. R.S.Gupta, the then Deputy Commissioner, had prepared report ignoring the report of Divisional Forest Officer, who had assessed the value of trees at Rs.50 lakh at that time, but interestingly, such allegation is totally missing in the FIR No.17 of 2013, wherein precise allegation is with regard to illegal felling of trees for the construction of the hotel “The Pavilion”. Moreover, aforesaid assertion contained in the status

report is nowhere recorded in the FIR, wherein specific allegation is that number of pine trees were standing on the land allotted to petitioner No.1 for construction of hotel, 'The Pavilion". Neither there is definite evidence with regard to existence, if any, of pine trees on the land allotted to petitioner No.1 for construction of hotel "The Pavilion" nor there is material available on record suggestive of the fact that trees, if any, standing on the land leased out for 33 construction of hotel "The Pavilion" were illegally felled, rather allegations contained in the FIR, sought to be quashed in the instant proceedings, are based upon mere presumption that since many trees have been found standing in and around the building/ infrastructure developed on the land leased out in favour of petitioner No.1 at Khanyara, there is possibility of forging of record by the revenue officials, enabling petitioner No.1 to raise construction of hotel on the land in question.

23.Leaving everything aside, since main FIR No.12 of 2013, dated 1.8.2013 stands quashed, no fruitful purpose would be served by keeping the present FIR alive, especially when State Government itself has decided to withdraw prosecution sanction in respect of FIR No.12 of 2013, dated 1.8.2013 registered with police Station, SV & ACV, Dharamshala, District Kangra, Himachal Pradesh. Though, nothing remains to be adjudicated in the instant case by this Court in view of the judgment passed by the Hon'ble Apex Court, but otherwise also, in totality of facts and circumstances of the case, this Court finds it to be a fit case to exercise power under Section 482 Cr.P.C., for quashment of FIR as well as consequent proceedings pending in

34 inherent jurisdiction under Section 482 Cr.P.C, the High Court has to be fully satisfied that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material produced is such, as would clearly reject and overrule the veracity of the allegations levelled by the prosecution/complainant.the competent court of law. It is now well settled that High Court while exercising power under Section 482 Cr.P.C, is well within its jurisdiction to quash the FIR or pending proceedings, which if allowed to continue would amount to sheer abuse of process of law. Case arisen out of FIR No.12 of 2013, if permitted to continue would not only result in the abuse of the process of law, but would also not serve the ends of justice. To invoke

24. Consequently, in view of the aforesaid discussion made hereinabove as well as judgment rendered by the Hon'ble Apex Court coupled with the decision taken by the Cabinet, FIR No.17/2013,dated 29.11.2013, under Sections 447, 406 201 and 120B of IPC and Section 13(2) of the Prevention 35 of Corruption Act, 1998, registered by Anti Corruption Unit at Dharamshala as well as consequent proceedings pending adjudication in the Court of learned Special Judge, Kangra at Dharamshala, are quashed and setaside and the petitionersaccused are acquitted of the charges framed against them.

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

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, JUDGE AND HON'BLE MR. JUSTICE ANOOP CHITKARA, JUDGE.

Kartar Singh alias Ajeet ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 405 of 2018
Judgment reserved on : January 01, 2020
Date of Decision : March 11, 2020

Indian Penal Code, 1860- Section 376 (2)(j)- Rape on woman incapable of giving consent- Appeal against conviction of Trial Court- Proof of- Held, victim was suffering from severe mental retardness- Her parents had to go to attend a marriage and thus had called their elder daughter 'ND' to their house to take care of victim and cattle- On reaching house, 'ND' did not find victim and went in search for her- She saw accused without pant and her sister not wearing salwar and

accused laying over victim and on her questioning, accused fled away- No enmity of complainant with accused- Absence of injuries on private parts of victim, in view of her mental retardness, meaningless as résistance would not occur to her which otherwise would happen on reflex action when force is applied- However hymen was in fact and swabs collected from victim's private parts did not find traces of semen- Possibility of slightest penetration having not taken place cannot be ruled out- It was an attempt to commit offence- Conviction altered to one under Section 376 (2)(j) read with Section 511 of Code- Appeal party allowed and sentence modified. (Para 16 to 20) Title: Kartar Singh alias Ajeet vs. State of Himachal Pradesh **D.B.** Page - 298

Whether approved for reporting?[37]*Yes.*

For the appellant : Mr. Vinay Thakur, Advocate, for the appellant.

For the respondent : Mr. R.R. Rahi, Deputy Advocate General for the respondent/State.

***Per:* Anoop Chitkara, Judge.**

The present appeal has been filed by convict Kartar Singh @ Ajeet, under Section 374(2) of the Code of Criminal Procedure, assailing the judgment dated Aug 18, 2018/Aug 20, 2018, passed by the Additional Sessions Judge (III), Kangra at Dharamshala, Camp at Baijnath, HP, in Sessions Case No. 02-D/VII/2014, whereby he has been convicted for having committed an offence punishable under Section 376(2)(j) of the Indian Penal Code, and sentenced to undergo rigorous imprisonment for a period of ten years years and pay a fine of INR 20,000/-, and in case of default of payment to fine to further undergo rigorous imprisonment for two months. The period for which, the convict already remained in custody, was also set off by giving him the benefit of Section 428 CrPC.

2. The gist of the facts apposite to arrive at a just conclusion, are as follows:

(a) On Aug 1, 2013, the mother of the victim, Nimmo Devi (PW-1) visited Police Station Mcleodgang, District Kangra, HP and informed them that she alongwith her husband and two daughters stay at Deepdhaar and teather cattle. On Jul 27, 2013, she had gone to another village along with her husband to attend the wedding of her niece and had deputed her elder daughter Naino Devi (PW-2) to come to Deepdhaar to stay with the prosecutrix and also graze the cattle. She and her husband returned from the wedding on Jul 29, 2013. On the next day i.e. Jul 30, 2013 when her husband had gone to cut the grass then in his absence her elder daughter Naino Devi (PW-2) told her that on Jul 27, 2013, Ajeet Kumar (appellant herein) had committed bad act with her younger daughter (sister of Naino Devi, PW-2). Naino Devi (PW-2) further explained to her mother that on Jul 27, 2013 at around 10.30 a.m., when she had reached near her hutment at Deepdhaar then she did not find the victim present there. On this, she started searching for the victim and called her but she did not reply. After that she went to search her towards the "goath" (where the animals are kept) and on the way towards the "Goath" when she had walked around 300 to 400 meters, she noticed that Ajeet Kumar had laid down the victim on earth and was committing bad act with her. She further noticed that the accused was committing bad act with the victim after removing her salwaar and his trousers. The moment he reached closure, he immediately ran away. After this complainant Nimmo Devi (PW-1) who is the mother of the victim, informed her husband about the occurrence. Consequently they contacted the Pradhan of the area namely Soma Devi (PW-15) on which the Pradhan told them to report the

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[37] **Whether reporters of Local Papers may be allowed to see the judgment?**

matter to the police. Thereafter, on Aug 1, 2013, the matter was reported to the police. The complainant further told the police that the victim had also suffered abrasions and injuries on her face. She further clarified that at the time of the incident the clothes which the victim was wearing had been kept by her at home. She cautioned that although the age of the victim was 23 years but she is a person of low intelligence, illiterate and of shy nature and that she hardly speaks.

(b) On this information, the Investigating Officer found a *prima facie* case under Section 376 and 323 IPC to have been made out and, hence, he registered FIR No. 66 of 2013, dated Aug 01, 2013 (Ext. PW-1/A), at Police Station, Mcleodgang, Distt. Kangra, HP.

(c) After that, the police took the victim for her medical examination on that day itself at 3.25 p.m., where Dr. Anupama Kapoor (PW-7) examined the victim vide MLC (Ext. PW-7/B). The Doctor opined that she did not notice any external injury on the victim and there was one injury on the nose which according to the mother of the victim was self inflictory. On examining the privates of the victim the Doctor specifically mentions "hymen not torn". Pregnancy test also resulted into negative. The Doctor collected the pubic hair, vaginal swab and vaginal slides of the victim and handed over the same to the police for chemical examination through Forensic Science Laboratory. Vide report (Ext. PW-18/C) the Regional Forensic Science Laboratory did not find any evidence of blood or semen on any of these articles.

(c) The police also took the victim to Psychiatric Department, Zonal Hospital, Dharamshala on Aug 2, 2013, from where she was referred to RPGMC Tanda for I.Q. Assessment vide report (Ext. PW-8/A). As pert report (Ext. PW-9/A) issued by Dr. Sukhjeet Singh (PW-9) the victim had a very low I.Q. of 33 and suffered from Mental Retardation (severe).

(d) The police arrested the accused on Aug 4, 2013 and also got his medical examination conducted through Dr. Anuradha Chaudhary (PW-6) according to whom the accused was capable of performing sexual intercourse, vide MLC (Ext. PW-6/A).

(e) On Nov 1, 2013 the police produced the victim before the Judicial Magistrate, 2nd Class, Dharamshala for recording her statement under Section 164 CrPC. As per the said statement (Ext. PW-17/B), the Magistrate did not find the victim to be capable of understanding the meaning of Oath, as such, she proceeded to ask questions without Oath. In response to her questions, the victim stated like a child that wrong thing had been done to her by Jeet and he caught hold of her from arm and unstring her salwar.

3. The Investigating Officer also procured the birth certificate (Ext. PW-5/A) of the victim according to which she was born on Nov 30, 1988. Therefore, the fact of the victim, above 18 years of age is undisputed.

4. On this evidence, the SHO filed a report under Section 173 CrPC, in the Court of Judicial Magistrate who committed the same to the Sessions Court, Kangra at Dharamshala. In compliance with the provisions of Section 207 CrPC., the Trial Court provided the complete copies of challan (Police report) to the accused/convict. Vide order dated Sep 3, 2014, the trial Court, as per the mandate of Sections 211 and 214 CrPC, framed charges against the accused for the commission of offence under Section 376 IPC. However, vide subsequent order dated Jul 22, 2017, the Trial Court reframed the charges against the accused and charged him for the commission of offence punishable under Section 376(2)(j) IPC which reads in the following terms:-

> "That on 27-07-2013 at about 10.30 AM, at place Deepdhar, P.S. Mcleodgang, you committed rape on the proxecutrix, who was incapable of giving consent due to mental retardation and thereby you committed an offence punishable u/s 376(2)(J) IPC and within the cognizance of this Court."

The accused, who at the time of the commission of the offence was 24 years of age,, did not plead guilt and claimed trial.

5. After the examination of the prosecution witnesses, in compliance with Section 313 CrPC, the trial Court put the incriminating evidence to the accused, to which he denied.

6. The Court offered the accused to bring any evidence in support of his defence. However, he did not avail of his legal rights. Consequently, the trial Court closed the evidence. The accused also did not file any written submissions as contemplated under Section 314 CrPC.

7. After hearing the arguments, the learned Addl. Sessions Judge (III), Kangra at Dharamshala, HP, accepted the prosecution evidence and convicted the accused for the charged offence and sentenced as aforesaid. Hence the present appeal.

8. We have heard Mr. Vinay Thakur, Advocate, for the appellant/accused and Mr. R.R. Rahi, learned Deputy Advocate General, for the respondent/State. We have also waded through the entire record.

9. After careful reading of the entire evidence, application of law and judicial precedents, our reasoning is as follows:-

10. Smt. Nimmo Devi, mother of the prosecutrix, testified in Court as PW-1 and stated that her elder daughter Naino Devi (PW-2) had told her what she had noticed and after that she informed the Pradhan, whereafter, she went to the police station and registered FIR (Ext. PW-1/A) against the accused.

11. The only eye witness Naino Devi, sister of the prosecutrix, appeared in Court as PW-2. She stated on oath that on Jul 27, 2013, her parents had gone from Deepdhaar to Dhanoli to attend a marriage and deputed her to come to Deepdhaar to stay with the prosecutrix and also to graze the cattle. She stated that she reached Deepdhaar at about 10.30 a.m. and when she had reached near her hutment at Deepdhaar then she did not find the victim present there. On this, she started searching for the victim and called her but she did not reply. After that, she went in search of her towards the "goath" (where the animals are kept) and on the way towards the "goath" when she had walked for around 10 minutes, she noticed that Ajeet Kumar had laid down the victim on earth and was committing bad act with her. She further noticed that the accused was committing bad act with the victim after removing her salwaar and his trousers. She further stated that on her asking the accused as to what he was doing with her sister, who was mentally retarded and could not understand the act and consequence, the accused put his clothes and ran away towards his hutment. She further stated that her parents returned home from the wedding after two days of the occurrence but she could not tell about the occurrence on that day as she was ashamed of telling the same in front of her father. She further told that next day when her father had gone to cut the grass then, in his absence, she narrated the incidence to her mother, who in turn told him about the incident.

12. The only difference in the statement of Naino Devi (PW-2) and that of the FIR (Ext. PW-1/A), is that in her statement on oath she stated that she had asked the accused that what was he doing with her sister and on this he ran away. Therefore, only this part that she had questioned the accused was not mentioned in the FIR and because the FIR was registered by her mother (PW-1) and not by this witness (PW-2), as such, the possibility of her forgetting this part cannot be ruled out.

13. It is pertinent to mention here that in cross examination of both Nimmo Devi (P-1) and Naino Devi (PW-2) the accused did not take the plea of false implication on some reasons or some enmity. It is a case where the accused relied upon the failure of the prosecution, instead of discharging the burden which had shifted upon him once the eye witness had testified before the Court.

14. Even if the defence counsel did not cross examine the complainant (PW-1) and her daughter (PW-2), still the testimony of Naino Devi (PW-2) explicitly states that she had seen the accused Ajeet lying on her sister (prosecutrix) and at that time he was not wearing

his trousers and her sister was not wearing her salwaar. She further clarified that when she reached the spot they noticed each other and on this she asked the accused that what he was doing with his sister on which he put on his clothes and belt and ran away. Naino Devi (PW-2) specifically stated that she made her sister wear salwaar which stood removed.

15. This clinching evidence proves the presence of the accused with the victim, who had the Intelligence Quotient (I.Q.) of just 33 and suffered from mental retardation (severe). In view of this the absence of injuries on her body becomes meaningless because resistance would not occur to her, which would happen as a reflex action when force is applied. But finding her alone accused would be caressing her to which she would understand as an act of pure love and not lust. Consequently, there was no question of her resistance.

16. The crucial question which arises for consideration is that whether the accused was able to penetrate, even slightly, so that the offence falls within the definition of Section 375 IPC which stood amended prior to the date of the incident. The Doctor (PW-7) who examined the victim did not find any injury over her privates. She specifically noticed that her hymen was intact and swabs collected from her privates and clothes did not find any traces of semen by the Forensic Science Laboratory. Therefore, there is no scientific evidence to prove that the act had resulted into penetration or ejaculation. In fact, the scientific evidence did not prove coitus at all.

17. It is significant to mention that when Naino Devi (PW-2) noticed the accused lying over the victim she did not explain any further. Even otherwise when she would have noticed the accused then the accused was in prostrate position because the victim was in supine position so PW-2 must have noticed the accused from back and not front position. Since the victim was a severe mentally challenged person, as such, only evidence to make out whether there was any penetration or not would be scientific evidence. Possibility cannot be ruled out that the moment the accused started to lay over the victim, at that very moment PW-2 arrived at the spot. Undoubtedly, timely arrival of PW-2 saved the victim from the accused from certain sexual assault. On one hand the trauma faced by the victim was extreme but simultaneously it was her good fortune that her sister reached there well in time. In case she had not reached there then there was nothing to stop the accused from committing coitus. Be that as it may, mere assumption will not make it a case of rape, but a case of attemptive rape where it is punishable with the aid of Section 511 IPC. The evidence is sufficient to prove that attempt to commit rape was made. This being the position, commission of the offence under Section 376(2)(j) is required to be altered to an offence under Section 376(2)(j) read with Section 511 IPC.

18. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed and the conviction and sentence passed by the trial Court is set aside and is altered to conviction under Section 376(2)(j) read with Section 511 IPC and the appellant/accused is sentenced to fiveyears, to be counted from the date of arrest and set off u/s 428 CrPC. Registry is directed to prepare fresh warrants accordingly. Registrar (Judicial) to ensure compliance.

19. Records of the Court below be immediately sent back.

20. The appeal stands partly allowed in the terms mentioned above. All pending applications, if any, are also closed.

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BEFORE HON;BLE MR. JUSTICE AJAY MOHAN GOEL, JUDGE.

State of H.P. & ors. ….Petitioners.

Versus

Ghanshyam Tagore …Respondent.

CMP(M) No.1396 of 2019 in
Civil Revision No.36 of 2020
Decided on: 12.03.2020

Code of Civil Procedure, 1908 - Order XXXIX Rules 1 & 2- Temporary injunction for restraining construction over land allocated by District Collector to Department of Panchayati

Raj- Held, land already stood allotted and transferred in the name of Education Department- Education Department as well as School Management Committee opposing transfer of land to Panchayati Raj Department- Land required by school for carrying out extension work for raising Science Laboratory, Administrative Block and playground-Though State has prerogative to allot land but it cannot act arbitrarily- Orders of Lower Courts granting temporary injunction against defendants from raising construction of Panchayat Bhawan over said land during pendency of suit, not perverse and findings borne out from material on record- Revision dismissed. (Para 8 & 11)

Whether approved for reporting?[38]

For the petitioners : Mr. Sumesh Raj, Mr. Dinesh Thakur, Mr. Sanjeev Sood, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General.

For the respondent : Mr. G.R. Palsra, Advocate.

Ajay Mohan Goel, Judge (Oral)

CMP(M) No.1396 of 2019

Heard. As this is convinced that delay in filing the revision petition is bonafide and not intentional, the same is condoned. Application is disposed of.

Civil Revision No.36 of 2020

Be registered. With the consent of the parties, this Revision Petition is heard today itself and the same is being disposed of vide judgment of even date.

This Revision Petition filed under Section 115 of the Civil Procedure Code is directed against the orders passed, respectively, by the Court of learned Senior Civil Judge (Junior Division), Court No.1, Mandi, District Mandi, H.P. in C.M.A. No. 124/2018 titled as Ghanshyam Tagore Versus State of H.P. & others, decided on 16.08.2018 in Civil Suit No.271 of 2018 and judgment dated 26.11.2018 in Civil Miscellaneous Appeal No.11/2018, dated 26.11.2018, titled as State of H.P. & others Versus Ghanshyam Tagore, passed by the Court of learned Additional District Judge (II), Mandi, District Mandi, H.P., vide which the application filed by the present respondent under Order 39, Rule 1& 2 of the Civil Procedure Code was allowed by the learned Trial Court and the appeal filed against the same by the State stands dismissed by the learned Appellate Court.

2. I have heard learned counsel for the parties and have also gone through the orders passed by the learned Courts below.

3. To obtain an order under Order 39, Rule 1 and 2 of the Code of Civil Procedure Code, a party has to demonstrate before the Court:- (a) prima facie case; (b) balance of convenience; (c) irreparable loss.

4. A perusal of the order passed by the learned Trial Court as well as the judgment passed by the learned Appellate Court demonstrates that it is only because the respondent before this Court i.e. the plaintiff before the learned Trial Court was able to demonstrate existence of a prima facie case, balance of convenience as well as irreparable loss in the event of

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Whether reporters of the local papers may be allowed to see the judgment?

denial of interim order, then the learned Trial Court granted interim order in favour of the respondent therein.

5. The matter which is pending adjudication before the learned Trial Court is that the plaintiff therein i.e. the present respondent has assailed the act of District Collector, Mandi, H.P., who vide order dated 25.09.2017, has ordered the transfer of 8 biswas of the suit land in favour of Panchayati Raj Department for construction of a Panchayat Bhawan for Gram Panchayat site. The case of the plaintiff before the learned Trial Court is that the transfer of the land in issue is against the interest of the school as the land was in the actual physical possession of Government Senior Secondary School, Saigaloo, Tehsil Kotli, District Mandi, H.P. and was required for the purpose of the extension of the school including its playground. Ignoring this, District Collector, Mandi, H.P. passed the order of handing over the land to the Panchayati Raj Department, which order was under challenge before the learned Trial Court.

6. By way of an application, which was filed under Order 39, Rule 1 and 2 of the Civil Procedure Code, a prayer was made before the learned Trial Court for grant of temporary injunction for restraining the defendants from raising any construction over the suit land till the disposal of the main suit. This application stood allowed by the learned Trial Court vide order dated 16.08.2018 and the appeal filed against the said order by the State before the learned Appellate Court stood dismissed.

7. Having perused the order passed by the learned Trial Court as well as the order passed by the learned Appellate Court, as I have already mentioned hereinabove also, this Court is of the view that the same do not call for any interference.

8. While passing the order as well as the judgment, learned Courts below have taken into consideration the fact that the Education Department was earlier approached for permitting the Panchayati Raj Department to use the said peace of land for the purpose of construction of a Panchayat Bhawan, however, the same was objected to by the Principal of the school. Record also demonstrates that SMC of the school in issue was also not in favour of the transfer of the land from school to Panchayati Raj Department. This was more so for the reason that the Education Department/SMC intended to carry out the extension work of the school by way of raising a science laboratory and also an Administrative Block as well as playground in the land which is the subject matter of the suit.

9. Learned Courts below held that though it was the prerogative of the State Government to allocate the land in favour of any department, however, the State cannot act in an arbitrary manner to the prejudice of the children, who are studying in the school and on these basis, learned Courts below held that in order to avoid multiplicity of litigation, it was in the interest of justice that defendants were restrained from raising any construction on the suit land till the disposal of the main suit.

10. During the course of arguments, learned Additional Advocate General has not been able to point out that the order and judgment under challenge were passed by the learned Courts below in exercise of jurisdiction either not vested in them or by not exercising the jurisdiction vested in them. He has also not been able to demonstrate that the order as well as the judgment have been passed by the learned Trial Court as well as learned Appellate Court by exercising jurisdiction vested in them with material irregularity. The order passed by the learned Trial Court as well as the judgment passed by the learned Appellate Court are well reasoned and the findings returned therein are duly borne out from the record as were necessary for the purpose of adjudicating an application filed under Order 39, Rule 1 and 2 of the Code of Civil Procedure.

11. Therefore, this Court is of the view that there is no need to interfere either with the order passed by the learned Trial Court or with the judgment passed by the learned Appellate Court. However, it is clarified that the observations which have been made by this Court in this Order are only for the purpose of adjudication of the present revision petition and the suit pending before the learned Trial Court shall be decided by it on the basis of the

pleadings of the parties as well as the evidence which may be led by the respective parties in support of their respective contentions. Petition is dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.