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Constitution of India, 1950 - Articles 14 & 226 – Transfer of an employee by the Government – Challenge thereto on ground of malafide exercise of power - Writ jurisdiction and scope of Court's interference – Held, if transfer is made in order to adjust a particular person with no reasonable basis, it can be termed as malafide and would normally liable to be quashed. (Para 10). Title: Sheela Suryavanshi vs. State of H.P. & Ors. **D.B.** Page - 336

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Constitution of India, 1950 - Articles 14 & 226 – Challenge to selection process for training in SAS on ground that paper of English/ Hindi was not inconsonance with syllabus mentioned in recruitment notice – Held, petitioner participated in the selection process without any protest - He had also the choice of attempting required number of questions from either of two parts of paper, if he so desired – Examination took place in 2011 and he filed writ on discovering that on merit, he was not in a position to make it for the training – Petition dismissed – Public Service Commission also cautioned that in future papers to be set are strictly inconsonance with advertisement issued by it. (Para 8 & 9).Title: Rajesh Kumar vs. State of H.P. and others Page – 351

Constitution of India, 1950- Articles 14 & 226- Rejection of bid of petitioner – Challenge thereto by way of writ- Maintainability- Held, notice inviting tenders specifically laying down that bidders would be declared qualified only if their assessed available bid capacity for construction work is equal or more than total bid value- Formula for assessing bid capacity was also laid down- Bid capacity of petitioner was less than of required standard- Terms and conditions of bid document also not challenged by him in writ- Words used in tender document cannot be ignored or treated as redundant or superfluous – No illegality in rejecting bid of petitioner as non-responsive- Petition dismissed. (Para 2 & 4) Title: Ankit Sharma vs. State of H.P. and others **D.B.** Page – 353

Constitution of India, 1950- Articles 14 & 226- **Authorization of Residential Accommodation in Department of Prison and Correctional Services, Himachal Pradesh**- Clause 6- Standing Order dated 25.09.2019 - Overstaying in official accommodation- Direction by department to vacate premises- Challenge thereto- Held, as per Standing Order, official accommodation can be retained only for three years- Petitioner has not vacated it and now same stands allotted to some other officer- Anyone who occupies official accommodation beyond permissible period is bound by rules that govern the retention of said accommodation- Petitioner cannot claim any exemption or exception to applicability of Standing Order- Petition dismissed. (Para 4, 15 & 16) Title: Rati Lal vs. State of Himachal Pradesh and others **D.B.** Page – 356

Constitution of India, 1950 – Articles 14 & 226 – Grant of increments- Entitlement- Vidya Upasaks engaged on payment of fixed monthly honorarium – Whether period spent on such engagement is to be counted for grant of increments after regularization? – Held, in view of judgment in earlier Writ, previous service as Vidya Upasaks before regularization is countable only for pension purposes - After grant of regular pay scale, levying of increments would be governed by all relevant rules and regulations. (Para 4) Title: Basant Kumar & others vs. State of H.P. & others **D.B.** Page - 360

Code of Criminal Procedure, 1973 (Code)- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 20, 29 & 37- Recovery of commercial quantity of 'charas' from occupants of bike 'B' and 'MS'- Petitioner 'SK' implicated in case on basis of material surfacing during investigation that he (petitioner) had hired 'B' and 'MS' to purchase charas from one 'GS'- Regular bail- Grant of – Held, material on record suggesting frequent phone calls between petitioner, 'B' and 'MS' and 'GS' prior to seizure of contraband from 'B" and 'MS'- Bail petitioner silent about this aspect- There is prima facie case against petitioner- Case being of commercial quantity, rigors of Section 37 of the Act will apply- Petitioner not entitled for bail- Petition dismissed. (Para 5, 17, 23 & 24) Title: Sandeep Kumar vs. State of Himachal Pradesh Page – 361

Constitution of India, 1950- Articles 14 & 226- Tender regarding public work- Rejection by the Committee- Challenge by way of writ jurisdiction- Court's jurisdiction- Held, award of contract is essentially a commercial transaction – State can choose its own method to arrive at a decision- It can fix its own terms of invitation to tender and that is not open to judicial scrutiny - However Court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. (Para 13) Title: M/s Chamunda Construction Company vs. State of Himachal Pradesh and others **D.B.** Page - 373

Constitution of India, 1950- Articles 14 & 226- Tender regarding public work- Rejection by the Committee- Challenge by way of writ jurisdiction- Court's jurisdiction- Held, notice inviting tender required tenderer to have past experience in similar works to the extent of 50% of estimated cost of the project- Petitioner did not fulfil eligibility criteria mentioned in the notice to tender- Rejection of its tender at technical bid stage by the respondents is not arbitrary or unreasonable. (Para 5 & 29) Title: M/s Chamunda Construction Company vs. State of Himachal Pradesh and others **D.B.** Page – 373

Constitution of India, 1950- Article 226- Writ of mandamus for directing State to acquire land of petitioner which is actually being used by it for public purpose- State raising plea of voluntary surrender of land- Delay/ time limit in filing writ- Effect- Held, where State has not taken any steps for acquisition of land on ground that it was expressly or impliedly surrendered at relevant time by the landowner for public purpose, landowner can invoke jurisdiction of Court and refute such stand of express or implied consent only within time within which a relief can be claimed by him in a civil suit- Question can be decided in writ petition itself. (Para 7) Title: Jawahar Lal vs. State of H.P.& others Page – 390

Central Civil Services (Pension) Rules, 1972 (Rules)- Pensionary benefits - Government Instructions dated 2.5.2019- Minimum qualifying service of 10 years- Computation of- Held, there was dispute regarding date of birth of employee- After inquiry, it was corrected in official records- He also admitted that it was the correct date of his birth- He stood retired on basis of corrected date of birth- From his regularization till retirement he rendered regular service for 8 years, less than the minimum required qualifying service- But service of 10 years rendered on daily wage is directed to be counted towards qualifying service for pensionary benefits as per ratio laid down in Sunder Singh vs. State, Civil Appeal No. 6309 of 2017. (Para 4 & 5) Title: State of H.P. and others vs. Sunder Ram **D.B.** Page – 397

Constitution of India, 1950- Articles 14 & 226- Disengagement of petitioner as an expert after expiry of contractual period allegedly on ground of his unsatisfactory performance etc.- Challenge thereto by way of Writ petition by contending that action of respondents is arbitrary- Held, passing an order for an unauthorized purpose constitutes malice in law- There was no complaint regarding working of petitioner either as Social Development Expert or as a Law Officer- Central Government vide instructions directed not to disengage employees engaged on casual or contractual basis. Contracts of other similarly situated persons engaged by the respondents were extended- Name of petitioner qua his performance was inserted in the noting sheets subsequently for seeking justification for not continuing with his contract- It is colourable exercise and deceived by illusion- Petition allowed- Order of respondents regarding disengagement of petitioner set aside- Respondents directed to reengage petitioner on same terms and conditions on which he was working earlier till completion of project. (Para 4, 11, 34 & 38) Title: Kanwar Singh Sharma vs. State of Himachal Pradesh and others **D.B.** Page - 401

Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973 (Code)**- Sections 433 & 433-A – Remission of sentence- Writ in the nature of Habeas Corpus or Certiorari- Factors relevant for grant of – Held, while considering prayer for remission of sentence, the Competent Authority must also consider (i) conduct of accused while in jail , (ii) his social and economic conditions, (iii) period spent by him in jail, (iv) possibility of his again indulging in crime and (v) possibility of rehabilitation of convict as a useful member of society – It must not be swayed away simply by gravity of offence committed by accused as he already stands convicted and sentenced for that. (Para 5 & 7) Title: Satya Parkash vs. State of H.P. & others Page - 416

Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973 (Code)**- Sections 433 & 433-A – Remission of sentence- Denial by the State Sentence Review Board on basis of report of Trial Court- Held on facts, petitioner had already completed 20 years of imprisonment- As per Jail Manual , his conduct in jail was good- Other authorities recommending his premature release- Denial of relief simply on basis of report of Trial Court that petitioner was involved in serious offence without considering other factors is arbitrary-

Order of Review Board set aside- Trial Court directed to consider case of petitioner expeditiously in the light of all relevant factors. (Para 4, 6, 7, 10 & 11) Title: Satya Parkash vs. State of H.P. & others Page - 416

Constitution of India, 1950- Articles 14 & 226- Contractual appointments- Nature of- Petitioners praying for extension after expiry of contractual period of appointment on ground that their services are governed by National Institute of Technology Act, 2007- Scope of Court's intervention- Held, appointments of petitioners were purely contractual and with efflux of time as envisaged in contract itself, the same came to an end- Persons holding such posts can have no right to continue or renewal of service contracts as a matter of right- Contractual appointments cannot be equated with repeated ad-hoc employment- Action of respondents is not shown to be unfair, perverse or irrational- Petition dismissed. (Para 8, 11, 15 & 33) Title: Dr. Rajesh Kumar Sharma and others vs. Union of India and others **D.B.** Page – 422

Constitution of India, 1950- Articles 14 & 226- **Central Civil Services (Pension) Rules, 1972 (Rules)**- Rule 13- Qualifying service for grant of pension- Period of service rendered in work charged establishment, whether to be considered towards qualifying service?- Held, period of service rendered by a person as work charged employee with any establishment of State of H.P. is to be counted towards qualifying service for pensionary benefits irrespective of fact whether Department is having work charged establishment or not- Petitioner being conferred with work charged status since May, 2002, is entitled for benefit of Pension Rules as well as GPF Rules- Government Notification dated 15.05.2003 stipulating for non-applicability of Pension Rules to employees appointed/engaged thereafter is not attracted. (Para 31 to 33) Title: Beli Ram vs. State of H.P. and another Page - 431

Constitution of India, 1950- Article 226- Writ seeking directions to State/ respondents to complete selection process to post of constable and give appointment to petitioner against category of 'ward of freedom fighter'- Entitlement- Held, no post for the 'ward of freedom fighter' was advertised in the recruitment notice- He was not considered against general category seats either because of his low merit- No merit in the petition and is dismissed. (Para 2 & 3) Title: Mukesh Kanwar vs. State of H.P. and others. Page – 440

Constitution of India, 1950- Article 226- Promotional posts- Amendment in Recruitment and Promotion Rules changing eligibility criteria- Whether amended Rules would apply qua posts which fell vacant prior to amendment in Rules?- Held, it is the Rule in vogue at time of consideration of candidature of person for promotion, which is applicable- And not the Rule which was in vogue when the vacancy fell vacant. (Para 17) Title: Prem Sagar and others vs. State of H.P and others Page – 441

Constitution of India, 1950- Articles 14 & 226- Non-selection of candidate to post of constable- Petitioner challenging selection of private respondent as a result of favouritism – Contending that though securing higher marks in written examination, he was intentionally given less marks in interview to exclude him- Held, mere securing higher marks in written test does not entitle a candidate to claim more marks in interview as well- All candidates secured more than 5 marks in interview except petitioner who secured 4.33 marks- Difficult to infer that less marks were given to petitioner to favour private respondent- In absence of material on record qua the allegations of malafides and wrong doings, expertise and wisdom of Members of Interview Board cannot be doubted- Court cannot substitute its own views for the wisdom of Selection Committee- No unreasonableness in decision of Board in awarding more marks to private respondent- Petition dismissed. (Para 6, 8 & 9) Title: Kamal Kishor vs. State of H.P. & others Page - 449

Constitution of India, 1950- Articles 14 & 226- Service jurisprudence- Whether benefit of judgment passed in previous litigation in favour of one set of employees can be extended to another set of similarly placed employees though they were not parties in previous writ?- Held, where judgment pronounced by Court is a judgment in rem and intention is to give benefit to all similarly situated persons, it is obligatory upon authorities to extend benefit

thereof to all similarly situated persons. (Para 9) Title: Bhupinder Singh Thakur and Ors vs. State of Himachal Pradesh and Ors. Page - 452

Constitution of India, 1950- Articles 14 & 226- Service jurisprudence-Judgment in rem or judgment in personam- Inference as to – Held, whether judgment of Court is a judgment in rem or judgment in personam can be inferred from the tenor and language of the judgment itself- Judgment dealing with pay anomaly between two cadres of service, is a judgment in rem. (Para 9) Title: Bhupinder Singh Thakur and Ors vs. State of Himachal Pradesh and Ors. Page – 452

Constitution of India, 1950- Articles 14 & 226- **Right of Children to Free and Compulsory Education Act, 2009 (Act)** – Appointment as 'Bhoti teacher' on part time basis- Petitioner seeking direction to State to regularize him against newly created post of Bhoti teacher- State objecting petition on ground that petitioner does not possess essential qualifications of elementary teacher as prescribed under the Act- And he cannot claim party with JBTs- Held, petitioner was initially engaged as Bhoti teacher on recommendations of Education Department in 2003 and working since then without interruption- Provisions of Act cannot be applied in case of petitioner as his services were engaged prior to its commencement – Only person with special knowledge and expertise in the field can be appointed as 'Bhoti teacher'- He cannot be made to compete with persons having qualifications in other fields- Claim of petitioner cannot be denied on ground that he does not possess requisite qualification prescribed under the Act- Petition allowed- State directed to consider case of petitioner for regularization. (Para 7 to 9) Title: Swami Raj vs. State of H.P. & Others Page - 460

Constitution of India, 1950- Articles 14 & 226- Appointment on compassionate grounds- Entitlement- Held, petitioner is entitled for appointment on compassionate grounds only if his case falls within the parameters of the policy prevalent on the date of consideration. (Para 1) Title: Pitamber Sharma vs. State of Himachal Pradesh and Ors. Page – 465

Constitution of India, 1950- Article 226- Selection to a public post - Old R&P Rules governing selection process stand replaced by New Rules- Whether petitioner can claim selection to post of PET on basis of old Rules on ground that he also belongs to 1998-99 batch and some persons of this batch were allowed to be appointed under old Rules- Held, expression "batch" necessarily means the date on which candidate qualifies examination and acquires mandatory educational qualifications- Petitioner though enrolled in 1998-99 batch for PET course but took examination in 2002- He belongs to 2002 batch and not of 1998-99 batch- Petitioner cannot claim selection/ appointment under old Rules- Petition dismissed. (Para 9 to 12 & 14) Title: Harish Kumar vs. State of H.P. & others Page - 467

Code of Criminal Procedure, 1973- Section 439- Grant of bail in a case involving rape of minor girl- Held, during trial victim stating before Court of her having taken lift on the motorcycle of accused and staying with him- Also deposing that accused did not commit any rape or sexual intercourse with her- Without commenting upon evidentiary value of DNA profile, coupled with statements of other witnesses recorded, petitioner made out a case for bail- Further incarceration of accused is not justified and not going to achieve any significant purpose- Possibility of accused influencing witnesses or tampering with evidence can be taken care of by imposing stringent conditions- Petition allowed- Bail granted. (Para 3,10 to 13 & 15) Title: Surat Singh vs. State of Himachal Pradesh Page – 476

Code of Criminal Procedure, 1973- Section 439- Regular bail in a case involving kidnapping of minor girl and committing sexual intercourse with her- Grant of- On facts held, during trial victim denying of sexual relation between her and accused- Also stating that she voluntarily left home with accused and despite his asking her to return her home, she did not accede to his request- Accused permanent resident of Ludhiana and his presence can be ensured- It may be a case of elopement- Further incarceration of accused will not serve any purpose- He is in custody for more than year- Petition allowed- Bail granted. (Para 15 & 18) Title: Vicky Kumar vs. State of Himachal Pradesh Page - 481

'D'

Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972 – Rule 5(1)- Held, ex-serviceman irrespective of the fact whether he has joined the Armed Forces during emergency or not, is entitled for grant of benefit of approved military service towards fixation of pay. (Para 15) Title: Sh. Amar Nath and others vs. State of Himachal Pradesh and others Page - 8

Drugs and Cosmetics Rules, 1945 (Rules)- Rule 85(2)- Suspension of Drug Licence and issuing 'stop manufacturing order' by Competent Authority against pharmaceutical unit- Procedural requirement- Held, power to suspend drug licence and issuing 'stop manufacturing order' can be exercised by the Competent Authority only in accordance with law- Petitioner Company had submitted replies to various show cause notices issued to it by the Competent Authority- Replies of petitioner not shown to have been considered- Without setting forth reasons required to be enumerated under Rule 85(2), manufacture/ sale of other formulations or drugs cannot be ordered where adulterated ingredient found in one drug alone, was not being used in other drugs - Nor drugs manufacturing licence could be suspended altogether in exercise of powers under Rule 85(2). (Para 6) Title: M/s Digital Vision vs. State of Himachal Pradesh and others. **D.B.** Page – 157

Drugs and Cosmetics Act, 1940 (Act) – Section 22 (1) (d) – Expression 'such other powers' – Meaning of - Held, this provision empowers Drugs Inspector to exercise such other powers to perform any act which is incidental and ancillary to powers conferred upon him expressly under the Act and Rules framed there under – It includes doing of all others acts for carrying out purposes of the Act and envisages taking of additional quantity of samples for analysis.(Para 43 & 46) Title: M/s Digital Vision through its partner Konic Goyal vs. State of Himachal Pradesh through Drug Controller Page - 313

Drugs and Cosmetics Act, 1940 (Act) – Section 23 – Procedure of taking sample– Applicability – Held, procedure prescribed in Section 23 of Act is required to be adhered to at time of sampling whether it is initial sample or additional sample. (Para 48) Title: M/s Digital Vision through its partner Konic Goyal vs. State of Himachal Pradesh through Drug Controller Page - 313

Drugs and Cosmetics Act, 1940 (Act) – Section 23 (5) (b) – Custody of seized stock of drugs – Held, provision does not envisage that custody of seized stock of drugs cannot be entrusted with Drugs Inspector by the Magistrate – Magistrate has the authority to pass appropriate orders with respect to custody of seized stock of drugs and it includes power to call the seized stock & release it and also to direct drawing of samples/additional samples in his presence for carrying out purposes of Act and Rules made thereunder. (Para 50 & 51). Title: M/s Digital Vision through its partner Konic Goyal vs. State of Himachal Pradesh through Drug Controller Page - 313

Drugs and Cosmetics Act, 1940 (Act) – Section 22 (1)(c) & (d) – Taking of sample of drug for analysis – Held, Drugs Inspector is empowered to take sample at any other place other than place of manufacturing or retailer depending upon facts and circumstance of situation. (Para 52) Title: M/s Digital Vision through its partner Konic Goyal vs. State of Himachal Pradesh through Drug Controller Page - 313

'E'

Evidence Act, 1872 (Act)- Sections 45 & 73- Directions to accused to give handwriting specimen for comparison purposes- Held, in view of provisions of Sections 45 and 73 of Act, during trial, Magistrate has power to issue direction to any person including accused to give his specimen signature or handwriting and to send questioned handwriting/ signature along with it to the expert for opinion. (Para 16) Title: Naginder Singh vs. Hari Dass Verma Page - 300

'H'

Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968- Section 3(1)(c) and 3(2)- Extension of parole for doing agricultural operation- Court directions, whether can be issued?- Held, grant or refusal of parole or furlough to prisoner is an administrative function of Government or Competent Authority prescribed under the Act- Court cannot enter into shoes of such Authority to perform administrative functions- Court cannot direct Authorities to grant parole or extend its period qua a prisoner- Petition seeking directions to Authorities to extend period of parole, dismissed. (Para 18, 19 & 22) Title: Deepak Verma vs. Director General of Prisons, Himachal Pradesh and another Page – 77

Himachal Pradesh Co-operative Societies Act, 1968- Section 72 (2)- Settlement of dispute by way of arbitration- Dispute as to service conditions of workman- Held, dispute as to conditions of service of workman employed by the Society is not a dispute touching the business of the Society- Such a dispute is not arbitrable before Registrar. (Para 8) Title: The Solan District Co-operative (Marketing & Consumer) Federation Ltd. vs. Ram Lal Page - 183

Himachal Pradesh Police Act, 2007 (Act)- Section 143- Standing Orders- Held, Authorities stipulated in Section 143 of Act have the power to issue Standing Orders to carry out purposes of the Act- It is open to them to amend the same in accordance with law. (Para 4) Title: Ct. Bhupinder Kumar and others vs. State of H.P. and another **D.B.** Page – 223

'I'

Industrial Disputes Act, 1947- Section 10- Reference to Labour Court- Adjudication of- Held, while answering reference, Tribunal has to confine its inquiry to question referred- It cannot travel beyond the question or terms of reference. (Para 15) Title: The Solan District Co-operative (Marketing & Consumer) Federation Ltd. vs. Ram Lal Page - 183

Industrial Disputes Act, 1947- Section 11 A- Consequential relief of back wages- Grant of- Held, in case of wrongful termination of service, though reinstatement with continuity of service and back wages is the normal rule yet it is subject to rider that Adjudicatory Authority or Court must take into consideration the length of service of workman, nature of misconduct if any proved against him, financial condition of employer and similar other factors including whether workman was gainfully employed during period of termination. (Para 20) Title: The Solan District Co-operative (Marketing & Consumer) Federation Ltd. vs. Ram Lal Page - 183

Indian Penal Code, 1860 – Sections 420, 468 & 471- Forgery and use of forged documents for cheating etc. – Proof – Revision against concurrent findings of acquittal of Lower Courts – Allegations against accused being that matriculation certificate tendered by him for obtaining job was forged – Held, matriculation certificate of accused has already been held to be valid by a declaratory decree of Civil Court – Decree attained finality – No basis to hold said certificate as forged – Revision dismissed. (Para 5 to 7). Title: State of Himachal Pradesh vs. Kuldeep Singh Page – 332

Industrial Disputes Act, 1947 - Section 2 (k) – 'Industrial dispute' – Existence of- Petition against award of Industrial Tribunal holding retrenchment of workman (R1) as illegal and directing payment of compensation to him jointly and severally by petitioner and respondent No.2 – Held, it is no case of workman (R1) that petitioner was the principal employer – Construction work was awarded by petitioner to respondent No. 2- Workman was engaged as driver by respondent No.2 – Petitioner had no administrative control over management of respondent No. 2 – He was not the principal employer qua the workman and petitioner could not have been saddled with liability – Award of Tribunal to the extent of holding petitioner jointly and severally liable, set aside. (Para 8 & 9) Title: The General Manager vs. Tej Singh and Anr. Page - 344

'J'

Junior Engineer (Electrical)/ Junior Engineer (IT) Class-III (Non-gazetted) Recruitment and Promotion Rules, 2006 (Rules)- Rules 7 & 10- Rules providing for diploma course in the

requisite subject as one of eligibility conditions- Whether candidates holding degree in that subject are also eligible?- Held, normal rule is that candidate with higher qualification is deemed to be fulfilling the lower qualification prescribed for the post but such higher qualification has to be in the same channel- Degree in engineering is not higher qualification in the channel of diploma course in required subject. (Para 40) Title: Robin Kumar and another vs. State of H.P. and others **D.B.** Page – 199

'L'

Land Acquisition Act, 1894 (Act)- Sections 18 & 19- Reference to District Judge- Particulars of reference and duty of Land Acquisition Collector- Held, while making reference to Court, Collector is required to state the particulars mentioned in clauses (a) to (d) of sub-section (1) of Section 19 of the Act including details of any trees, buildings or standing crops on the land- It is his duty to send full information to the Court regarding entire acquired land. (Para 4) Title: Himachal Pradesh Power Corporation Ltd. & another vs. Indira & others Page – 285

'M'

Motor Vehicles Act, 1988- Section 166- Motor accident- Claim application qua bodily injuries and consequent permanent disability- Medical evidence- Appreciation of - Insurance Company seeking reference to third expert for ascertaining whether disability of claimant was permanent or not?- Held, in view of conflicting medical evidence qua disability of claimant, Tribunal had referred matter to Chief Medical Officer for his examination by a proper Medical Board- Said Board including an orthopedic surgeon examined petitioner and issued disability certificate- Disability certificate also proved by examining one of the medical officers of the Board- No evidence that disability certificate is contrary to medical record- There is no necessity to send matter to third expert. (Para 9 & 10) Title: The New India Assurance Co. Ltd. vs. Akhilesh and Ors. Page - 471

Motor Vehicles Act, 1988- Section 166- Motor accident- Permanent disability- Loss of academic year of an engineering student on account of injuries- Assessment of income- Held, assessment of monthly income of an engineering student at Rs.15,000/- by the Tribunal cannot be said to be on higher side. (Para 12) Title: The New India Assurance Co. Ltd. vs. Akhilesh and Ors. Page - 471

'S'

Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 (Act)- Sections 13(4), 17(1), 17(2) and 18- **Security Interest (Enforcement) Rules, 2002 (Rules)**- Rules 6(2) and 8(6)- E-auction of movable and immovable secured assets of defaulter- Confirmation thereof- Whether e-auction proceeding can be assailed by person who was merely a participant in it?- Writ jurisdiction- Petitioner contending that as it is neither borrower nor the secured creditor therefore, remedy under Section 17 of Act is not available to it and grievances can only be redressed by way of writ jurisdiction- Held, against the measures taken under Section 13(4) by the secured creditor to recover secured debt, remedy provided is under Section 17 of the Act- Remedy is available not only to borrower but to 'any person' aggrieved against such measures including auction proceedings- Section 17 (2) of Act empowers Debt Recovery Tribunal to consider whether such measures taken under Section 13(4) by secured creditor were in consonance with provisions of Act and Rules thereunder- Petitioner has alternative statutory remedy by way of appeal and writ petition cannot be entertained- Petition dismissed. (Para 4 to 6) Title: Hamco Industries Private Limited vs. The Kangra Central Cooperative Bank Ltd. and others **D.B.** Page - 141

'R'

Reserve Bank of India Act, 1934 (as amended vide Amendment Act 1997)- Sections 45-IA (6) (ii) & 6(iv) (b), proviso- Non-banking Financial Institution (NBFI) failing to maintain Net Owed Fund (NOF) of Rs.200 Lakh in particular year as required under law- Reserve Bank of

India (RBI) cancelling its Certificate of Registration (COR) as NBFI- Whether RBI was required to provide an opportunity to NBFI to comply the requirement before cancelling registration under first proviso?- Held, petitioner did not achieve the minimum prescribed limit of NOF within stipulated period and it failed to comply directions issued by RBI under provisions of Chapter-IIIB of Act- COR was cancelled by recourse to Section 45-IA(6)(iv) which does not entail providing of any opportunity to NBFI for complying with provisions violated by it – Section 45-IA(6)(ii) has no applicability in the case- Petition dismissed. (Para 4 & 5) Title: M/s Shakun Holdings Private Limited vs. Union of India and others **D.B.** Page – 66

Right of Children to Free and Compulsory Education Act, 2009 - Himachal Pradesh Elementary Education Department Trained Graduate Teacher, Class-III (Non-gazetted) Recruitment and Promotion Rules, 2009 (Rules) - Clause 11- Column No. 7- Essential qualifications for promotional post of TGT enhanced by way of amendment in Rules in 2012 i.e. 50% marks in graduation level and having passed Teacher Eligibility Test- Amendment in Rules making petitioners who were appointed as JBT earlier to 2012, ineligible for promotion- Challenge thereto- Held, Government in its wisdom has kept 15% quota for JBT teachers for promotion to post of TGT (Arts) provided they fulfill the minimum eligibility criteria laid in Rules for appointment to post of TGT (Arts) – Condition of having passed TET was incorporated in terms of statutory provisions of the Act- Condition not arbitrary as endeavour is to have more meritorious persons manning posts of teachers to impart education. (Para 12 to 14) Title: Prem Sagar and others vs. State of H.P and others Page - 441

Rights of Persons with Disabilities Act, 2016 (Act) - Section 2 (r) - 'Person with benchmark disability'- Meaning of- Held, 'Person with benchmark disability' means a person with not less than forty percent of a specified disability. (Para 4) Title: Prabhu Kumar vs. State of H.P. & ors. **D.B.** Page – 263

Rights of Persons with Disabilities Act, 2016 (Act) - Section 2 (zc), Schedule – 'Specified disability'- Held, locomotor disability forms part of physical disability and therefore is a 'specified disability' under the Act. (Para 4) Title: Prabhu Kumar vs. State of H.P. & ors. **D.B.** Page - 263

Rights of Persons with Disabilities Act, 2016 (Act) - Sections 2 (r) & 33 – Identification of posts for persons with benchmark disability- Held, State Government is required to constitute an Expert Committee with representation of persons with benchmark disabilities for identification of posts which can be held by persons with benchmark disability- The only limitation is that a physically handicapped person to become eligible for such post must have minimum disability of 40%. (Para 4) Title: Prabhu Kumar vs. State of H.P. & ors. **D.B.** Page – 263

Rights of Persons with Disabilities Act, 2016 (Act) – Section 34 (1) , second proviso- Exemption from reservation of posts for physically handicapped persons- Held, in consultation of Chief Commissioner of State, State Government may exempt any of its establishment from provisions of this Section mandating reservation of seats for physically handicapped persons. (Para 4) Title: Prabhu Kumar vs. State of H.P. & ors. **D.B.** Page - 263

Rights of Persons with Disabilities Act, 2016 (Act) – Sections 2(r), 33 & 34, Schedule- Benchmark disability- Whether Government can stipulate a maximum limit of disability for determining eligibility of candidate to particular post?- Held, appropriate Government can prescribe a maximum eligibility limit of disability for persons belonging to physically handicapped category for posts reserved for them under the provisions of the Act. (Para 4) Title: Prabhu Kumar vs. State of H.P. & ors. **D.B.** Page - 263

Rights of Persons with Disabilities Act, 2016 (Act) – Section 34 – Intendment- Held, intention of Act is not to accept reduced standards of efficiency in performance of functions of a particular post merely because employee suffers from a disability. (Para 4) Title: Prabhu Kumar vs. State of H.P. & ors. **D.B.** Page - 263

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'B'

B. Varadha Rao vs. State of Karnataka & Others, AIR 1986 SC 1955;
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Salem Advocate Bar Association, T.N. versus Union of India, (2005)6 SCC 344;
Sam Built Well Private Limited vs. Deepak Builders and others, (2018) 2 SCC 176,
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Satpal Singh v. State of Punjab, (2018) 13 SCC 813;
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Secretary, State of Karnataka and others vs. Uma Devi (3) and others (2006) 4 SCC 1;
Shankar Dass Vs. State of Himachal Pradesh and Connected matters,2013(2) Him. L.R.(FB) 698;
Siddharam Satlingappa Mhetre v. State of Maharashtra and others, (2011) 1 SCC 694;
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State (Delhi Administration) vs. Pali Ram, AIR 1979 SC 14, (1979) 2 SCC 158;
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State of Punjab vs. V.K. Khanna & Ors., AIR 2001 SC 343;
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State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808;
State of H.P. vs. Suresh Kumar Verma and another (1996) 7 SCC 562;
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State of Karnataka and Ors v. C. Lalitha, (2006) 2 SCC 747;
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Sunil Fulchand Shah v. Union of India & others, (2000) 3 SCC 409;
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Union of India and another Vs. Talwinder Singh (2012) 5 Supreme Court Cases 480;
Union of India and Ors v. Tarsem Singh, 2008 (8) SCC 648;
Union of India and others vs. Dipak Mali (2010) 2 SCC (Annexure P-5);
Union of India and others vs. Dipak Mali, AIR 2010 SC 336;
Union of India v. Merajuddin, (1999) 6 SCC 43,
Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738;
Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624].
Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1,
Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798;
Unionof India Vs. S. Vinodh Kumar (2007) 8 SCC 100;

'V'

Varun Bhardwaj v. State of H.P., Latest HLJ 2017 (HP) 707;
Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala, 2019 (2) Scale 134;
Vijendra Kumar Verma Vs. Public Service Commission (2011) 1 SCC 150;

'W'

Wazir Chand vs. Union of India & others (2001) 6 SCC 596;
West Bengal State Electricity Board vs. Dilip Kumar Ray, AIR 2007 SC 976;

'Z'

Zahoor Ahmad Rather and others vs. Sheikh Imtiyaz Ahmad and others (2019) 2 SCC 404;
Zonal Manager, Bank of India, Zonal Office, Kochi and others vs. Aarya K. Babu and another (2019) 8 SCC 587;

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN,J. & HON'BLE MS JUSTICE JYOTSNA REWAL DUA, J.

CWP No.851 of 2020
Ses Ram ...Petitioner.

Versus

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

CWP No.1413 of 2020

Bhagirath Rai Petitioner.

Versus

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

CWP No.1428 of 2020

Kulwant Singh Petitioner.

Versus

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

CWP No.1539 of 2020

Ravinder Kumar Petitioner.

Versus

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

CWPOA No.6382 of 2020

Chhote Lal Sharma Petitioner.

Versus

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

CWP No. 851 of 2020
Reserved on: 20.07.2020
Decided on: 31.07.2020

Constitution of India, 1950- Articles 14 & 226- Office Memorandum dated 04.11.2019 withdrawing earlier Office Memorandum dated 29.3.2013 enhancing retirement age of Blind Government/differently abled employees from 58 to 60 years - Held, Office Memorandum dated 29.3.2013 was issued by State in exercise of its Administrative/Executive powers- There was no legal embargo upon State to withdraw the same subsequently by issuing another Office Memorandum- These Office Memoranda were in nature of administrative directions and instructions and had no statutory force- Administrative power of State to issue Office Memorandum cannot be questioned- Petitioners have no right to remain in Government employment up to age of 60 years- Petition dismissed. (Para 3)

Cases referred:

Bishun Narain Misra Vs State of U.P. (AIR 1965 SC 1567);
Roshan Lal Tandon Vs. Union of India (AIR 1967 SC 1889);
K. Nagaraj Vs. State of A.P. (AIR 1985 SC 551);

For petitioners. : Mr. Subhash Mohan Snehi, Advocate in CWP No.851/2020.
Mr. Sudhanshu Jamwal, Advocate, in CWP No.1413 of 2020.
Mr. Sanjay Kumar Sharma, Advocate in CWP No.1428 of 2020.
Mr. Onkar Jairath and Shubham Sood, Advocates in CWP No.1539 of 2020.
Mr. Bhim Raj Sharma, Advocate in CWP No.6382 of 2020.

For respondents : *Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur, Mr. Ranjan Sharma, Mr. Desh Raj Sharma, Additional Advocate Generals and Ms. Svaneel Jaswal, Deputy Advocate General, for the respondents/State in all the petitions.*

Jyotsna Rewal Dua, Judge.

Office memorandum dated 29.03.2013 enhancing the retirement age of the Blind Government Employees from 58 years to 60 years has been withdrawn by the State vide office memorandum dated 4.11.2019. Aggrieved against this withdrawal, all these petitions have been preferred laying challenge to the office memorandum dated 4.11.2019. Being connected and involving the same issue, all these petitions are taken up together for disposal.

2(i) On 29.03.2013, following office memorandum (in short OM) was issued by the respondents/State enhancing the retirement age from 58 to 60 years in respect of Blind Government Employees:-

> *"Subject: Regarding enhancement of retirement age from 58 years to 60 years in respect of blind government employees.*
>
> *The undersigned is directed to refer to the subject cited above and to say that the matter for enhancement in the retirement age from 58 years to 60 years in respect of blind government Employees was under consideration of the Government for some time past. After careful consideration of the matter, the Governor, Himachal Pradesh is pleased to order that the retirement age of the Blind Government Servants is enhanced from 58 years to 60 years with immediate effect."*

2(ii) Seeking parity with Blind Government Servants for enhancement of retirement age, certain petitions were preferred by hearing impaired/locomotor impaired and other State Government Employees with such physical disabilities. One such petition bearing O.A. No.1004 of 2015 filed by a person with 'impaired hearing' was allowed by erstwhile H.P. Administrative Tribunal vide judgment dated 10.01.2018, with following operative directions:-

> *"10. Consequently, the original application is allowed and the respondents are directed to modify the memorandum dated 29.03.2013, Annexure A-6, to the extent that the benefit of enhancement of retirement age is also extended to the hearing impaired also to which category the applicant belongs, from 58 to 60 years as specified under Section 2(i) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The applicant is deemed to be in service till the attained age of 60 years with all consequential benefits."*

2(iii) Writ petition No.1577 of 2018, preferred by the State Government challenging the above extracted decision was dismissed by this Court on 5.11.2018. While dismissing the writ petition, it was observed that all differently abled persons constituted one homogeneous class falling within the definition of Section 2(i) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995. Pursuant to the office memorandum dated 29.03.2013, as applied to Blind Government Employees as well as to certain other categories of differently abled persons, many such employees were allowed to remain in service till they attained the age of 60 years.

2(iv) Following OM was issued on 4.11.2019, whereby office memorandum dated 29.03.2013 was withdrawn in public interest with immediate effect:-

> *"The undersigned is directed to refer to this department office Memorandum of even number dated 29th March, 2013 on the above cited subject vide which retirement age from 58 years to 60 years in respect of blind Government employees was enhanced. Now after careful consideration of the matter the Governor, Himachal Pradesh is pleased to order that his office Memorandum dated 29.03.2013 be hereby withdrawn with immediate effect, in public interest."*

2(v) The result of OM dated 4.11.2019 was that retirement age of blind government employees, which was earlier enhanced to 60 years was again brought back to 58 years. As a necessary corollary, all categories of differently abled persons, who were either enjoying or intended to seek the benefit of OM dated 29.03.2013 were also similarly affected. Therefore feeling aggrieved against the withdrawal of office memorandum dated 29.03.2013 by OM dated 4.11.2019 bringing the retirement age from earlier enhanced 60 years back to 58 years, these petitions have been preferred.

3. We have heard learned counsel for the parties and gone through the record.

3(i). At the outset, it may be noticed that OM dated 29.03.2013 was issued by State in exercise of its Administrative/Executive Power. Therefore, there was no legal embargo upon the respondents/State to withdraw the same by subsequently issuing another office memorandum on 4.11.2019. The administrative or executive power of the respondents/State to issue OM dated 4.11.2019 cannot be questioned.

3(ii) Learned counsel for the petitioners relied upon following para of the judgment in (2007) 6 SCC 196 titled **Union of India vs. A.S. Gangoli & others**:-

> *"11. There is considerable force in the submission of the appellant. Varying periods of weightage are added to the qualifying service of defence service officers to compensate for, or offset the disadvantage of early age of superannuation in defence service. The weightage of 7 years for a Group Captain is because he normally retires from Air Force Service at a comparatively early age of 52 years. If a Group Captain is permitted to prematurely retire so that he can be permanently absorbed immediately in a public sector undertaking where the retiring age is 58 or 60, the need to provide weightage disappears. Further, special provisions were made for such retirees under the circulars dated 17.3.1986 and 19.2.1987. They directed that premature retirement, to take up employment under PSUs, with the permission of the Government, will not entail forfeiture of service or retirement benefits. In such cases, the officer is deemed to have retired from the date of premature retirement and eligible to receive the retirement benefits, enumerated in those circulars. Therefore, the decision not to extend the benefit of weightage to those who retired prematurely for immediate permanent absorption in a PSU or autonomous body is a matter of policy of the government supported by logical reasons. So long as such policy is not manifestly arbitrary and does not violate any constitutional or statutory provision, it is not open to challenge."*

This judgment has no applicability for determining the point involved in the instant case. Also the judgment delivered by this Court in CWP No.1577/2018 was in the backdrop of facts as they existed at that time, where the State by way of OM dated 29.3.2013 had enhanced the retirement age of its blind employees from 58 to 60 years. Since all persons with physical disabilities constituted a homogeneous class, therefore, the benefit of enhancement in the age of superannuation extended by erstwhile H.P. Administrative Tribunal to certain other categories of persons with disabilities, was upheld. Situation in these writ petitions is different. State has now withdrawn OM dated 29.03.2013. OM dated 29.03.2013 cannot be saved on the strength of judgment delivered in CWP No.157/2018.

3(iii) A three judge Bench of Hon'ble Apex Court in ***State of Uttar Pradesh and others Vs. Hirendra Pal Singh & others,*** reported in (2011) 5 SCC 305, quashed the interim orders of the High Court, which had directed the Government to restore 62 years as the age of superannuation for Government pleaders. Hon'ble Apex Court held that fixation of the retirement age falls within exclusive domain and competence of the State and that Courts should not interfere with such decision, unless they were unconstitutional. Relevant extracts from para-8 are as under:-

> *"8. ..... So far as the issue of reduction of age from 62 to 60 years is concerned, it has not been brought to the notice of the High Court that it is within the exclusive domain of the State Government to reduce the age even in Government services. So in case of purely professional engagement, the age could validly be reduced by the State Government unilaterally."*

In the afore referred judgment, previous judgments in ***Bishun Narain Misra Vs State of U.P***. (AIR 1965 SC 1567), ***Roshan Lal Tandon Vs. Union of India*** (AIR 1967 SC 1889), ***K. Nagaraj Vs. State of A.P***. (AIR 1985 SC 551), were also noticed as per following extracts:-

> *"9. A Constitution Bench of this Court in Bishun Narain Misra v. The State of Uttar Pradesh & Ors., AIR 1965 SC 1567 held that new rule reducing the age of retirement from 58 to 55 years could neither be invalid nor could be held to be retrospective as the said rule was a method adopted to tide over the difficult situation which could arise in public services if the new rule was applied at once and also to meet any financial objection arising in enforcement of the new rule.*
>
> *10. In Roshan Lal Tandon v. Union of India & Ors., AIR 1967 SC 1889, a similar view has been reiterated by this Court observing that emoluments of the Government servant and his terms of service could be altered by the employer unilaterally for the reason that conditions of service are governed by statutory rules which can be unilaterally altered by the Government without the consent of the employee. (See also B.S. Vadera v. Union of India & Ors., AIR 1969 SC 118; The State of Jammu & Kashmir v. Triloki Nath Khosa & Ors., AIR 1974 SC 1; B.S. Yadav & Ors. v. State of Haryana & Ors., AIR 1981 SC 561; and State of Jammu & Kashmir v. Shiv Ram Sharma & Ors., AIR 1999 SC 2012).*
>
> *11. In K. Nagaraj & Ors. v. State of Andhra Pradesh & Anr. etc., AIR 1985 SC 551, this Court examined the amended provisions of Andhra Pradesh Public Employment (Regulation of Conditions of Service) Ordinance, 1983 by which the age of retirement was reduced from 58 to 55 years and this Court upheld the amended provisions being neither arbitrary nor irrational. The court further rejected the submission of the appellants therein that the said amended provisions would have retrospective application taking away their accrued rights. (See also State of Andhra Pradesh etc. etc. v. S.K. Mohinuddin etc. etc., AIR 1994 SC 1474).*
>
> *12. In view of the above, it is evident that even in government services where the terms and conditions of service are governed by the statutory provisions, the Legislature is competent to enhance or reduce the age of superannuation. In view of the above, it is beyond our imaginations as why such a course is not permissible for the appellant-State while fixing the age of working of the District Government Advocates."*

3(iv) It is well settled that in order for executive instructions to have the force of statutory rules, it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the constitution providing therefore. In the instant case the OMs in question have not been issued either under the authority conferred on the State Government by some statute or under some provision of the constitution, therefore, it has to be held in the nature of administrative instructions and not statutory rules. *Petitioners have no vested right to remain in Government employment upto the age of 60 years. Their entitlement to continue upto the age of 60 years was only under OM dated 29.03.2013, which stands withdrawn vide office OM dated 4.11.2019. Both the office memorandums were issued by the State in exercise of its administrative power. In (2004) 1 SCC 592, titled* ***Sureshchandra Singh and others Vs. Fertilizer Corporation of India Ltd and other,*** *Hon'ble Apex Court held that the Courts cannot issue a writ for enforcement of administrative instruction and that office memorandums are only administrative directions not having force of law.*

In P.U. Joshi and others Vs. Accountant General and others *(2003) 2 SCC 632, it was held that question relying to constitution pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions is all within the exclusive discretion and jurisdiction of the State subject to the limitation or restriction envisaged in the Constitution of India.*

3(v) Petitioners cannot insist for continuing in service upto the age of 60 years on the strength of OM dated 29.03.2013. This OM did not create any right much-less any vested right in their favour. It cannot be enforced in exercise of writ jurisdiction of this Court. More so when this OM has been withdrawn by the State by issuing another OM. The respondents/State had the power to issue the OM as well as the power to withdraw it later by issuing another OM. It has not demonstrated before us that OM issued on 4.11.2019 was unconstitutional.

The fixation of retirement age of persons with disabilities is within the domain of the State Government. Vide earlier OM dated 29.03.2013 the retirement age for the blind government employees was enhanced from 58 to 60 years. Benefit of OM dated 29.03.2013 was later accorded to certain other categories of differently abled persons. However OM dated 4.11.2019 has withdrawn OM dated 29.03.2013. As of now, age of retirement of persons with disabilities is 58 years. It is not the case of the petitioners that they have been discriminated with any other category. It is not the case of the petitioners that they have not been paid for the work they did while in service beyond the age of 58 years. It is also not the case of the petitioners that recovery of any kind is being effected from them pursuant to OM dated 4.11.2019. It is not the case of the petitioners that they have any vested right to continue in service till the age of 60 years. Petitioners have failed to point out as to how OM dated 4.11.2019 is illegal, arbitrary or unconstitutional.

Therefore we find no merit in these writ petitions and the same are dismissed accordingly. The parties are left to bear their own costs. Pending application(s), if any, shall also stand disposed of.

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

Mohan Lal ....Petitioner.

Vs.

Prem Chand and another .....Respondents.

CMPMO No.: 185 of 2020
Date of Decision: 07.07.2020

Code of Civil Procedure, 1908- Order VIII Rule 1- Filing of written statement- Time period of 30/90 days- Commencement of- Held, period of 30/90 days as stipulated in the provision is to be counted from date of service of defendant and not from date of his appearance made in the Court. (Para 11)

Cases refered:

Desh Raj Vs. Balkishan (D) through proposed LR Ms. Rohini, 2020 (1) Supreme 409

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

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

For the respondents: Mr. Gautam Sood, Advocate, for respondent No. 1.

Respondent No. 2 is *ex parte.*

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has assailed order dated 27.11.2019, passed by the Court of learned Civil Judge, Court No.-II, Una, H.P. in CMA No. 2474 of 2019, vide which, an application filed by the petitioner for permission to file the written statement stands dismissed.

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

Respondent No. 1 herein has filed a suit against the present petitioner as well as proforma respondent No. 2, which is pending adjudication in the Court of learned Civil Judge, Court No.-II, Una. For the purpose of placing on record his written statement, the petitioner herein

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

filed alongwith the written statement an application under Section 151 of the Code of Civil Procedure praying for permission to file the written statement.

3. The application was opposed by the plaintiff before the learned Court below, *inter alia,* on the ground that the service stood effected upon defendant No. 1, i.e., the present petitioner on 10.05.2018, whereas the application stood filed by him on 11.10.2018, which was not within the stipulated mandatory provisions as per the requirement of Order 8, Rule 1 of the Code of Civil Procedure. It was further the stand taken by the plaintiff in the reply filed to the application that the contention of the applicant in the application that the written statement was within the stipulated period of 90 days, was incorrect.

4. Vide impugned order, the application so filed by the present petitioner has been dismissed. While dismissing the application, it has been held by the learned Trial Court that the applicant claimed that he wanted to file the written statement within the stipulated period of 90 days, however, perusal of summons which stood served upon him demonstrated that he was duly served on 11.05.2018 and thereafter, he had put in appearance before the Court for the first time on 27.08.2018 through Counsel. On 11.10.2018, the application stood filed and it was not clear as to from which date, the applicant was counting the period of limitation. Learned Trial Court further held that the application stood filed two months later and, that too, with the prayer that the applicant intended to file the written statement within the stipulated period, whereas no prayer whatsoever for extension of time or for condonation of delay stood made in the application. On these grounds, learned Trial Court held that the application was not maintainable and accordingly, the same stood dismissed by the learned Trial Court.

5. Feeling aggrieved, the petitioner has filed this petition.

6. Learned Senior Counsel for the petitioner has argued that the order passed by the learned Trial Court is not legally sustainable as the Court has failed to appreciate that as from the date when the petitioner appeared before the Court, i.e., the date which was fixed by the learned Trial Court for the appearance of parties, the application was filed within the statutory period. He further submitted that even otherwise, a hyper technical approach was adopted by the learned Trial Court without appreciating that it is always in the interest of justice in case an endeavour is made to decide the case on merit. On these basis, he submitted that the order passed by the learned Trial Court be set aside and the written statement which stood appended by the applicant alongwith the application filed under Section 151 of the Code of Civil Procedure be ordered to be taken on record.

7. Learned counsel for the contesting respondent has argued that there is no infirmity in the order which has been passed by the learned Trial Court, because as from the date when the summons stood served upon the present petitioner, it was incumbent upon him to have had filed the written statement within the statutory period. He further argued that the application which stood filed under Section 151 of the Code of Civil Procedure was cryptic and vague. Nothing was mentioned in the application as to why the written statement could not be filed by the petitioner within the prescribed period. He further argued that the observations contained in the impugned order, as have been made by the learned Court below that there was no request made for extension of time were clearly borne out from the contents of the application, as it was not the case of the applicant in the application that for some *bonafide* reason he was not able to file the written statement in time, therefore, reasonable extension be granted. Learned counsel for respondent No. 1 has also relied upon para Nos. 20 and 21 of the judgment passed by the Hon'ble Supreme Court in ***Desh Raj*** Vs. ***Balkishan (D) through proposed LR Ms. Rohini,*** 2020 (1) Supreme 409, in which Hon'ble Supreme Court has held as under:

> *"20. Routine condonation and cavalier attitudes towards the process of law affects the administration of justice. It affects docket management of Courts and causes avoidable delays, cost escalations and chaos. The effect of this is borne not only by the litigants, but also commerce in the country and the public-in-general who spend decades mired in technical processes.*
>
> *21. It is obvious from the record that nothing prevented the appellant from filing the written statement through counsel or in person. He has, thus, failed to give any cogent reason for the delay and is unable to satisfy due diligence on his part though he is right in his submission that the High Court erroneously relied upon the ratio of Oku Tech (supra)."*

8. I have heard learned counsel for the parties and have also gone through the documents appended with the petition.

9. What has has happened in this case is that the notice stood served upon the present petitioner in the Civil Suit on 11.05.2018 informing him that the matter was listed for his appearance before the learned Trial Court on 27.08.2018. On the said date, the petitioner appeared before the learned Court below through counsel and a Memo of Appearance was also filed by learned counsel on behalf of the petitioner. On 27.08.2018, learned Trial Court passed the following order:

> *"Be listed for filing POA and filing WS on 01.11.2018 subject to limitation provided in CPC."*

10. In compliance to said order, when the petitioner filed his written statement before the learned Trial Court, he also filed an application under Section 151 of the Code of Civil Procedure, copy of which stands appended with the present petition as Annexure P-4, praying for permission to file the written statement within the stipulated period of 90 days. Here it is not the case where despite reasonable opportunities, the petitioner failed to file the written statement and then moved an application under Section 151 of the Code of Civil Procedure for extension of time to do so. What has happened is that in compliance to order dated 27.08.2018, vide which learned Trial Court ordered listing of the case for the purpose of filing the Power of Attorney as well as written statement on 01.11.2018, subject to limitation provided in the Code of Civil Procedure, petitioner herein filed his written statement and as a matter of abundant precaution also moved an application under Section 151 of the Code of Civil Procedure for permission to file the same within the stipulated period of 90 days. It is apparent that the reference of 90 days in the application was on account of the notion in the mind of the petitioner that it was from 27.08.2018 that the period of 90 days was to be counted.

11. Be that as it may, it is a matter of record that the petitioner was served in the Civil Suit only on 11.05.2018 and the application alongwith written statement was filed before the learned Trial Court on 11.10.2018. Admittedly, the written statement was not filed within the period of 90 days as from the date of service of the present petitioner, yet the same was filed by him before the learned Trial Court before the date for which the matter was ordered to be listed by it after the petitioner put in appearance before it on 27.08.2018. Incidentally, on 27.08.2018, learned Trial Court posted the matter for 01.11.2018 for the purpose of filing the written statement, subject to limitation provided in the Code of Civil Procedure, whereas the period of three months as from the date of service was over even as on that date itself. The delay in filing the written statement, in the facts of the present case, was not all that inordinate and the plaintiff could have been duly compensated by the learned Trial Court by allowing the written statement to be taken on record, subject to payment of cost by the petitioner. However, learned Trial Court rather than doing this, adopted a hyper-technical approach and went on to dismiss the application, which was filed under Section 151 of the Code of Civil Procedure by the petitioner herein alongwith the written statement, with the prayer to submit the written statement. As limitation is to be counted from the date summons stood served upon the defendants, the written statement was not filed within 90 days, yet in the peculiar facts of this case, the order vide which the application which was filed under Section 151 of the Code of Civil Procedure stands dismissed and the written statement has not been taken on record, *inter alia,* on the ground that there was no request made in the application for extension of time, is not sustainable in law. This I say for the reason that as I have already mentioned above, learned Court below erred in not appreciating that in what context the application stood filed by the applicant. Further, even if there was no request made expressly and explicitly in the application for extension of time in filing the written statement, yet the Court could have and should have had exercised discretion vested it it under Section 151 of the Code of Civil Procedure to do the needful. In the alternative, the Court could have had called upon the applicant to move an appropriate application under Section 148 of the Code of Civil Procedure.. The Court bows to the observations which have been made by the Hon'ble Supreme Court in the judgment which has been relied upon by the learned counsel for the respondent, however, in the facts of this case, it cannot be said that there was inordinate delay on the part of defendant No. 1 in filing the written statement. This Court reiterates that it is the duty of the Court to make an endeavour that the matters should be decided on merit. The procedures are there to facilitate the enhancement of cause of justice and not to throttle the same. Yes, there is merit in the contention which has been so made by learned counsel for the respondent that the application filed under Section 151 of the Code of Civil Procedure for permission to file the written statement was cryptic, but then it is common knowledge as to how these applications are prepared before the learned Courts below and it would be naive on the part of this Court to believe that the application was drafted strictly in terms of the instructions imparted to learned counsel by the present petitioner. In the peculiar facts of this case, it is reiterated that it cannot be said that there was any inordinate delay in filing the written statement. Learned Court below should have had adopted an approach to advance the cause of justice by ordering the placing of written statement on record and plaintiff could have been compensated by levying cost upon the defendant No. 1. By not doing this and by dismissing the application filed under Section 151 of the Code of Civil Procedure by the petitioner herein, indeed, grave injustice has been caused to the present petitioner, by way of passing the impugned order, which is not sustainable in law.

12. In view of the observations made hereinabove, the petition is allowed. Order dated dated 27.11.2019, passed by the Court of learned Civil Judge, Court No.-II, Una, H.P. in CMA No. 2474 of 2019 filed in Civil Suit No. 27/2018 is set aside and it is ordered that the written statement which has been filed by the present petitioner, shall be taken on record, subject to payment of cost of Rs.10,000/- by the petitioner to respondent No. 1/plaintiff. It is clarified that in case by the next date of hearing, which is fixed before the learned Trial Court, cost is not paid by the petitioner to respondent No. 1, i.e., the plaintiff before the learned Trial Court, then the order passed by the learned Trial Court shall automatically revive. It is further ordered that the cost shall be paid by the petitioner to respondent No. 1 by way of a Bank Draft, which shall be drawn in the name of the plaintiff and the learned Trial court is directed that the payment of cost in no other mode shall be accepted by it to be a proof of cost having been paid.

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

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

1. CWPOA No. 231 of 2019

Sh. Amar Nath and others ....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

2. **CWPOA No. 237 of 2019**

Sh. Jeet Ram and others ....Petitioners.

Vs.

State of Himachal Pradesh and others ....Respondents.

CWPOA No. 231 of 2019 a/w CWPOA No. 237 of 2019
Reserved on: 25.06.2020
Date of Decision: 15.07.2020

Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972 – Rule 5(1)- Held, ex-serviceman irrespective of the fact whether he has joined the Armed Forces during emergency or not, is entitled for grant of benefit of approved military service towards fixation of pay. (Para 15)

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

For the petitioner(s): M/s Onkar Jairath & Shubham Sood, Advocates.

For the respondents: M/s Somesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General.

Ajay Mohan Goel, Judge:

As common issues of fact and law are involved in both these petitions, they are being disposed of by a common judgment.

2. Petitioners in these two petitions are Ex-servicemen. After being released from the Armed Forces, they joined the civil employment and are presently engaged as Lecturers, Trained Graduate Teachers, Art and Craft Teachers and Language Teachers respectively in the Department of Education. The details of the posts being held by them as well as their initial dates of appointment on contract basis and thereafter regularization are as under:

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

CWPOA No. 231 of 2019

Sr.No.	Name of petitioner	Post	Date of appointment on contract basis	Date of regularization
1.	Sh. Amar Nah, S/o Sh. Bidhu Ram	Art & Craft Teacher	28.01.2014	02.06.2017
2.	Sh. Manoj Kumar, S/o Late Sh. Purshottam Singh	Language Teacher	20.09.2013	29.05.2017
3.	Sh. Satish Chand	Language Teacher	15.12.2011	15.05.2017

CWPOA No. 237 of 2019

Sr.No.	Name of petitioner	Post	Date of appointment on contract basis	Date of regularization
1.	Sh. Jeet Ram, S/o Sh. Bidhu Ram	TGT (Arts)	20.12.2008	23.06.2015
2.	Sh. Dinesh Kumar, S/o Sh. Kishori Lal	TGT(Arts)	03.09.2014	02.06.2017
3.	Sh. Anil Kumar, S/o Sh. Sunit Chand	TGT (Arts)	22.09.2012	02.06.2017
4.	Sh. Meen Chand, S/o Sh. Chuni Lal	TGT(Arts)	03.03.2014	02.06.2017
5.	Sh. Udai Singh, S/o Sh. Uttam Singh Dhadwal	Lecturer (School Cadre) (English)	21.08.2012	18.05.2017
6.	Sh. Kewal Singh, S/o Sh. Surjan Ram	Lecturer (School Cadre) (Political Science)	03.08.2012	18.05.2017
7.	Sh. Jasbir Singh Katoch, S/o Sh. Randhir Singh Katoch	TGT (Arts)	27.12.2008	23.06.2015
8.	Sh. Parveen Kumar, S/o Sh. Rikhi Ram	TGT (Arts)	18.03.2014	01.06.2017
9.	Sh. Rajesh Guleria, S/o Sh. Kamer Chand Guleria	TGT (Arts)	25.09.2012	01.06.2017
10.	Sh. Baldev Singh, S/o Sh. Ravan	TGT (Arts)	26.12.2008	23.06.2015
11.	Sh. Krishan Dev, S/o Sh. Inder Pal	TGT (Arts)	22.03.2010	22.06.2015
12.	Sh. Manjeet Singh, S/o Sh. Rajmal	TGT(Arts)	22.03.2014	02.06.2017

13.	Sh. Surender Kumar, S/o Sh. Kishore Chand	TGT(Arts)	07.01.2009	22.06.2015
14.	Sh. Karnail Singh, S/o Sh. Nathu Ram	TGT (Arts)	03.01.2009	22.06.2015
15.	Sh. Parveen Singh, S/o Sh. Faquir Singh	TGT (Arts)	15.03.2014	02.06.2017
16.	Sh. Swarn Kumar, S/o Sh. Salig Ram	TGT (Arts)	10.03.2014	21.05.2017
17.	Sh. Satish Kumar, S/o Sh. Nidhi Ram	TGT (Arts)	08.10.2012	02.06.2015
18.	Sh. Ashok Kumar, S/o Late Sh. Gian Chand	TGT(Arts)	24.09.2012	06.06.2017
19.	Sh. Kamlesh Kumar, S/o Sh. Vidya Sagar	TGT(Arts)	10.03.2012	01.06.2017
20.	Sh. Som Dutt, S/o Sh. Dhani Ram	TGT (Arts)	06.03.2009	23.06.2015
21.	Sh. Paramjit Thakur, S/o Sh. Godham Ram	TGT (Arts)	26.09.2012	02.06.2017
22.	Sh. Sarwan Kumar, S/o Sh. Moti Ram	TGT (Arts)	20.12.2008	23.06.2015
23.	Sh. Ramesh Kumar, S/o Sh. Dharam Singh	TGT (Arts)	20.12.2008	23.06.2015
24.	Sh. Varjeet Mankotia, S/o Sh. Milap Singh Mankotia	TGT (Arts)	20.12.2008	23.06.2015
25.	Sh. Vikas Sood, S/o Sh. Hem Raj	TGT (Arts)	21.09.2012	02.06.2017
26.	Sh. Ram Pal, S/o Sh. Mansha Ram	TGT (Arts)	20.12.2008	23.06.2015
27.	Sh. Manoj Kumar, S/o Sh. Ram Dass	TGT (Arts)	17.09.2012	01.06.2017

3. Facts necessary for the adjudication of these petitions are as under:

In the State of Himachal Pradesh, there are invogue the Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972 (hereinafter referred to as 'the 1972 Rules'). Rule 5(1) of the abovementioned Rules provided as under:

> ***"5. Seniority and Pay:*** *(1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant Rules, shall count towards fixation of pay and seniority in that service. (This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under State/Central Govt. against reserved posts)."*

4. The constitutionality of these Rules was assailed before this Court by way of CWP No. 488 of 2001, titled as *Shri V.K. Behal and others Vs. State of H.P. and others,* which was allowed by the Hon'ble Division Bench of this Court vide judgment dated 29.12.2008 in the following terms:

> *"In view of the above discussion, the writ petition is allowed. The provision of Rule 5(1) of the Rules are read down and they are held to be unconstitutional in so far as they give benefit of counting the past army service towards seniority in civil employment in case of ex-servicemen who have not joined the Armed Forces during the period of emergency. It is also held that the benefit of such service cannot be given from a date prior to the date when the ex-serviceman attains the minimum educational eligibility criteria prescribed in the rules. Consequently, the seniority list Annexure P-3 is held to be illegal and is accordingly quashed and the respondents are directed to re-frame the same in accordance with the directions issued hereinabove. There shall be no order as to costs."*

5. Said judgment was assailed before the Hon'ble Supreme Court by way of Civil Appeal No. 011060 of 2017, titled as *R.K. Barwal and others Vs. The State of Himachal Pradesh and others.* Hon'ble Supreme Court vide judgment dated 25th August, 2017, dismissed the appeal by upholding the judgment passed by the Hon'ble Division Bench of this Court.

6. The effect of the judgment passed by this Court was that Rule 5(1) of the 1972 Rules (*supra*) was held to be unconstitutional, as far as it provided for granting the benefit of counting the benefit of past military service towards seniority in civil employment in case of ex-servicemen, who had not joined the Armed Forces during the period of emergency was concerned.

7. Incidentally, Rule 5(1) of the 1972 Rules, in addition to giving benefit of counting the past Army service towards seniority in civil employment, also conferred the benefit of counting the said period in the matter of fixation of pay. As far as the conferment of benefit of fixation of pay by counting past military service is concerned, the same was neither discussed nor touched by the Hon'ble Division Bench of this Court in *Sh. V.K. Behal's case (supra).*

8. Another Hon'ble Division Bench of this Court in CWP No. 4654 of 2013, titled as *Avtar Singh Dyal Vs. H.P. State Electricity Board Ltd.* and CWP No. 4708 of 2013, titled as *Salinder Singh Vs. H.P. State Electricity Board Ltd. & Ors.* reiterated that the Ex-servicemen were entitled for the grant of benefit of approved military service towards fixation of pay. Relevant portion of said judgment is quoted hereinbelow:

> *".....Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972, reads thus: "*
>
> *(1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant rules, shall count towards fixation of pay and seniority in that service. This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under the State/Central Govt. against reserved posts."*
>
> *8. In case the aforesaid rule is minutely analyzed, it would be seen that it comprises of two parts, 1st pertains to counting of service for the purpose of fixation of pay and 2nd pertains to counting of service for the purpose of seniority.*
>
> *9. The question therefore, required to be determined is as to whether this court while deciding V. K. Behal's case (supra) declined all the benefits provided under Rule 5(1) (supra) to those exservicemen, who admittedly had joined the Armed*

Forces as a career. In our humble and considered opinion the court has only adjudicated upon the benefit of counting of past army service towards seniority in civil employment and has not adjudicated upon the conferment of benefit of past army service in so far it pertains to fixation of pay. In fact this claim was neither agitated by the petitioners therein nor adjudicated upon by this court. Rather what appears from the perusal of judgment is that even the petitioners therein had no objection in case financial benefit like fixation of pay was granted to the ex-servicemen, as would be clear from para-3 of report, which reads as follows:-

"3. The main contention raised on behalf of the petitioners by Sh.Dalip Sharma is that the Rules are unconstitutional because they give benefit of even those ex-servicemen who had not joined service in the armed forces during the period of emergency. According to the petitioners, the persons who join the armed forces when the situation in the Country is normal do not do anything extra-ordinary and they join the armed forces like any other career and therefore, there is no rationale for giving them benefit of the service rendered by them in the armed forces for the purposes of pay and seniority. Sh. Dalip Sharma, learned counsel for the petitioners had urged that he is not in any manner arguing that the ex-servicemen do not form a separate class. He submits that to satisfy the tests of Article 14 not only should the classification be justified but there should be a reasonable nexus with the object sought to be achieved. It is his submission that if the object is to rehabilitate the ex-serviceman this object is served by providing reservations to them. However, according to him, there is no justification in granting them the benefit of seniority by adding the period of service rendered by them in the Army. He submits that once the persons are recruited from various sources and become members of one service no further distinction can be made between them on the ground of the past service rendered in a totally unrelated employment. In the alternative he submits that the benefit, if any, should be restricted to grant of financial benefits like fixation of pay only and the rights of other individuals who joined service much before the ex-servicemen cannot be jeopardized by giving the ex-servicemen benefit of adding the service rendered by them in the armed forces for reckoning their seniority. According to him, the case of ex-servicemen who joined armed forces during the period of emergency when the Nation was facing foreign aggression or when the sovereignty and integrity of the Country was at stake, stands on a completely different footing and the exservicemen who joined during emergency have to be treated as a different class. The benefit given to such ex-servicemen who joined during emergency cannot be extended to the person who joined service during normalcy. In the alternative it is urged that even if the Rule is held to be valid the deemed date of appointment cannot be from a date prior to such persons acquiring the minimum educational eligibility criteria prescribed in the Rules."

10. Notably even this court did not find any illegality in so far as the pay of ex-servicemen was protected, as would be clear from the following observations:-

"10. There may exist an intelligible criteria for providing reservation to ex-servicemen. The object is also reasonable i.e.. to rehabilitate the ex-servicemen but this object can be achieved by providing reservations to them. Nobody is against such reservation. Their pay can also be protected. The problem arises when there is a conflict between persons from

> *the civil society who have joined service much earlier than the ex-servicemen but then they are placed lower when the ex-servicemen who are given benefit of their past service regardless of the fact whether they have joined during emergency or not."*
>
> *11. Once this is the position, the respondents cannot under pretext of judgment in V.K.Behal's case (supra), being sub-judice before the Hon'ble Supreme Court, deny to the petitioners the benefit of approved military service for counting the same towards fixation of pay.*
>
> *12. In so far as the question of counting the same towards the seniority is concerned, the same shall essentially have to abide by the decision of the apex court in V.K.Behal's case. In the event of the Hon'ble Supreme Court ultimately deciding in favour of the exservicemen, then needless to say that the same benefit shall also have to be extended to the petitioners.*
>
> *13. With these observations, the petitions are partly allowed. The respondents are directed to grant the benefit of approved military service towards fixation of pay after considering their cases against the vacancies of ex-servicemen, which have arisen in the year 2012."*

9. As already stands mentioned hereinabove, the judgment passed by the Hon'ble Division Bench of this Court in *V.K. Behal's* case has been upheld by the Hon'ble Supreme Court.

10. The grievance of the petitioners before this Court is that the benefit of approved military service is not being given to them towards fixation of their pay by the State on the pretext of Communications Annexure A-5 and A-6 appended with the petition.

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

12. Annexure A-5 is the Notification issued by the Department of Personnel, Government of Himachal Pradesh dated 29th January, 2018, vide which, Sub-rule(1) of Rule 5 of the 1972 Rules has been amended in the following terms:

> *"...Amendment of rule 5. 2. For sub-rule(1) of the rule 5 of the Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal State Non-Technical Services) Rules, 1972, for the existing provisions of Sub rule (1), the following shall be substituted, namely:-*
>
> *"Only the period of approved military service rendered after attaining the minimum age and qualification prescribed for appointment to the service concerned, by the candidate(s) appointed against reserved vacancy under the relevant rules, shall count towards fixation of pay in that service at the time of first civil appointment against reserved vacancy. This benefit shall not be admissible in subsequent appointment(s) of Ex-Servicemen who are already employed under the State/Central Government against reserved post(s):*
>
> *Provided that such fixation of pay will be in accordance with the instructions issued by the Finance Department from time to time."*

13. As far as Annexure A-6 is concerned, the same is a Communication dated 30th January, 2018 issued by the Chief Secretary, Government of Himachal Pradesh to all the Administrative Secretaries of the Government of Himachal Pradesh as well as other functionaries mentioned therein to the effect that in terms of the judgment of this Court in *V.K. Behal's case,* as upheld by the Hon'ble Supreme Court, the benefits of seniority extended under the provisions of the 1972 Rules and Ex-servicemen (Reservation of Vacancies in the Himachal Pradesh Technical Services)

Rules, 1985, are to be reviewed and seniority lists in all cadres are to be re-framed accordingly showing position as on 29.12.2008, when this Court had read down and declared the Rule 5(1) of the 1972 Rules as unconstitutional, in so far as it gives benefit of counting of past Army service towards seniority in civil employment in case of Ex-servicemen, who have not joined the Armed Forces during the period of emergency. This communication further provides as under:

> *".....However, the Ex-Servicemen appointed against the vacancies reserved for Ex-Servicemen in civil employment shall be entitled to avail the benefit of fixation of pay from a date when the Ex-Servicemen attain minimum age and educational qualification eligibility criteria prescribed in the rules. The fixation of pay will be in accordance with the instructions issued by the Finance Department from time to time. The above referred instructions dated 17.05.2013 are rescinded accordingly."*

14. Coming to the facts of these petitions, the petitioners herein have reconciled with the fact that the benefit of approved military service cannot be given to them for the purpose of seniority in the course of their civil employment. They are only praying for grant of benefit of their approved military service for the purpose of fixation of their pay.

15. In my considered view, the act of the respondent-State of not giving benefit of approved military service towards fixation of pay to the petitioners is arbitrary and not sustainable in law. This right stands conferred upon the petitioners by virtue of provisions of Sub-rule (1) of Rule 5 of the 1972 Rules. This right still exists in the Rules in issue. Though Hon'ble Division Bench of this Court in *V.K. Behal's case (supra)* has held the grant of benefit of approved military service towards fixation of seniority in the case of Ex-servicemen, who did not join Armed Forces in emergency to be unconstitutional, but the Hon'ble Division Bench did not comment upon that part of Sub-rule (1) of Rule-5, which dealt with the grant benefit of approved military service towards fixation of pay. Not only this, the right of an Ex-serviceman to be entitled to the benefit of approved military service towards fixation of pay has been upheld by the Hon'ble Division Bench of this Court in *Avtar Singh Dayal's case (supra),* meaning thereby that this issue is no more *res integra* that in terms of Sub-rule (1) of Rule-5 of the 1972 Rules, an Ex-serviceman, irrespective of the fact whether he has joined the Armed Forces during emergency or not, is entitled for the grant of benefit of approved military service towards fixation of pay.

16. Coming to Annexures A-5 and A-6 appended with the present petition, a perusal of the same demonstrates that the amendment which has been carried in Sub-rule (1) of Rule 5 vide Annexure A-5, does not at all affects the rights of the present petitioners to claim the benefit of approved military service towards fixation of pay. In fact, what the Government of Himachal Pradesh has done by issuing Notification dated 29th January, 2018, is this that Sub-rule (1) of Rule 5 of the 1972 Rules has now been brought in harmony with the judgment of the Hon'ble Division Bench of this Court in *V.K. Behal's case (supra).* The provision of grant of benefit of approved military service for fixation of pay was there in the unamended 1972 Rules and the same has not been altered even by the amendment which has been carried out. This Court reiterates that Notification dated 29th January, 2018 does not adversely affects the right of the petitioners for the grant of benefit of approved military service towards fixation of pay. Similarly, Annexure A-6 also nowhere creates any impediment towards the said right of the petitioners.

17. During the course of hearing, an argument was advanced by the learned Additional Advocate General to the effect that the petitioners shall be entitled to the grant of benefit of approved military service towards fixation of their pay prospectively from 29th January, 2018 onwards. In my considered view, the contention so raised on behalf of the State by the learned Additional Advocate General is worth rejection. The service conditions of Ex-serviceman, who joined civil employment are, *inter alia,* determined by the provisions of 1972 Rules. The Rule position as it existed at the time when the petitioners joined their service was that they were entitled to the grant of benefit of approved military service towards fixation of pay. It is not as if this right has been conferred upon them only by way of amendment, which has been incorporated vide Annexure A-5. In this view of the matter, there is no merit in the contention of the State that the petitioners are entitled for the relief prospectively.

18. Accordingly, these writ petitions are allowed and the respondents are directed to grant the benefit of approved military service towards fixation of pay in favour of the petitioners as from the date of their joining civil employment. It is ordered that actual benefit shall be conferred upon the petitioners. In case entire emoluments are being paid to them within a period of 90 days from today, the State shall not be liable to pay any interest on the amount, as may be due to the petitioners, but in the event the emoluments not being paid within a period of 90 days from today,

the State shall also pay simple interest @6% per annum on the due amount to each of the petitioner, as from the date of judgment.

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

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

Varsha Gangta ....Petitioner.

Vs.

Himachal Pradesh Public Service Commission and another .....Respondents.

CWP No.: 2870 of 2019
Reserved on: 30.06.2020
Date of Decision: 06.07.2020

Constitution of India, 1950- Articles 14 & 226- Selection to posts of Scientific Officers with H.P. State Pollution Control Board- Challenge to syllabus prescribed for written examination by the H.P. Public Service Commission (Commission)- Held, as per R&P Rules, direct recruitment to the posts was to be made on basis of viva-voce test or if Commission or other Recruiting Authority considered it necessary by way of written examination etc.- The standard of test and its syllabus was to be prescribed by the Commission- No other candidate objected to standard or syllabus prescribed for the post except the petitioner- She sent representation against syllabus at extremely belated stage- Standard and syllabus of the test was not out of context vis-à-vis essential qualifications prescribed- Examination was not out of syllabus – No allegations of malafides are raised in petition- Act of respondents cannot be upset simply because candidate feels that syllabus was purportedly loaded towards a particular stream- Petition dismissed. (Para 13 to 18 & 25)

Cases referred:

Union of India and another Vs. Talwinder Singh (2012) 5 Supreme Court Cases 480;
Prabhu Dayal Sesma Vs. Rajasthan Public Service Commission (1991) 2 RLW 93;
Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and others (2010) 3 Supreme Court Cases 732;

Whether approved for reporting?[3] *Yes.*

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate,
with Mr. Rakesh Thakur, Advocate.

For the respondents: Mr. Vikrant Thakur, Advocate, for respondent No. 1.

Mr. Maan Singh, Advocate, for respondent No. 2.

Ajay Mohan Goel, Judge *(Oral):*

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

"(i) That appropriate writ order or direction may very kindly be issued directing the respondent to amend the syllabus by providing equal opportunities to all the three streams which are eligible for the post i.e., Scientific Officer in H.P. State Pollution Control Board under the Department of Environment Science and Technology, by providing equal marks for the written screening test for Chemistry, Environment Science and Microbiology, in the interest of law and justice.

(ii) Entire record pertaining to the case may very kindly be summoned from the respondent.

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

(iii) Any other order which this Hon'ble Court deems fit in the facts and circumstances of the case may very kindly be also passed in favour of the petitioner."

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

Vide Advertisement No. 3/2019, dated 21st February, 2019 (Annexure P-1), respondent No. 1 invited applications from eligible candidates for filling up various posts in different Departments of Himachal Pradesh Government. This included the post of Scientific Officer, Class-I (Contract Basis) in Himachal Pradesh State Pollution Control Board under the Department of Environment Science and Technology. As per Advertisement, the candidate was to possess requisite essential qualification prescribed for the post for which he/she intended to apply as on closing date, i.e., 13th March, 2019 for submission of Online Recruitment Applications on the Website of respondent No. 1. The number of posts of Scientific Officer, Class-1, which were advertised vide Advertisement (Annexure A-1) were four and these were all un-reserved posts. The posts were advertised in the Pay Band of Rs.10,300-34800/-+Rs.5400/- Grade Pay. The essential qualification for the post in issue was as under:

*"**(a) Essential Qualification:***

1st Class M.Sc. Degree in Chemistry/Environmental Science/Micro-Biology with a Bachelor's Degree in Basic Science from a recognized university/institution as a regular student or Bachelor Degree in Chemical Engineering or Bio-Chemical Engineering.

***(b) Desirable Qualification:** Knowledge of customs/manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions, prevailing in Himachal Pradesh."*

As per the petitioner, as she was eligible for the post in issue, she applied for the same. According to her, neither in the Recruitment and Promotion Rules for the post in issue, which stand appended with the petition as Annexure P-2 nor in the Advertisement there was any mention with respect to the pattern and syllabus for the written screening test. In this background, the petitioner first made inquiries from the employer, but she was referred to respondent No. 1 and accordingly, she kept on making inquiries as to what would be the syllabus of the written screening test from respondent No. 1. According to her, right from the month of March, 2019 onwards, she was intimated by respondent No. 1 that they were consulting with Himachal Pradesh State Pollution Control Board and it is the employer, who would finalize the syllabus and thereafter, the same would be made known to the eligible candidates. However, as per the petitioner, no intimation with respect to the syllabus was given up to the month of June, 2019 and thereafter, she stopped making inquiries in this regard. According to her, respondent No. 1 uploaded the syllabus for the post in issue on its Website somewhere either in the end of the month of June, 2019 or in the month of July, 2019, which came to the notice of the petitioner in the month of August, 2019. After perusing the syllabus, which stands appended with the petition as Annexure P-3, she found that the screening test was to be of 100 marks, out of which, there were to be multiple choice questions of 80 marks, for which syllabus was given. Besides this, 10 questions were to be about General Knowledge of Himachal Pradesh and 10 questions were to be about National/International affairs. Petitioner was astonished and surprised to see that the syllabus of 80 marks predominantly consisted of Chemistry Stream, despite the fact that persons who were possessing 1st Division in M.Sc. Environment Science/Microbiology were eligible for the post in issue. According to the petitioner, the syllabus settled for the purpose of Screening Test from Chemistry stream, was to benefit the candidates who had done M.Sc. in Chemistry, whereas according to her, the syllabus should have been equal from all the three streams, i.e., Chemistry, Environment Science and Microbiology. She made a representation to the respondents on 27th September, 2019 (Annexure P-4), but without paying any heed to her representation, the respondents declared the date of Screening Test vide Press Note dated 1st October, 2019 to be held on 18th October, 2019, which thereafter vide Press Note dated 4th October, 2019 (Annexure P-6) was preponed to 16th October, 2019. Again a reminder was sent by the petitioner with regard to the discrepancy in the syllabus vide Annexure P-7 on 11th October, 2019, but the same was ignored by the respondents leaving the petitioner with no choice but to approach the Court.

3. Petitioner challenges the syllabus so prescribed by the respondents, *inter alia*, on the ground that the same was violative of settled norms of service jurisprudence, as once persons having 1st Division in M.Sc. Chemistry/Environment Science and Microbiology were eligible for appointment against the post in question, then the syllabus should have been proportionate and equal for all the streams, so that none of the stream was unduly benefited. The act of the respondents of not doing so was thus bad in law. Further as per the petitioner, initially respondent No. 1 was asking respondent No. 2 to prescribe the syllabus, but as respondent No. 2 declined to do

so, respondent No. 1 itself prepared and prescribed the same, which led to the discrepancy in the syllabus, which as per the petitioner was bad and therefore, there was a need to redraw the Syllabus. Further as per the petitioner, the syllabus, as settled, benefited the candidates from Chemistry background and discriminated the candidates from Environment Science and Microbiology background and, therefore also, the act of the respondents was bad as fair and equal treatment was not given to all in the matter of employment. It is on these grounds that act of the respondents stands assailed in this petition.

4. Replies to the petition stand filed by the respondents. Respondent No. 2 in its reply has taken the stand that requisition to fill up four posts of Scientific Officers with respondent No. 2 was sent to respondent No. 1 and said respondent advertised the posts in issue alongwith other posts vide Advertisement No. 3/2019 (*supra*). Respondent No. 2 has further mentioned in its reply that the syllabus for conducting the Screening Test for recruitment to the post in issue was finalized by respondent No. 1 in terms of Column No. 15 of the Recruitment and Promotion Rules, which provides that selection for appointment to the post in case of direct recruitment shall be made on the basis of Viva-Voce test or if the Himachal Pradesh Public Service Commission or other recruiting authority considers necessary or expedient, by written test or practical test, the standard/syllabus etc. of which will be determined by the Commission or the other recruiting authority, as the case may be. As per respondent No. 2, the syllabus for selection process of post in issue was finalized by respondent No. 1 in consultation with the subject matter experts. It is further the stand of said respondent that a meeting to finalize the syllabus for recruitment to the post of Scientific Officer and Junior Scientific Officer was convened by respondent No. 1 on 12.04.2019, wherein, representative of respondent No. 2 was also present. As essential qualification for the post contained multiple disciplines, therefore, the Commission consulted the subject matter experts to finalize the syllabus and the syllabus was finalized and published by the Himachal Pradesh Public Service Commission on its Website. Said respondent has appended with its reply the minutes of the meeting held on 12.04.2019, *inter alia,* for the post of Scientific Officer, Class-1 as Annexure R2/2. It further stands mentioned in the reply that respondent No. 1 finalized and published the syllabus for the post of Scientific Officer, whereas, recruitment to the post of Senior Scientific Officer, which post was also advertised by the Public Service Commission vide same Advertisement, was withdrawn on administrative grounds.

5. No rejoinder has been filed by the petitioner to the reply filed by respondent No. 2.

6. In its reply filed by respondent No. 1 to the writ petition, the Commission denied the allegations of the petitioner. The mode and manner in which the syllabus stood prescribed stands mentioned in para Nos. 4 and 5 of the preliminary submissions, which are reproduced hereinbelow:

> *"5. That it is amply clear that the essential qualification(s) for the post of Scientific Officer is diverse. Therefore, it wasn't feasible to prescribe syllabus from amongst all E.Q. for the said post. Separate syllabi for M.Sc. Degree holders in Chemistry/Environment Science/Microbiology would have been disadvantageous to candidates. As the expert committee was of th opinion that the candidate of one stream will be completely unfamiliar to Masters' level syllabus of other steam, whereas at the Graduation level, candidates of all streams have read the common subjects. Having the syllabus prescribed on Graduation level basis shall provide level playing field to all the candidates. Apart from 80 multiple choice questions covering essential qualification(s) for the said post, 10 questions of General Knowledge of H.P. and 10 questions consisting of General Knowledge of National/International affairs were prescribed.*
>
> *5. That the syllabus for the post of Scientific Officer has been prescribed by a Committee of subject experts taking into consideration Essential Qualification(s) for the said post. The E.Q. for the said post also includes that candidates should possess Bachelor's degree in Basic Science, which clearly transpires that they had studied Chemistry at Graduation level. Committee of subject experts have taken this fact into account and accordingly prescribed common syllabus out of the syllabus of Bachelor's degree level which was deemed to be studied by all candidates. Hence, the syllabus for the said post was rightly prescribed by the replying respondent and no injustice has been done to any candidates including petitioner by replying respondent."*

It is further borne out from the reply filed by the said respondent that in response to the Advertisement in issue, 1189 Online applications were received and 1015 candidates were admitted provisionally on claim basis. Computer based Screening Test for the post in issue was conducted on 16th October, 2019 at various examination centres in the State and 405 candidates appeared in the said test. As per the respondent-Commission, the syllabus for the post in issue was finalized by the Commission in terms of the provisions contained in the Recruitment and Promotion Rules for the post in issue in general and Column No. 15 thereof in particular. Syllabus for the post in issue was uploaded on the site of the Commission on 16th May, 2019 after finalization of the same for information of all concerned and the desirous and eligible candidates had five months period for preparation as from the date of uploading of syllabus for the post in issue, test for which was conducted on 16th October, 2019. As per respondent No. 1, as the petitioner was working as a Junior Scientific Officer with respondent No. 2, the intent of the petitioner was to intentionally delay recruitment process, as but obvious, Scientific Officers, who were to be recruited, were to become senior to her after their appointment. Further, as per respondent No. 1, it was fully competent to prescribe the syllabus for any post, where no syllabus was prescribed in the Recruitment and Promotion Rules. The syllabus for the post in issue was uploaded on the Commission's Website on 16th May, 2019 after finalization of the same for information of all concerned and the representation of the petitioner was considered and not found worthy of merit. It is further mentioned in the reply that the date of test was pre-poned on account of administrative reasons. There was no co-relation between recruitment to the post of Senior Scientific Officer and Scientific Officer, as number of candidates who had applied for the post of Scientific Officer was comparatively higher than Senior Scientific Officer and a Screening Test thus for this post was inevitable for short listing candidates. It is further the stand of the said respondent that a meeting was held under the Chairmanship of Under Secretary, Himachal Pradesh Public Service Commission on 12th April, 2019 for prescribing the *syllabi* for various posts of respondent No. 2, including that of Scientific Officer and as the Committee was unable to decide the *syllabi* for these posts, therefore, the Committee unanimously decided to consult subject matter experts for prescribing *syllabi* for the post in issue. On these basis, said respondent denies the claim of the petitioner.

7. Petitioner in her rejoinder reiterated the stand taken in the petition, including the fact that the syllabus was prescribed just to give advantage to the persons from the Chemistry stream. As per the petitioner, the entire process deserved quashing as fair opportunity was not given to all eligible candidates.

8. Learned Senior Counsel for the petitioner has argued that the syllabus which was prescribed by the respondent-Commission was heavily loaded in favour of Chemistry stream, which resulted in grave injustice to the candidates of other streams, like the petitioner. He argued that the reply filed by respondent No 1 was vague, as no details were given as to who ultimately prescribed the syllabus and who set the papers, on the basis of said syllabus. He argued that the entire process was shrouded with suspicion and, therefore, the same deserved to be quashed and set aside. He stated that as the process adopted by the respondent was not fair, therefore, this Court should direct the respondent-Commission to produce the entire record to demonstrate as to how the syllabus was set, who set the syllabus and who set the papers. No other point was urged. He also relied upon the judgment of Rajasthan High Court in *Prabhu Dayal Sesma Vs. Rajasthan Public Service Commission (1991) 2 RLW 93.*

9. On the other hand, learned counsel appearing for respondent No. 1 while vehemently opposing the petition argued that there was no merit in the petition as entire claim of the petitioner was without any valid genesis. He argued that the syllabus in issue was set up strictly in consonance with the Recruitment Rules as well as eligibility criteria laid down in the Rules. He argued that it was also evident from the reply filed by respondent No. 1 that the syllabus which was prescribed for the post in issue was of graduation level and the purpose of prescribing a graduation level syllabus was to ensure that all candidates who were to appear in the examination, had a fair opportunity to compete in the recruitment process. He further argued that it was not the case of the petitioner that the questions were out of syllabus or that the syllabus was not in consonance with the questions prescribed. He submitted that there was no occasion for the Public Service Commission to reveal as to who set the papers, on the demand of the petitioner, because the entire secrecy which is involved in the papers would be then revealed. On these basis, he defended the act of respondent No. 1 and prayed for dismissal of the petition. He also relied upon the following judgments:

> *"1. Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and others (2010) 3 Supreme Court Cases 732.*
>
> *2. Union of India and another Vs. Talwinder Singh (2012) 5 Supreme Court Cases 480."*

10. Learned counsel for respondent No. 2 adopted the arguments of learned counsel for respondent No. 1.

11. I have heard learned counsel for the parties and have also gone through the pleadings as well as documents appended with the petition.

12. At the very out set, learned Senior Counsel was asked by the Court as to whether the petitioner alleges *malafide*? Learned Senior Counsel very fairly submitted that no *malafide* was being alleged, however, he urged that what the petitioner alleging was colourable exercise of power by respondent No. 1.

13. The factum as stands narrated hereinabove clearly demonstrates that the grievance of the petitioner primarily is with regard to the syllabus which was prescribed by respondent No. 1 for making recruitment to the post of Scientific Officer. The Advertisement inviting applications for the post in issue was issued on 21st February, 2019 and the last date to submit applications was 13th March, 2019. Though it is the allegation of the petitioner that she moved from pillar to post to find out as to what was the prescribed syllabus for the written test, however, her entire endeavour yielded no results till she came to know somewhere in the month of August, 2019 that the syllabus stood uploaded on the Website of respondent No. 1 somewhere in June-July, 2019, but facts demonstrate that the averments which have been made in this regard are contrary to the record. Petitioner alleges that the syllabus was uploaded on the Website by respondent No. 1 somewhere in June-July, 2019, whereas it is a matter of record that the syllabus stood uploaded on the Website of respondent No. 1 on 16th May, 2019.

14. Incidentally, it is an admitted fact that the petitioner is working as Junior Scientific Officer with respondent No. 2 and is residing in Shimla. That being so, it is difficult to believe that she was not aware of the uploading of syllabus by respondent No. 1 in the month of May, 2019. Be that as it may, it is further a matter of record that the first representation which she made against the syllabus is dated 27th September, 2019 and reminder was purportedly sent by her on 11.10.2019.

15. A perusal of the Advertisement demonstrates that the essential qualification for the post in issue was 1st Class M.Sc. Degree in Chemistry/Environmental Science/Micro-Biology with a Bachelor's Degree in Basic Science from a recognized University/Institution or Bachelor Degree in Chemical Engineering or Bio-Chemical Engineering. As per the Recruitment and Promotion Rules of the post in issue which are appended with the petition as Annexure P-2, the selection for appointment to the post in case of direct recruitment was to be made on the basis of Viva-Voce test or if the Himachal Pradesh Public Service Commission or other recruiting authority as the case may be, considers it necessary and expedient, then by way of a written test or practical test, the standard/syllabus etc. of which was to be determined by the Commission or the recruiting authority. A perusal of the Recruitment and Promotion Rules thus makes it apparently clear that in the eventuality of a written test being held, standard of the test and syllabus of the test was to be prescribed by the Commission.

16. The syllabus for the post, which stood uploaded by respondent No. 1, stands appended with the petition as Annexure P-3. Though as is borne out from the record, more than one thousand candidates applied for the post in issue, yet none objected to the standards of the test or the syllabus prescribed for the post except the petitioner, who also submitted her representation against the syllabus at an extremely belated stage.

17. Be that as it may, as I have already mentioned hereinabove, Recruitment and Promotion Rules clearly lay down that the standards and syllabus for the written test was to be determined by the Himachal Pradesh Public Service Commission or any other recruiting authority as the case was to be.

18. In the present case, as the process for recruitment was undertaken by the Commission, therefore, but natural, standards of the test as well as syllabus of the test was to be determined by the Commission. It is not the case of the petitioner that either the standards of the test or the syllabus of the test was out of context vis-a-vis the essential qualification prescribed. It is also not the case of the petitioner that the syllabus prescribed was not in consonance with the qualification prescribed. Further, it is not the case of the petitioner that the written test was out of syllabus. As I have already mentioned above, it is not the case of the petitioner that the syllabus in issue was prescribed by respondent No. 1 malafidely to help someone. That being the case, as it was the prerogative of the recruiting agency which in the present case is respondent No. 1 to prescribe the syllabus, the act of the said agency cannot be upset by this Court simply because a candidate feels that the syllabus purportedly is loaded towards a particular stream.

19. Incidentally, in para-5 of the preliminary submissions of its reply, respondent No. 1 has clearly stated that the Committee of subject experts prescribed common syllabus out of the syllabus of Bachelor's degree level, which was deemed to be studied by all candidates, keeping in view that essential qualification for the post also prescribed that the candidates were to possess Bachelor's degree in Basic Science, which includes study of Chemistry at graduation level.

20. Prescribing the syllabus is the job of experts. As *malafides* are not alleged and it is not alleged that the syllabus was beyond qualifications or the papers were out of syllabus, this Court in exercise of its power of judicial review would not enter into the footsteps of the experts in the matter of prescribing the syllabus or setting the papers. As far as the argument of learned Senior Counsel for the petitioner that the State should call for the records from respondent No. 1 as to how the syllabus was prescribed or how and who set the papers, this Court concurs with the submissions made by learned counsel for respondent No. 1 that this should not be done for the simple reason that the same would lift the veil of secrecy, which is completely undesirable in the facts of this case.

21. I will briefly refer to the judgments which have been relied upon by learned counsel for the parties.

22. In ***Prabhu Dayal Sesma*** Vs. ***Rajasthan Public Service Commission*** (1991) 2 RLW 93, i.e., the judgment which has been relied upon by learned Senior Counsel for the petitioner, the Hon'ble Court was dealing with a situation where the syllabus which was prescribed for recruitment to the post of Junior Accountant provided that compulsory papers shall be of higher secondary standard. In the said case, in the paper which was from Arithmetic stream, questions relating to Algebra, Geometry and even Statistics were asked and the Hon'ble Court held that it was clear that Arithmetic, Algebra and Geometry were being treated as independent papers for the purpose of higher secondary standard and on these basis, Hon'ble Court held that the examiner who was asked by the Commission to prepare the question paper had ignored the fact that the questions should be confined to Arithmetic only. Hon'ble Court held that the examiner probably took the paper of Mathematics and included the questions relating to Algebra, Geometry and even Statistics in that paper and this demonstrated that the question paper of Arithmetic was not in accordance with the syllabus. This judgment, in my considered view, is of no assistance to the petitioner, because here the case of the petitioner is not this that the written test was not in consonance with the syllabus. Her case also is not that the syllabus is not in consonance with the essential qualifications. Petitioner wants the syllabus to be of her liking rather than the same being, as determined by the Himachal Pradesh Public Service Commission.

23. Learned counsel for respondent No. 1 has also relied upon two judgments. In ***Secretary and Curator, Victoria Memorial Hall*** Vs. ***Howrah Ganatantrik Nagrik Samity and others*** (2010) 3 Supreme Court Cases 732, Hon'ble Supreme Court has held as under:

> *"37. The Constitution Bench of this Court in The University of Mysore Vs. C.D. Govinda Rao and Anr. AIR 1965 SC 491 held that "normally the Court should be slow to interfere with the opinions expressed by the experts." It would normally be wise and safe for the Courts to leave the decision to experts who are more familiar with the problems they face than the Courts generally can be. This view has consistently been reiterated by this Court as is evident from the Judgments in The State of Bihar & Anr. Vs. Dr. Asis Kumar Mukherjee & Ors., Dalpat Abasaheb Solunke Vs. Dr. B.S. Mahajan, Central Areca Nut & Cocoa Marketing & Processing Co-operative Ltd. Vs. State of Karnataka & Ors. and Dental Council of India Vs. Subharti K.K.B. Charitable Trust.*
>
> *38. However, if the provision of law is to be read or understood or interpreted, the Court has to play an important role. [P.M. Bhargava & Ors. Vs. University Grants Commission & Anr. and Rajbir Singh Dalal (Dr.) Vs. Chaudhari Devi Lal University, Sirsa & Anr.*
> *39. In the instant case, the Expert Committee was appointed by the High Court itself. No allegation of malafide or disqualification against any Member of that Committee had ever been made/raised. Thus, we fail to understand as on what basis, its recommendation on the issue involved herein, has been brushed aside by the High Court without giving any reason whatsoever, particularly, when the Act governing VMH does not prohibit the use of the part of the compound for the purpose other than connected with Queen Victoria.*

24. Similarly, in ***Union of India and another*** Vs. ***Talwinder Singh*** (2012) 5 Supreme Court Cases 480, Hon'ble Supreme Court has held as under:

> *"10. In Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity, this Court while placing reliance upon a large number of earlier judgments including Constitution Bench judgment in University of Mysore Vs. C.D. Govinda Rao held that ordinarily, the court should not interfere with the order based on opinion of experts on the subject. It would be safe for the courts to leave the decision to experts who are more familiar with the problems they face than the courts generally can be."*

25. Thus, in view of the discussions made hereinabove as well as the law discussed (*supra*), as this Court finds no merit in the present petition, the same is dismissed, so also pending miscellaneous applications, if any. Interim orders, if any, stand vacated. No order as to costs.

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

Prem Chand ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr.M.P(M) No. 884 of 2020
Date of Decision: July 3, 2020

Code of Criminal Procedure, 1973- Section 439- **Protection of Children from Sexual Offences Act, 2012**- Sections 6 & 17- **Indian Penal Code, 1860**- Sections 363, 366, 376, 506 & 120-B- Regular bail- Complainant alleging kidnapping, wrongful confinement and rape by accused 'A', son of bail petitioner in connivance with him (petitioner)- Held, victim giving two contradictory versions regarding incident- In petition filed before High Court prior to registration of FIR, she swore an affidavit that she was not kidnapped by anyone and she solemnized marriage with 'A' after attaining majority- In later version, she alleging of 'A' having kidnapped her, confined in a room at Bangaluru and having forced her to marry him- Also stating that subsequent to her being employed in a showroom at Bangluru, bitterness developed between her and 'A' because he suspected her character- Petitioner, a retired teacher is father of 'A', - He is permanent resident of district Kangra and for ensuring arrest of a son, his detention cannot be permitted- Petition allowed- Petitioner admitted on bail subject to conditions. (Para 8 to 12)

Whether approved for reporting?[4] *Yes*

For the Petitioner: Mr.Chandernarayan Singh, Advocate, through Video Conferencing.

For the Respondent: Mr. Gaurav Sharma, Deputy Advocate General, through Video Conferencing.

Vivek Singh Thakur, J (oral)

This petition has been preferred, seeking regular bail, under Section 439 Criminal Procedure Code (in short Cr.P.C.), in case FIR No.48 of 2017, dated 28.07.2017, registered under the provisions of Sections 363, 366, 368, 323, 376, 344, 506 and 120-B of the Indian Penal Code

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

(in short 'IPC') and Sections 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act'), in Police Station Panchrukhi, District Kangra, H.P.

2. Status report stands filed.

3. As per status report, FIR has been lodged by Anil Kumar, who is father of the victim, stating that his eldest daughter having date of birth 03.12.2000, educated upto plus two Class, had left house on 23.06.2017 on the pretext that she had to collect certificate from Shivalik Radiance Public School, Panchrukhi and on the said day, she stayed in the house of her maternal uncle at Thakurdwara and had returned back to Panchrukhi and talked with her mother, however, after 1.30 p.m. no talk had taken place with her and till 28.07.2017, i.e. uptill lodging complaint she was not traceable despite searching everywhere and complainant had come to know that his daughter had been kidnapped by one Amit son of Prem Lal on his Motorcycle with intention to marry her.

4. It is also stated in the status report that despite all-out efforts Amit and Victim were not traceable and, therefore, after four months untraced report was prepared on 25.01.2019. Further that later on in December 2019, a copy of Cr.MMO No.759 of 2019 was received in Police Station through Law Officer, wherein accused Amit and Victim were petitioners and they had disclosed therein that they had married on 17.01.2019 and the family members of victim were harassing family of the boy and, therefore, prayer in this petition was made to quash FIR lodged by father of the victim.

5. Further, it is stated in the status report that on 04.03.2020, victim came to Police Station alongwith her parents and had stated that on 24.06.2017 accused Amit Kumar had kidnapped her from Panchrukhi and offered some cold-drink on the way, because of which, she had lost her consciousness and after regaining consciousness, she had found herself detained in a room, where accused Amit Kumar had violated her person and for some days she was kept in a room and thereafter taken to Bangalore and she could not identify the places where she was taken and for a considerable long time she was kept at Bangalore in a closed room and later on under the pressure and fear of accused Amit Kumar and his father Prem Chand, she got married with accused on 17.01.2019 at Arya Samaj Mandir, Harit Vihar, Delhi.

6. According to status report, on the basis of statement of victim, she was subjected to medical examination and thereafter Sections 368, 376, 323, 344, 506 and 120-B IPC read with Sections 6 and 17 of POCSO Act, were also added. During investigation, it has been found that victim had solemnized marriage with accused on 17.01.2019 at Arya Samaj Mandir, Harit Vihar, Delhi and statement to that effect has also been recorded in the Court of Sub-Divisional Magistrate, Delhi, on 21.01.2019. It is also alleged in the status report that accused was continuously threatening the victim and his father was always pressurizing victim to marry with his son, failing which, he was threatening to kidnap her younger sister also and to defame her, her parents and relatives also and on her refusal to accept the proposal, she was used to be beaten and abused and because of fear she was bearing every harassment by accused and when she attained 18 years of age, then she was married with accused Amit Kumar by accused Prem Chand at Delhi and she had filed an affidavit in the High Court of Himachal Pradesh under pressure of accused.

7. Lastly, it is also stated that victim had disclosed that for a considerable long time, she was detained in a room and thereafter she was employed in a Showroom at Bangalore, but accused Amit Kumar, doubting her character, started harassing and beating her. Whereupon, she contacted her parents through phone of persons known to her and after hearing her tale of sorrow, her parents had booked an Air Ticket for her up to Chandigarh and wherefrom on 21.01.2020, she came to house of her parents.

8. Record of Cr.MMO No.759 of 2019 has also been made available by the Registry in sequel to order passed on previous date. Filing of this petition and swearing of affidavit filed therewith dated 13.09.2019, wherein it has been stated that she had left her house because of ill behaviour of her parents and was residing with her friend and no one had allured or kidnapped her and she had contracted marriage with Amit Kumar after attaining the age of 18 years with her free will, consent and without any pressure and that her husband and in-laws were having danger of life and property from her parents and relatives are also admitted facts.

9. The reason for not reporting the matter to anyone, assigned at the first instance by the victim, is that she was detained in a room and was not allowed to meet anybody. Whereas, later on, she has also disclosed that she was employed in a Showroom at Bangalore and thereafter bitterness had developed in relation of couple on account of doubt by her husband with respect to her character. Detaining in the room and employment in the Showroom are two things, which are self contradictory to each other. There may be possibility of ill-treatment by husband and/or in-laws, but as to whether any offence, as alleged in the FIR is made out or not, is subject matter of

the investigation. Material documents available on record, are talking about two stories contrary to each other but with common fact that solemnization of marriage by victim with accused Amit Kumar has not been denied, rather admitted in no uncertain words.

10. It is also submitted by learned Deputy Advocate General that accused Amit Kumar is absconding and, therefore, also present petitioner, who is father of accused Amit Kumar, is not entitled for bail.

11. Petitioner aged 60 years, is a retired Teacher and having permanent residence in Village Dharehar in District Kangra and is ready to abide by the conditions imposed by the Court. In any case, for ensuring arrest of a son, detention of father is never permissible.

12. Without commenting on merit on plea of either party, considering entire facts and circumstances, I find that it is a fit case, where petitioner can be enlarged on bail at this stage. Accordingly, petitioner is directed to be enlarged on bail in case FIR No.48 of 2017, under the provisions of Sections 363, 366, 368, 376, 323, 344, 506 and 120-B IPC and Sections 6 and 17 of POCSO Act, subject to furnishing his personal bond in the sum of `50,000/- with one surety in the like amount to the satisfaction of the trial Court/Special Judge, within two weeks from today, also subject to following further conditions:-

(i) That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;

(ii) that the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that he shall not obstruct the smooth progress of the investigation/trial;

(iv) that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;

(v) that the petitioner shall not misuse his liberty in any manner;

(vi) that the petitioner shall not jump over the bail; and

(vii) that he shall keep on informing about the change in addresses, landline number and/or mobile number, if any, for his availability to Police and/or during trial.

13. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice.

14. In case the petitioner violate any conditions imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

15. Trial Court/Special Judge, is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

16. Observations made in this petition hereinbefore shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application. Petition stands disposed of in the aforesaid terms.

17. The trial Court shall not insist for certified copy of the order and can verify the same from the High Court Website and from the Registry before accepting the bail bonds to be furnished by the petitioner. Petitioner is at liberty to produce the downloaded copy of the order from the High Court Website.

18. Record of Cr.MMO No.759 of 2019 be returned to the concerned Branch.

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

Shashi Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 419 of 2020
Reserved on : July 20, 2020
Date of Decision: July 23, 2020

Code of Criminal Procedure, 1973- Section 439- Regular bail- Grant of in a case involving rape by accused with his minor real niece (Bhanji)- Held, accused repeatedly committed coitus with victim, his real niece- DNA examination of foetus of victim with samples of accused proving him to be the biological father- Relationship of 'Mama' is as pious as that of father- Earlier bail applications of accused were dismissed- Case is at the final stage- Rejection or grant of bail by High Court may influence the Trial Court- Petition disposed of with liberty to accused to file application before Trial Court. (Para 5, 7, 10 & 12)

Whether approved for reporting?[5] ***Yes***.

For the petitioner : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate, for the petitioner.

For the respondent : Mr. Nand Lal Thakur, Additional Advocate General for the respondent/State.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

For repeatedly indulging in coitus with his real Bhanji (niece), the petitioner, who is her Mama (Mother's brother) and is under arrest, on being arraigned as an accused in FIR No.120 of 2019, dated Aug 26, 2019, registered under Sections 376 of the Indian Penal Code, 1860 and under Section 6 of the Protection of Children from Sexual Offences Act, 2012, in the file of Police Station Badsar, Distt. Hamirpur, H.P., disclosing non bailable offences, has come up before this Court under Section 439 of the Code of Criminal Procedure, seeking regular bail.

2. Status report stands filed. I have seen the status report as well as the police file to the extent it was necessary for deciding the present petition, and the police file stands returned to the police official.

3. I have heard learned Counsel for the petitioner and the learned Additional Advocate General for the respondent-State.

4. Prior to the present bail petition, the petitioner had filed a bail petition under Section 439 CrPC, before learned Special Judge, Hamirpur, HP. However, vide order dated 30.10.2019, passed in Bail Application No. 135 of 2019, the Court had dismissed the same. Also subsequent bail petition filed under Section 439 CrPC before this Court was dismissed vide order dated 3.1.2020, passed in Cr.MP(M) No. 2283 of 2019.

FACTS

5. The gist of the First Information report and the Investigation is as follows:

(a) The victim was born on Aug 11, 2004. After one year of her birth her mother left her with her brother. The family of her mother's brother comprised of her two unmarried sisters apart from her parents.

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

(b) When the victim was in Class-7, then her Maama, Shashi Kumar, petitioner herein, raped her. After that he kept on indulging in coitus with her on numerous occasions. During those days her Maama (petitioner) was unmarried. The victim could not pass her final examination and after that she moved to her house at Balh Rehre. She further stated that these days she studies in Class-10.

(c) On Jul 7, 2019, she had gone to the house of her Maama (petitioner) at Bijhdi. Her Maama had married two years ago. His wife was pregnant and as such she stayed in a separate room. On Jul 11, 2019, during night time, her Maama (petitioner) came to her room and committed sexual intercourse with her.

(d) The victim stated that she had her last mensuration cycle on Jun 28, 2019, and after that she did not have menses. On Aug 3, 2019, she returned to her home. After that she started having pain in her abdomen. On this her aunt (Tai) took her to a Doctor. After examination, the Doctor conducted test for pregnancy which resulted positive. The said Doctor informed the Bangana police and after that the female police officials recorded her statement to the aforesaid effect leading to the registration of the present FIR.

(e) The police arrested the petitioner on Aug 27, 2019 and got his DNA sample on FTA Card through Medical Officer.

(f) On Aug 28, 2019, the police took the victim to Judicial Magistrate Ist Class, Court No. 2, Hamirpur where she made her statement under Section 164 CrPC.

(g) On Aug 31, 2019 the Doctor preserved the sample from her foetus and handed it over to the police for DNA test.

(h) During investigation the police also took into possession the date of birth certificate of the prosecutrix according to which the victim was born on Aug 11, 2004.

(i) The DNA report confirmed that the petitioner was the biological father of the foetus and the victim its biological mother.

6. Learned counsel for the petitioner places reliance upon two decisions of a Coordinate Bench of this Court reported in *Jagdish Chand vs. State of Himachal Pradesh,* 2018 (2) Shim.LC 967 and *Dinender Morya vs. State of Himachal Pradesh,* 2018(2) Shim.LC 983.

7. There can be no doubt that in both the cases this Court had granted bail to the accused who were facing prosecution for indulging in coitus with minor girls. However, present case is clearly distinguishable from the facts of the judicial precedents on the ground that here the relationship of the victim with the petitioner is of Maama & Bhanji. The relationship of Maama is as pious as that of a father.

8. Mr. Satyen Vaidya, Ld. Senior Advocate contends that the victim in her testimony during trial, did not support the case of the prosecution and blamed another person for the rape. He further states that accused wants to lead evidence in his defence and to do so effectively, he needs to come out of prison, hence bail.

9. Mr. Nand Lal Thakur, Ld. Additional Advocate General contends that the DNA of the accused connects with the pregnancy of the victim, which is sufficient to deny bail.

10. In the present case the result of the DNA test, which has crossed the stage of eclipse and accepted as best scientific evidence, implicates the petitioner.

11. If this Court grants bail on the analogy that the accused wants to lead evidence in his defence and to do so effectively, he needs to come out of prison, then to get bail, what an accused is do is to state that he wants to lead evidence in his defence, and after that keep on asking time on one pretext or the other. Be that as it may, depending upon the gravity of the offence, criminal history of the accused, and the nature of evidence the accused wants to adduce by demonstrating that to get such evidence he needs to be out of jail, the trial Court may consider interim bail for limited period. However, the bail petition lacks any such pleadings.

12. Indisputably the trial has reached a final stage, statements of prosecution witnesses as well as the statement of accused under section 313 CrPC stand recorded. If this Court grants bail or rejects the same, it is likely to influence the trial Court to arrive at a verdict that otherwise should be independent of all external influences whatsoever.

13. Given above, it would be appropriate for the petitioner to file a petition for grant of bail before the Ld. Trial Court. Resultantly, the petition is dismissed.

14. 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.

Petition stands disposed of in the aforesaid terms.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Suneel Dutt .....Petitioner.

Versus

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

CWP No. 2171 of 2020.
Date of decision: 13.07.2020.

Central Civil Services (Classification, Control and Appeal) Rules, 1965- Rules 6 & 10(7) – Suspension of an employee- Requirement of review/ extension of order within 90 days- Non-compliance of procedure- Effect- Held, order of suspension of a government employee remains valid for 90 days- Competent Authority is required to review and extend the order before expiry of period of 90 days- Subsequent review and extension of order cannot revive order which has already become invalid after expiry of 90 days from date of suspension. (Para 4 & 11)

Cases referred:

Union of India and others vs. Dipak Mali, AIR 2010 SC 336;
Union of India and others vs. Dipak Mali (2010) 2 SCC (Annexure P-5);

Whether approved for reporting?[6] ***Yes***

For the Petitioner : Mr. Mandeep Chandel, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Desh Raj Thakur, Additional Advocate General, Mr. Bhupinder Thakur, Ms. Svaneel Jaswal, and Ms. Seema Sharma, Deputy Advocate Generals.

Tarlok Singh Chauhan, Judge (Oral)

The instant petition has been filed for the following substantive reliefs:

"i) That in view of the above mentioned facts and circumstances the impugned extension order of the petitioner dated 26.06.2020 may kindly be quashed and set aside and revoke the suspension of the petitioner in the interest of justice and fair play.

ii) That the respondents may kindly be directed to revoke the suspension order of the petitioner and re-instate the petitioner as per law laid down in CWP No. 4915 of 2010 titled Puran Chand Sharma vs. State of H.P. & another vide judgment dated 31.12.2010 on a verdict rendered by the Hon'ble Apex Court in ***Union of India and others vs. Dipak Mali (2010) 2 SCC (Annexure P-5)*** *along with all consequential benefits."*

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

2. The brief facts of the case are that the petitioner was placed under suspension vide order dated 21.12.2019 as he remained in custody. Admittedly, such suspension order was not reviewed and extended in terms of Rule 10(7) of the CCS (CCA) Rules within the prescribed period of 90 days from the date of suspension.

3. Rule 10(7) of CCS (CCA) Rules reads as under:

> *[2]["(7) An order of suspension made or deemed to have been made under sub-rule (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days.*
>
> *Provided that no such review of suspension shall be necessary in the case of deemed suspension under sub-rule (2), if the Government servant continues to be under suspension at the time of completion of ninety days of suspension and the ninety days' period in such case will count from the date the Government servant detained in custody is released from detention or the date on which the fact of his release from detention is intimated to his appointing authority, whichever is later.]"*

4. The aforesaid rule came up for consideration before the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***Dipak Mali, AIR 2010 SC 336*** wherein it was held that if the initial or subsequent period of extension has expired, the suspension order comes to an end because of the expiry of the period provided under Rule 10(6) of the Rules 1965. It was further held that the suspension order reviewed or extended thereafter is not permissible after expiry of the original period of 90 days. It shall be apposite to reproduce the necessary observations as contained in paras 10 and 11 which read as under:

> "*10. Having carefully considered the submissions made on behalf of the parties and having also considered the relevant dates relating to suspension of the Respondent and when the Petitioner's case came up for review on 20th October, 2004, we are inclined to agree with the views expressed by the Central Administrative Tribunal, as confirmed by the High Court, that having regard to the amended provisions of Sub- rules (6) and (7) of Rule 10, the review for modification or revocation of the order of suspension was required to be done before the expiry of 90 days from the date of order of suspension and as categorically provided under Sub- rule (7), the order of suspension made or deemed would not be valid after a period of 90 days unless it was extended after review for a further period of 90 days.*
>
> *11. The case sought to be made out on behalf of the petitioner, Union of India as to the cause of delay in reviewing the Respondent's case, is not very convincing. Section 19(4) of the Administrative Tribunals Act, 1985, speaks of abatement of proceedings once an original application under the said Act was admitted. In this case, what is important is that by operation of Sub-rule (6) of Rule 10 of the 1965 Rules, the order of suspension would not survive after the period of 90 days unless it was extended after review. Since admittedly the review had not been conducted within 90 days from the date of suspension, it became invalid after 90 days, since neither was there any review nor extension within the said period of 90 days. Subsequent review and extension, in our view, could not revive the order which had already become invalid after the expiry of 90 days from the date of suspension."*

5. The learned Advocate General does not dispute the legal position, but would contend that the suspension order could not be reviewed and extended because of the outbreak of COVID-19 pandemic and came to be reviewed and extended in the meeting of the Review Committee held on 12.06.2020 and going by the prevailing situation, no fault much less illegality can be found in the order passed by the Review Committee and needs to be upheld.

6. We have heard the learned counsel for the parties and gone through the records of the case.

7. It is not in dispute that in view of the outbreak of COVID-19 pandemic, lockdown was announced by the Government only on 24.03.2020 and the time 90 days for review of the suspension order in terms of the Rules 10(7) had already expired. Therefore, the respondents can take no advantage of the lockdown that was imposed subsequently.

8. In addition to the aforesaid, we find it extremely disturbing that the members of the Review Committee which had failed to review the case of the petitioner for extending/revocation of his

suspension order would blame it on the lockdown as if that had foreseen it earlier to its actually being enforced.

9. It would be apposite to refer to the necessary observations which are extracted hereinbelow:

> *"The matter regarding reviewing his suspension after expiry of 90 days was remained under consideration since 17 March, 2020, but due to sudden imposition of curfew lockdown due to COVID 19 in the State, this process has been hampered as some essential requisite information could not be gathered."*

10. This tendency of inventing reasons for one's failure, when practically none exist, needs to be strongly deprecated. We observe so because in another CWP No. 2168 of 2020 titled Gauri Shankar vs. State of H.P. and others', we have already vide separate order of the day asked the members of the Review Committee to explain their position as therein also these very members had tried to justify their inaction for no plausible reasons whatsoever.

11. It cannot be disputed that Rule 10(7) of the CCS (CCA) Rules confers a valuable right on a person placed under suspension and as held by the Hon'ble Supreme Court in ***Dipak Mali's case*** *(supra)* the subsequent review and extension of the order cannot revive the order of suspension which has already become invalid after the expiry of the 90 days from the date of the suspension.

12. Consequently, we find merit in this writ petition and the same is accordingly allowed. The impugned extension order of the suspension of the petitioner dated 26.06.2020 is quashed and set aside and resultantly the suspension of the petitioner is revoked. The petitioner shall be entitled to all consequential benefits after completion of the 90 days' suspension period which are admissible to him as per rules. Pending application, if any, also stands disposed of. No order as to costs.

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

Shri Virender Kaushal .....Petitioner

Versus

Himachal Pradesh Staff Selection Commission and Anr. .....Respondents

CWPOA No. 80 of 2019
Decided on: 20.7.2020

Constitution of India, 1950- Articles 14 & 226- Selection to post of Pump Operator- Recruitment advertisement required that candidate must possess requisite qualification as on last day meant for calling applications (17.11.2016)- Petitioner though having requisite qualification on that date but marks card was issued on a subsequent date (31.12.2016) – After written examination and evaluation, Commission rejecting his candidature on ground of his not possessing essential qualification on relevant date- Held, Educational Institute had declared result of the Course on 04.11.2016- Result was put in public domain on 05.11.2016- Petitioner attached downloaded copy dated 05.11.2016 of his result with application sent to Commission, much before the last date- He possessed requisite qualification on that date- Date of issuance of certificate would be deemed to be 05.11.2016 for all intents and purposes when petitioner downloaded result sheet from NCVT MIS-Portal- It cannot be concluded that till issuance of certificate, petitioner did not possess the qualification- Commission could not have rejected candidature of petitioner- Petition allowed- Commission directed to recommend name of petitioner for the post. (Para 6 to 10)

Whether approved for reporting? [7] Yes.

For the Petitioner	**:**	Mr. Sanjay Bhardwaj, Advocate.
For the Respondents	**:**	Ms. Archana Dutt, Advocate, for respondent No.1.
		Mr. Lokinder Paul Thakur, Senior Panel Counsel, for respondent No.2.

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

Sandeep Sharma, Judge (oral):

250 posts of Pump Operators came to be advertised vide advertisement No. 32-3/2016 dated 18.10.2016, issued by respondent No.1 (Annexure A-5), whereby online applications were invited from the eligible candidates. It stood clearly mentioned in the aforesaid advertisement as well as instructions issued by respondent No.1-Commission for filling up online applications that the date for determining the eligibility of all candidates including the essential qualification(s) and experience, if any, etc., shall be the prescribed closing date for submission of Online Recruitment Application Form (ORA) i.e. 17.11.2016. Besides above, it was also mentioned in the advertisement that candidates must ensure that their eligibility in respect of category, experience, age and essential qualification etc., is mentioned against each post in the advertisement to avoid rejection at the later stage.

2. Perusal of instructions for filling up online applications annexed as Annexure R1/A with the reply filed by respondent No.1 reveals that it was also made clear in the heading **ELIGIBILITY CONDITION** that "***onus to prove that candidate has acquired requisite Degree/Essential qualification before the stipulated date is on the candidate and in the absence of proof, the date as mentioned on the face of the certificate/degree or the date of issue of certificate/degree shall be taken as date of acquiring essential qualifications"***

3. Pursuant to aforesaid advertisement, petitioner applied online and respondents relying upon the information furnished by him online, admitted him provisionally to the written screening test amongst other candidates. Petitioner qualified the written screening test and was shortlisted for 15 marks evaluation on the given parameters, but on the date of evaluation, it transpired that Detailed Marks Certificate (DMC) of 4th Semester in the trade of Electrician was issued on 31.12.2016. Since Detailed Mark Certificate qua the aforesaid qualification of the petitioner was issued on 31.12.2016, his candidature was rejected by respondent No.1-Commission. In the aforesaid background, the petitioner approached the Erstwhile HP State Administrative Tribunal by way of OA No. 734 of 2018, which after abolishment of the Tribunal stands transferred to this Court for adjudication. The main relief, as prayed for, in the instant petition is as follows:-

> ***"That the rejection of the candidature of the applicant for the post of Pump Operator, Post Code-537 vide communication dated 17.1.2018 (Annexure A-12) may kindly be quashed and set-aside and further the respondent No.1 may kindly be directed to recommend the name of the applicant for the post of Pump Operator to be appointed in the Department of Irrigation and Public Health, Himachal Pradesh and Justice be done."***

4. Having heard learned counsel for the parties and perused material available on record, this Court finds that there is no dispute with regard to petitioner's having acquired essential qualification i.e. mark/qualification, 10+2/qualification and certificate/ITI diploma. It is also not in dispute that pursuant to advertisement, as referred herein above, petitioner submitted his application form and he was also permitted provisionally to participate in the written screening test. Problem arose when the petitioner was shortlisted for 15 marks evaluation after his having qualified written screening test. As per the respondents, documents furnished by the petitioner in support of eligibility and other claims made in the application revealed that detailed marks certificate of 4th Semester was issued on 31.12.2016, whereas last date of receipt of application form was 17.11.2016. To the contrary, claim of the petitioner is that result of I.T.I. in Electrician Trade done by him was declared on 5.11.2016 and as such, he while submitting the online application form rightly claimed himself to have passed diploma in Electrician Trade.

5. Mr. Sanjay Bhardwaj, learned counsel for the petitioner while fairly admitting that last date of submission of application was 17.11.2016, contended that petitioner had annexed computer generated copy of result sheet (Annexure A-4), perusal whereof reveals that same was generated on 5.11.2016 and on that date, petitioner had already passed certificate/diploma in Electrician Trade. Essential qualification prescribed qua the post code No. 537, against which petitioner had applied, clearly reveals that at the time of furnishing online application, candidate should have passed matriculation or its equivalent from a recognized university-Board. Besides above, candidate should have also possessed certificate in trades Electrician/Wireman/Diesel Mechanic/Pump Mechanic/Motor Mechanic/Pump Operator-cum-Mechanic from the recognized I.T.I.

6. No doubt, perusal of statement of marks for AITT conducted under the aegies of NCVT, as contained in Annexure A-7, reveals that certificate declaring petitioner to have passed certificate/diploma in electrician trade was issued on 31.12.2016, but it is also not in dispute that result of aforesaid examination was declared much prior to the issuance of certificate as has been taken note herein above. Perusal of document generated on 5.11.2016 (Annexure A-4), wherein name of the petitioner stands duly reflected, clearly reveals that on 5.11.2016, petitioner had possessed certificate/diploma in Electrician Trade and as such, respondent No.1 could not have rejected his candidature on the ground that since final certificate qua the course in question was issued on 31.12.2016, the petitioner was not eligible to fill up online form because same was to be filled before 17.11.2016.

7. Leaving everything aside, reply having been filed by respondent No.2 clearly reveals that result of All India Trade Test (AITT) under Craftsman Training Scheme (CTS) held in July/August 2016 was declared on 4.11.2016 and the same was made available to the public for downloading from the NCVT MIS- portal on the same day and onwards. Aforesaid reply having been filed by respondent No.2 further reveals that the issuance date mentioned on the document is the date of downloading of the document from the NCVT MIS- portal, meaning thereby, date of issuance of certificate in the case at hand for all intents and purposes would be deemed to be 5.11.2016, when petitioner downloaded the result sheet from the NCVT MIS- portal (Annexure A-4). Authenticity and correctness of documents indicative of eligibility of the petitioner is not under challenge in the instant case, rather candidature of the petitioner came to be rejected on the ground that on the date of filling up of online application, he did not possess the requisite qualification, which stance of respondents is totally contrary to the record and as such, cannot be allowed to sustain. No doubt, in the case at hand date of issuance of certificate in question is 31.12.2016, but that does not mean that till the issuance of certificate, petitioner had not acquired the required qualifications.

8. At the cost of repetition, it may be noticed that result of All India Trade Test (AITT) under Craftsman Training Scheme (CTS) held in July/August 2016 was declared on 4.11.2016 and the same was made available to the public for downloading from the NCVT MIS portal on the same day. Date for determining the eligibility of all candidates in respect of qualification and experience was 17.11.2016 in terms of advertisement (Annexure A-5) and admittedly, in the case of the petitioner, he had acquired, essential qualification on or before 17.11.2016 and as such, action of the respondent in rejecting the candidature of the petitioner is totally uncalled for and cannot be allowed to sustain.

9. Record reveals that on 5.3.2018, Tribunal while issuing notice to the respondents had ordered that result for the post of Pump Operators be not declared without the prior leave of the Court, but subsequently, aforesaid order was modified vide order dated 15.3.2018, whereby the court while permitting the respondents to declare the result of process of recruitment of Pump Operators, directed respondent No.1 to keep one post of Pump Operator vacant till the final disposal of the Original Application. One post of Pump Operator is still lying vacant in terms of order dated 15.3.2018 and as such, this Court sees no impediment in accepting the prayer made in the application.

10. Consequently, in view of the aforesaid, present petition is allowed and Communication dated 17.1.2018 (Annexure A-12), whereby the candidature of the petitioner was rejected, is quashed and set-aside and respondent No.1 is directed to recommend the name of the petitioner for the post of Pump Operator against the one post lying vacant in terms of order dated 15.3.2018, forthwith. Needless to say, petitioner would be deemed to be in service from the date when other persons, who had applied pursuant to the advertisement, were appointed against the other posts and shall be entitled to all consequential benefits. In the aforesaid terms, present petition is disposed of, so also pending application(s), if any.

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

Bhuto Devi & others ...Petitioners.

Versus

The State of Himachal Pradesh & another ...Respondents.

CWPOA No.278 of 2019
Decided on: 15.06.2020

Administrative Law- Quasi-judicial functions- Necessity of giving reasons for order(s)- Held, whenever a Quasi-judicial or Administrative Authority passes an order affecting rights of an

individual, then order must be reasoned and speaking one so that it is borne out as what was genesis which led to the conclusion contained in the order- Order of Disciplinary Authority without referring to charge sheet, inquiry report, response of the delinquent to the notice issued by it disagreeing with report of Inquiry Officer, being unreasoned and non-speaking, set aside. (Para 10 & 11)

Central Services (Classification, Control & Appeal) Rules, 1965- Rule 14- OM No.11012/7/99-Estt.(A) dated 20th October, 1999 – Disciplinary proceedings- Death of delinquent during proceedings- Effect- Held, if during pendency of departmental proceedings, employees dies i.e. without charges being proved against him, the proceedings shall stand closed- Petition allowed – Order of compulsory retirement set aside- State directed to release all service benefits accruable to the deceased employee. (Para 15 & 16)

Cases referred:

Basudeo Tiwary Versus Sido Kanhu University and Others (1998) 8 Supreme Court Cases 194;

Whether approved for reporting?[8] Yes

For the petitioners : Mr. Vishwa Bhushan, Advocate.

For the respondent : Mr. Sumesh Raj, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General.

Ajay Mohan Goel, Judge (Oral)

Brief facts necessary for the adjudication of this petition are as under:-

This petition was originally preferred by Shri Amin Chand, before the learned Erstwhile Himachal Pradesh Administrative Tribunal, primarily praying for the following relief:-

"(i) That the impugned order dated 1-7-2002 (Annexure/A-14) passed by the respondent No.2 may kindly be quashed and the applicant may please be ordered to be re-instead alongwith all consequential benefits".

2. During the pendency of the petition before the learned Tribunal, Shri Amin Chand died and present petitioners, who are legal representatives of Shri Amin Chand, were substituted as petitioners. The grievance of the original applicant was that a memorandum was issued to him by respondent No.2, dated 28.06.2000 (Annexure A-2), alongwith Charge Sheet, seeking his response to the article of charges, which were to the effect that the original applicant had gained the job on the basis of a false Scheduled Caste Certificate, as the original applicant did not belong to the Scheduled Caste category.

3. Record demonstrates that the original applicant refuted the allegations and submitted his response. However, as the Disciplinary Authority was not satisfied with his response, therefore, disciplinary proceedings stood initiated against original applicant for imposition of a major penalty upon him. An Inquiry Officer was appointed, who submitted his Inquiry Report, copy of which is appended with this petition as Annexure A-11. The Inquiry Officer came to the conclusion that the original applicant had not taken any undue gain of the Scheduled Caste Certificate and though he had submitted such certificates to the department concerned, however, he had not taken any benefit

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of the same. It was further the findings of the Inquiry Officer that an earlier certificate, which stood issued, was to be deemed to have been cancelled on account of the ambiguities attached therewith. It was further the findings of the Inquiry Officer that whatever had happened was a result of the ambiguity which existed in the Rules.

4. After the receipt of the said Inquiry Report, vide Annexure A-12, the Disciplinary Authority while not concurring with the conclusion of the Inquiry Officer, proceeded to impose penalty upon the original applicant and forwarded a copy of the Inquiry Report to the original applicant, calling upon him to make his representation thereto. The original applicant submitted his response vide Annexure A-13 and vide impugned order Annexure A-14, dated 08.07.2002, Disciplinary Authority imposed the punishment of compulsory retirement upon the original applicant. It is in this background that the original applicant filed the original application before the learned Himachal Pradesh Administrative Tribunal.

5. As I have already mentioned above, during the pendency of the original application, the original applicant died and the present petitioners, who are legal representatives of the original applicant, stood impleaded as petitioners.

6. I have heard learned counsel for the parties and also gone through the pleadings.

7. Before I proceed further, it is pertinent and relevant to state at this stage that what stood assailed by the original applicant was the order of compulsory retirement passed by the Disciplinary Authority and this was done without exhausting the remedy of appeal provided under the Central Services (Classification, Control & Appeal) Rules, 1965.

8. At this stage, in my considered view, it will be extremely harsh on the part of the Court to dismiss this petition, on the ground that the original application was filed without exhausting the remedy of appeal for the simple reason that original applicant is dead and the order of voluntarily retirement stood passed by the Disciplinary Authority as far back as in the month of July 2002. Therefore, the Court is proceeding to adjudicate the issue involved in this lis on merit.

9. A perusal of the order which has been passed by the Disciplinary Authority i.e. Annexure A-14, *prima facie* demonstrates that it is neither a speaking order nor a reasoned order. Contents of the said order for ready reference stand reproduced hereinbelow:-

"Order:-

Whereas Shri Amin Chand, Patwari was charge sheeted vide order No.Sa.Ka.246/2495 dated 26-6-2000 under Rule 14 of the CCS (CCA) Rules, 1963.

And whereas the S.D.M. Jawali was appointed Inquiry Officer vide order No.Sa.Ka.(c) 246-4901-05 dated 29.12.2000.

And whereas the Inquiry Officer submitted his report vide No.003/Steno/02 dated 1-1-2002. And after carefully examining the inquiry report, the undersigned disagreed with the findings of Inquiry Officer and an order to this effect was passed under the provisions of Rule 15(2) of the CCS(CCA) Rules, 1965. And the copy of this order alongwith a copy of inquiry report was supplied to the charged official to afford him an opportunity to make representation if any.

And whereas the said Shri Amin Chand has given written representation which has been duly and carefully considered by the undersigned. And the charge against Shri Amin Chand, Patwari stands proved beyond doubt. Now, therefore, in exercise of powers conferred by Rule 15(4) of the CCS(CCA) Rules, 1965, the undersigned directs that Shri Amin Chand, Patwari shall be compulsorily retired from services w.e.f.8.7.2002".

10. There is no reasoning given in the impugned order, as to why the punishment of compulsorily retirement stood imposed upon the original applicant by the Disciplinary Authority. Annexure A-14 stood passed by the Disciplinary Authority in its capacity as a Quasi-Judicial Authority. It has been held again and again by Hon'ble Supreme Court of India that whenever an Authority may be a Quasi-Judicial or even Administrative, passes an order, affecting the rights of an individual or an employee, then the order has to be a reasoned and a speaking one, so that from the contents of the order, it is borne out as to what was the genesis which lead to the conclusion, so contained in the order. In the impugned order, there is no discussion of the Charge Sheet, there is no discussion of the report of the Inquiry Officer, there is no discussion of the response given by the original applicant to communication dated 22.11.2002 (Annexure A-12), served upon by the Disciplinary Authority. All that the impugned order contains is that the Disciplinary Authority in exercise of powers conferred by Rule 15 (4) of the CCS (CCA) Rules, 1965, orders the compulsorily

retirement of the delinquent officer. This, I reiterate is not the mandate of law which requires that whenever an order is passed by a Quasi –Judicial Authority, the same has to be a reasoned and a speaking order, wherein discussion has to be there on the facts of the case as well as the stand of the respective parties viz-a-viz final conclusion contained in the order.

11. The impugned order, thus, being *prima facie* a non-speaking order, is not sustainable in law and is, accordingly, quashed and set aside.

12. As the impugned order is being set aside by this Court on technical grounds, now the issue which this Court has to decide is as to what will be the effect thereof keeping in view the peculiar facts of this, wherein the original applicant i.e. the employee, is no more.

13. In this regard, it is also relevant to refer to the department of Personnel & Training OM No.11012/7/99-Estt.(A) dated 20th October, 1999, which reads as under:-

"(2) Procedure regarding closing of disciplinary cases in the event of death of the charged official. This department has been receiving references seeking clarification whether disciplinary cases initiated against the Government Servant under CCS (CCA) Rules, 1965, would be closed in the event of death or the charged officer during pendency of the proceedings. After careful consideration of all the aspects, it has been decided that where a Government servant dies during the pendency of the inquiry i.e. without charges being proved against him, imposition of any of the penalties prescribed under the CCS(CCA) Rules, 1965, would not be justifiable. Therefore, disciplinary proceedings should be closed immediately on the death of the alleged Government servant".

14. Hon'ble Supreme Court of India in ***(1998) 8 Supreme Court Cases 194***, titled as ***Basudeo Tiwary*** Versus ***Sido Kanhu University and Others*** has held as under:-

"*14. the appellant has since demised during the pendency of these proceedings, no further direction either as to further inquiry or reinstatement can be given. We declare that the termination of the appellant by the respondent as per the notification referred to by us is invalid. Consequently, it would be deemed that the appellant had died in harness. Needless to say that the appellant would become entitled to the payment of arrears of salary from the date of termination of his services up to the date of his death on the basis of the last pay drawn by him. Let the respondent take action within a period of three months from today to work out the arrears due to the appellant from the date of his termination till his death and pay the same to his legal representatives*".

15. In this case, the report of the Inquiry Officer is in favour of delinquent officer and as the order passed by the Disciplinary Authority has been quashed by this Court, therefore, the legal position is that the Government Servant has died during the pendency of the inquiry at a stage where definitely charges have not been proved against him and therefore, in these circumstances, imposition of any penalty prescribed under the CCS (CCA) Rules would not be justifiable in terms of the Personnel & Training OM No.11012/7/99-Estt.(A) dated 20th October, 1999 of the department of Personal & Training referred to hereinabove.

16. Accordingly, this petition is allowed by setting aside the order passed by the Collector, Kangra at Dharamshala, dated 01-07-2002 (Annexure/A-14) and by directing the State to release all the benefits which were accruable to the deceased original applicant, by treating him to be in service till the date of his death or the age of superannuation whichever was earlier. No order as to costs. Pending miscellaneous application, if any, stand disposed of. Interim order, if any, stands vacated.

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

Kiran Chand Sharma .....Petitioner

Versus

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

CWPOA No. 698 of 2019
Decided on: 30.6.2020

Central Civil Services (Pension) Rules, 1972 (Rules)- Rule 17- Government Notification dated 17.08.2006- Notification providing for only Contributory Pension Scheme to employees appointed on and after 15.05.2003- Grant of pension under Rules to employees appointed prior to 15.05.2003

on contract basis but regularized after said period- Entitlement- Held, period of contract service followed by regularization against substantive post without there being any interruption would be counted towards qualifying service for grant of pension under Rules- Once State has counted contractual service of petitioner for regularization, there is no reason to not to count it for computing qualifying service for pensionary benefits. (Para 8 & 9)

Cases referred:

Prem Singh v. State of UP and Ors, AIR SC 4390;
R. N. Nanjundappa v. T. Thimmiah and Anr, 1972 (1) SCC 409;

Whether approved for reporting? [9] Yes.

For the Petitioner	**:**	Mr. Bhuvnesh Sharma, Advocate, through Video Conferencing.
For the Respondents	**:**	Mr. Sudhir Bhatnagar, Additional Advocate General, through Video Conferencing.

Sandeep Sharma, Judge (oral):

Precisely, the facts of the case, as emerge from the record, are that petitioner namely Kiran Chand Sharma was initially appointed as JBT teacher on contract basis at GPS Shilla, Education Block Naggar, District Kullu, H.P., on 4.12.1997, whereafter after completion of eight years of contractual services, services of the petitioner came to be regularized on 5.7.2006, w.e.f. 1.1.2006 (Annexure P1 and P2). It is also not in dispute that contract services of the petitioner were followed by regularization without there being any interruption. The petitioner claimed before the authorities that services rendered by him on contract basis be also taken into consideration while computing his qualifying service for the purpose of pension (Annexure R-3), but since, no action ever came to be taken at the behest of the respondents on the aforesaid representation filed by the petitioner, he was compelled to approach this Court by way of writ petition filed under Article 226 of the Constitution of India, praying therein for following main relief:

> ***"That the respondents may very kindly be directed to count the services of the petitioner rendered on contract basis followed by regularization, for the purpose of service increments and towards pension, with all consequential benefits"***

In the year, 2015, petition came to be transferred to the Erstwhile HP State Administrative Tribunal, however, same has been again transferred to this Court on the abolishment of Tribunal.

2. Having heard learned counsel for the parties and perused material available on record, this Court finds that it is not in dispute inter-se parties that the petitioner was initially appointed against the substantive post by following due procedure in accordance with law and recruitment was made consequent upon the selection made by the duly constituted Selection Committee. Similarly, there is no dispute that the petitioner kept on serving the education department uninterruptedly till his regularization.

3. Respondents while admitting factum with regard to appointment of the petitioner as JBT on contract basis have stated in their reply that the petitioner at the time of accepting appointment on contract basis had executed an agreement, wherein there was no condition that services rendered during contract would be counted for computing qualifying service for pensionary benefits. Apart from above, respondent State has also placed reliance upon the judgment dated 28.4.2011 rendered by the Division Bench of this Court in LPA No. 114 of 2010, titled *State of H.P. Vs. Uma Dutt Sharma*, wherein it has been held that ad-hoc/tenure service rendered by the employee followed by the regular appointment shall count for the purpose of increment and pension, but not contract service.

4. In the aforesaid facts and circumstances, question which needs to be decided in the instant proceedings is that "*Whether services rendered by an employee on contractual basis can be subsequently counted towards qualifying service for grant of pension or not?*"

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

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

6. Question as formulated herein above has been already considered and decided by this Court vide judgment dated 1.1.2020 passed by this Court in CWP No. 3267 of 2019 titled ***Ram Krishan Sharma v. The Accountant General (A&E) HP and Ors,*** wherein having taken note of various judgments rendered by the Hon'ble Apex Court as well as co-ordinate Benches of this Court, it has been concluded that services 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 this Court reveals that petitioner in that case was appointed as Ayurveda Doctor on ad-hoc basis vide communication dated 23.1.1999 and his services were thereafter regularized on 25.11.2006. After superannuation of aforesaid Ayurveda doctor, respondent issued pension payment order in favour of the petitioner authorizing him to have benefit of pension after superannuation from the Directorate of Ayurveda and he was in receipt of pension till the issuance of communication dated 11.10.2019, whereby District Ayurvedic Officer, Bilaspur requested the Accountant General to stop pension of the petitioner. In the case referred above, District Ayurvedic Officer apprised the Accountant General that as per government of Himachal Pradesh Finance (Pension) vide notification No. Fin.(Pen) A(3)-196 dated 17.8.2006, employees appointed on regular basis after 15.5.2003 are entitled to only to the Contributory Pension Scheme and not entitled to pension under CCS Pension Rules, 1972 and as such, petitioner is not entitled to pension under CCS Pension Rules 1972.

7. Taking cognizance of the aforesaid communication sent by the District Ayurvedic Officer, Office of Accountant General stopped the pension of the petitioner, however, this Court in ***Ram Krishan Sharma's*** (Supra) quashed the order stopping pension issued by the District Ayurvedic Officer and held that the petitioner would be deemed to be in regular service of department in the capacity of Ayurvedic Medical Officers since date of his initial engagement. In the aforesaid judgment, this Court while placing reliance upon various judgments rendered by the Hon'ble Apex Court held that services rendered prior to regularisation in any capacity be it work-charged employees, contingency paid fund employees or non-pensionable establishment have to be counted towards qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

8. Since issue in the present case is similarly to the issue, which stands already decided vide aforesaid judgment (***Ram Krishan Sharma's*** case) as well as judgment rendered by the co-ordinate Bench of this Court in ***CWPOA No. 195 of 2019 dated 26.12.2019, titled Sheela Devi v. State***. It would be apt to take note of relevant paras of judgment passed in ***Sheela Devi's*** case supra:

> ***"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."

In the aforesaid judgment, it has been categorically held that the services rendered prior to regularization in any capacity be it work-charged employees, contingency paid fund employees or non-pensionable establishment have to be counted towards qualifying service.

9. Though in the instant case, respondents in their reply have claimed that since there was no condition in the contract agreement

signed by the petitioner at the time of accepting service on contract basis that services rendered by him toward contract period shall be counted for the purpose of computing qualifying service for pension and increment, claim of the petitioner is not sustainable, but having taken note of the facts and circumstances of the case as well as law discussed herein above, aforesaid submission is not only fallacious, rather same is without any logic and as such, cannot be accepted. No doubt, initial appointment of the petitioner was on contract basis, but that in any manner cannot said to be qualitative different from the regular employees. The taking of work on contract basis for long period amounts to exploitation and as such, period spent by the petitioner on contract basis, if not counted towards qualifying service, petitioner would not only be deprived from the due emoluments qua the period he served on less salary on contractual basis, but he would also be deprived of counting of the period for pensionary benefits. Once State has counted the service rendered by the petitioner on contract basis for the purpose of regularization, there is no plausible reason to not to count such services for computing qualifying service for the purposes of pension.

10. Classification cannot be done on irrational basis, especially when respondents themselves have counted services rendered by the petitioner on contract for regularizing services. It would be unjust, illegal and impermissible to accept the aforesaid classification 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 prior to regularisation in any capacity be it work-charged employees, contingency paid fund employees or non-pensionable establishment have to be counted towards qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment. Aforesaid view taken by this Court is fortified by the judgment rendered by the Hon'ble Apex Court in case titled ***Prem Singh v. State of UP and Ors, AIR SC 4390***., which has been otherwise taken note of, by this Court while passing judgment in *Ram Krishan's Case supra.* In light of the aforesaid law laid down by the Hon'ble Apex Court as well as this Court, no discrimination can be made *inter-se* employees, who renders or have rendered services prior to regularization in the capacity of contractual employees and were subsequently regularized.

11. Contention of learned Additional Advocate General that initial date of appointment after regularization would be date on which the petitioner or other similarly situate persons took charge of the post is wholly mis-placed and cannot be accepted. Once entire service of the petitioner or other similarly situate persons rendered in any capacity is to be counted as qualifying service, then his date of appointment is to relate back to his initial date of appointment and such persons cannot be estopped from pension scheme by applying the date of regularization

12. The Hon'ble Apex Court in case titled ***R. N. Nanjundappa v. T. Thimmiah and Anr, 1972 (1) SCC 409*** has categorically 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. 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***, wherein it has been held that service rendered before regularization is liable to be counted for the purpose of pension. Relevant paras of the aforesaid judgment are as reproduced 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."

Aforesaid judgment rendered by the Punjab and Haryana High Court has attained finality because SLP bearing No. CC/7901 of 20111 having been filed by the State of Punjab stands dismissed.

14. Consequently, in view of the detailed discussion made herein above as well as law relied upon, present petition is allowed and respondents are directed to count the service rendered by the petitioner on contract basis while computing qualifying service for the purpose of pension and increment. Petition stands disposed of accordingly.

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

Dr. Kamal Dev Sharma .....Petitioner

Versus

State of Himachal Pradesh and Ors. .....Respondents

CWPOA No. 849 of 2019
Decided on: 15.7.2020

Central Civil Services (Pension) Rules, 1972 (Rules)- Rule 17- Government Notification dated 17.08.2006- Notification providing that Government employee appointed on and after 15.05.2003 would be governed by H.P. Civil Services Contributory Pension Rules, 2006- Grant of pension under Rules to employees engaged prior to 15.05.2003 on ad-hoc basis but regularized after said period- Entitlement- Held, regularization cannot be said to be a form of appointment- Regularization would mean conferring quality of permanence on appointment which was initially made on temporary, ad-hoc or contract basis- Service rendered prior to regularization therefore is to be counted towards qualifying service even if it is not preceded by temporary or regular appointment in a pensionable establishment- After regularization, initial date of appointment would be date on which petitioner was appointed on ad-hoc basis- He is not governed by Contributory Pension Scheme, 2006- Petition allowed. (Para 11, 14 & 15)

Whether approved for reporting? [10] Yes.

For the Petitioner	**:**	Mr. Onkar Jairath and Mr. Shubham Sood, Advocates, through Video Conferencing.
For the Respondents	**:**	Mr. Ashok Sharma, Advocate General, with Mr. Sudhir Bhatnagar & Mr. Arvind Sharma, Additional Advocates General and Mr. Kunal Thakur, Deputy Advocate General.

Sandeep Sharma, Judge (oral):

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

In the instant proceedings filed under Article 226 of the Constitution of India, prayer has been made on behalf of the petitioner to quash and set-aside order dated 9.8.2011 (Annexure P-4), passed by respondent No.1 in purported compliance of order/judgment dated 29.12.2010, passed by the Division Bench of this Court in CWP No. 3561 of 2010, titled Dr. Kamal Dev Sharma v. State of HP and Ors., whereby following directions came to be issued:-

> ***"Having regard to the CCS (Pension) Rules, 1972, having regard to the GPF Rules and having regard to the submissions as above, we are of the view that in the case of the petitioners, the matter requires fresh consideration by the Government since as the amendment introduced w.e.f. 15.5.2003, all appointments made in the State of Himachal Pradesh on or after the date of publication of the notification namely, on 15.5.2003, they alone are not be covered by CCS (Pension) Rules, 1972. It is also to be noted as per the Scheme dated 17.8.2006, the same is only made applicable to the new appointees appointed after 15.5.2003.***
>
> ***Having regard to the factual matrix and legal position as referred to above, whereby the appointments though on adhoc/ contractual/tenure basis having been made prior to 15.5.2003 and which appointments having been given effect by way of regularization with effect from the date of adhoc/tenure/contractual basis, the contentions as referred to above, assume significance and force. Therefore, these writ petitions are disposed of directing the first respondent to consider the case of the petitioners afresh and take appropriate action in the matter expeditiously."***

2. Perusal of order dated 9.8.2011 passed by the respondents reveals that representation having been filed by the petitioner in terms of aforesaid order passed by this Court, came to be rejected and as such, he was again compelled to approach this Court in the instant proceedings, praying therein for following reliefs:

> ***"i. to quash and set aside the impugned order Annexure P-4, dated 9th August, 2011, passed by respondent No.1, thereby directing the respondents to continue the contribution of petitioner towards GPF account No. Med-16543, which was allotted to the petitioner.***
> ***ii. to hold that the Contributory Pension Scheme i.e. Himachal Pradesh Civil Services Contribution Pension Rules, 2006 is not applicable retrospectively to the Government employees including the petitioner."***

3. 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 Ayurvedic Medical Officer on adhoc basis vide communication dated 23.1.1999 (Annexure P-1). Close scrutiny of aforesaid communication reveals that 50 Ayurvedic doctors including the petitioner were ordered to be appointed in the pay scale of Rs. 7220-11,660/- on the recommendation of Selection Committee. It is also not in dispute that services of the petitioner were subsequently regularized vide communication dated 25.11.2006 (Annexure P-2). Petitioner after his appointment as Ayurvedic Medical Officer at Ayurvedic Dispensary, Shong, District Kinnaur, H.P, started contributing towards General Provident Fund (GPF) and accordingly, he was allotted GPF number i.e. Med-16543.

4. After regularization of the services of the aforesaid Ayurvedic Officers including the petitioner, respondents directed the petitioners to switch over to Contributory Pension Scheme introduced vide notification dated 17.8.2006. However, being aggrieved with the aforesaid decision taken by the respondent-State, petitioner alongwith other Ayurvedic Doctors, approached this Court by way of CWP No. 3561 of 2010, titled *Dr. Kamal Dev Sharma v. State of HP and Ors*. and CWP No. 1921 of 2008, titled *Dr. Deepak Pathania and Ors v. State of HP and Ors*., praying therein for reliefs as have been prayed in the instant petition.

5. The Division Bench of this Court after having heard parties and perused record made available to it disposed of the writ petitions, directing therein respondent No.1 to consider the case of the petitioners afresh. In purported compliance of aforesaid direction issued by the Division Bench of this court, respondent No.1 considered the matter afresh and vide speaking order dated 9.8.2011, Principal Secretary (Ayurveda) Government of Himachal Pradesh, concluded that employees appointed on or after 15.5.2003 are governed by the HP Civil Services Contributory Pension Rules, 2006 and are not eligible to subscribe to the General Provident Fund as per Rule

4(4) of the HP Civil Services Contributory Pension Rules, 2006. While drawing aforesaid conclusion, Principal Secretary (Ayurveda), observed in the order that Rule 4 (26) of the HP Civil Services Contributory Pension Rules, 2006 provides that employees appointed on or after 15.5.2003 and who are already contributing towards the GPF shall cease to continue to subscribe towards the GPF from the date of notification of Contributory Pension Scheme and the amount deposited in their GPF account, shall be transferred to their respective CPF accounts alongwith interest.

6. Mr. Onkar Jairath, learned counsel representing the petitioner contended that decision dated 09.8.2011 taken by respondent No.1 in purported compliance of judgment rendered by the Division Bench of this Court in earlier case filed by the present petitioner is not sustainable in the eye of law because competent authority while considering case of the petitioner afresh has failed to take note of the observations/directions made/passed by the Division Bench of this court while passing judgment dated 29.12.2010. He further contended that respondents have failed to take note of the fact that petitioner after having joined his duty on 17.2.1999 was allotted GPF number i.e. Med-16543 on 14.7.1999 and since then, he had been regularly contributing to the GPF from monthly salary and as such, there was no occasion for the respondents to direct the petitioner to switch over from GPF to CPF. Mr. Jairath further contended that once services of the petitioner were ordered to be regularized from the date of his joining as Ayurvedic Medical Officer, Contributory Pension Scheme introduced vide notification dated 17.8.2006 could not be made applicable in the case of the petitioner, who was admittedly appointed in the year, 1999 and was regularized on 25.11.2006. Mr. Jairath, further contended that in judgment dated 26.12.2019, passed by the Division Bench of this Court, in case titled ***Smt. Sheela Devi v. State of HP and Ors*** *in* ***CWPOA No. 195 of 2019*** as well as judgment dated 1.1.2020, passed by this Court in CWP No. 3267 of 2019 tilted ***Ram Krishan Sharma v. The Accountant General (A&E) HP and Ors,*** it has been categorically held that service rendered by an employee prior to regularization in any capacity are required to be counted towards qualifying service for grant of pension and increment and as such, case of the petitioner is squarely covered with the aforesaid judgments. While concluding his arguments, Mr. Jairath, argued that this Court while rendering judgment in ***Ram Krishan Sharma's case*** (Supra) has held that the entire service of an employee is to be counted as qualifying service and his date of appointment will relegate back to his initial date of appointment and as such, he cannot be ousted from the pension scheme by applying the date of regularization.

7. Respondents though have virtually admitted the facts of the case, as have been taken note herein above, but their case is that since petitioner was appointed on regular basis after 15.5.2003, his services have been rightly held to be governed by the HP Civil Services Contributory Pension Rules, 2006. Mr. Arvind Sharma, learned Additional Advocate General, contended that as per Rule 4 (26) of the aforesaid Rules, employees appointed on or after 15.5.2003 and who are already contributing towards the GPF shall cease to continue to subscribe towards the GPF from the date of notification of the Contributory Pension Scheme and as such, no infirmity and illegality can be found in the order impugned before this Court in the instant proceedings.

8. Having heard learned counsel for the parties and perused material available on record, this Court finds that respondent No.1 has rejected case of the petitioner on the ground that since his services were regularized on 25.11.2006, he is governed by the Contributory Pension Scheme, but in the instant case, petitioner was appointed as Ayurvedic Medical Officer on adhoc basis in the year, 1999 and his services were regularized on 25.11.2006 i.e. after 15.5.2003.

9. At this stage, it may be noticed that this Court while dealing with cases of Ayurvedic Medical Officers, as is the case of the petitioner, have already held that service of an employee appointed on contract basis in temporary capacity or on adhoc is to be counted towards qualifying service for grant of pension and increment.

10. In ***Sheela Devi*'s** case (supra), husband of the petitioner 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, but same 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 towards pensionary 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 contention of the department that since services of the husband of the petitioner were regularized after 14.5.2003, he cannot be held entitled for pension.

11. Bare perusal of judgment rendered by this Court in ***Ram Krishan Sharma's case*** supra suggests that contention of respondent department, that since services of the petitioner in that case were regularized in the year, 2006, his date of appointment to the regular post is to commence from the date of his regularization, was rejected outrightly. In the aforesaid judgment, it has been specifically held by this Court that 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. In ***Sheela Devi's*** case (supra), it has been held as under:-

> ***"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 cutoff 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."

13. In ***Ram Krishan Sharma's case*** (supra), it has also been held as under:-

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."

14. It is quite apparent from the aforesaid exposition of law laid down by the coordinate Bench of this Court as well as 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.

15. If aforesaid analogy is applied in the case of the petitioner, his initial date of appointment after regularization will be the date on which he was initially appointed on adhoc basis in the year, 1999 and as such, he cannot be said to be covered under the HP Civil Services Contributory Pension Rules, 2006, which specifically provides that employees appointed on or after 15.5.2003, are not eligible to subscribe for GPF.

16. Aforesaid Rules provide that employees appointed on or after 15.5.2003 and who are already contributing towards the GPF, shall cease to continue to subscribe towards the GPF from the date of notification of Contributory Pension Scheme, but in the instant case, petitioner cannot be said to be appointed on or after 15.5.2003, rather for the reasons stated herein above petitioner's date of appointment will relegate back to his initial date of appointment i.e. 1999 and as such, he cannot be estopped from contributing towards GPF.

17. Consequently, in view of the aforesaid discussion as well as law relied upon, present petition is allowed and impugned order dated 9.8.2011 (Annexure P-4) is quashed and set-aside. It is further held that the HP Civil Services Contributory Pension Rules, 2006 is not applicable retrospectively in the case of the petitioner and he is entitled to contribute towards GPF qua which he has been already allotted GPF No. i.e. Med-16543. In the aforesaid terms, present petition is disposed of, so also pending application(s), if any.

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

G.S.Guleria ..... Petitioner

versus

State of H.P.& another .....Respondents

CWPOA No.868 of 2019
Date of Decision: 17.7.2020

Constitution of India, 1950- Article 226- Order qua recovery of salary paid in excess- Challenge by way of writ on ground that no misrepresentation was made by petitioner regarding fixation of his salary and amount cannot be recovered at a belated stage- Held, step up in pay was given to petitioner on his representation- Order of step up passed by Authority which was not competent to grant it- Order was made subject to audit verification and right of department to recover overpayment if any- Petitioner also furnished undertaking to refund overpayment resulting from wrong re-fixation of his pay- Due notice given to petitioner by department before issuing order of recovery- Payment of excess amount also not disputed by petitioner- Department has a right to recover excess amount from petitioner- Petition dismissed. (Para 10, 14 & 15)

Cases referred:

Sahib Ram vs. State of Himachal Pradesh, 1995(1) Supp. SCC 18;
State of Punjab vs. Rafiq Masih, (2015)14 Supreme Court Cases 334;

Whether approved for report? Yes.

For the Petitioner : Mr. Karan Singh Parmar, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General,
with Mr. Sudhir Bhatnagar, Additional Advocate General.

Sandeep Sharma, Judge *(oral)*

Being aggrieved and dissatisfied with the order dated 27.3.2012 passed by Engineer-in-Chief, I & PH Department, Shimla, H.P., whereby a sum of Rs. 88,838/- has been ordered to be deducted from the arrear of revised pay scale of the officer i.e. petitioner, petitioner has approached this Court in the instant proceedings, praying therein following reliefs:-

(i) That order dated 27.3.2012 may kindly be quashed and set-aside and respondents may kindly be directed to refund a sum of Rs.88,838/- to the petitioner alongwith interest at some Nationalized bank;

(ii) That the respondents may kindly be burdened with costs;

2. Certain undisputed facts, which are necessary for adjudication of the case are that initially petitioner joined services as Assistant Engineer in the respondent department on 23rd January, 1979. Person namely, Sh. Rajesh Kamal Sharma also joined the post of Assistant Engineer as Direct Recruit on 28.7.1981. On 1.7.2009, final seniority list as it stood on 31.12.2008 was circulated by the respondent department, wherein name of the petitioner finds mention at Sr. No.7, whereas above named person Sh. Rajesh Kamal Sharma at Sr. No.13 of the seniority list.

3. It is not in dispute that subsequently both the petitioner as well as person namely, Sh. Rajesh Kamal Sharma were promoted as Superintending Engineer in the I & PH Department. On 30.6.2010, petitioner retired from the respondent department, but on 12.10.1999 he after having come to know that person namely, Sh. Rajesh Kamal Sharma, who was junior to him is drawing higher salary, represented the competent authority, praying therein for stepping up of his salary qua Sh. Rajesh Kumar Sharma.

4. Consequent upon aforesaid representation made by the petitioner, his pay was re-fixed by step up w.e.f.26.6.1996, as is evident from the office order dated 19.3.2011 (Annexure R-3). However, respondent department subsequently vide communication dated 28th September, 2011 informed the petitioner (Annexure P-4) that after having carefully perused the Due Drawn Statement, it has transpired that sum of Rs. 88838/-(Rupees Eighty Eight Thousand Eight Hundred Thirty Eight only) is recoverable from you. Engineer-in-Chief I& PH Department by way of aforesaid communication specifically stated in the aforesaid communication that before further action is taken, you may furnish your comments within a period of thirty days. Pursuant to aforesaid communication, petitioner filed reply dated 20.12.2011 (Annexure P-5) stating therein that since there was no misrepresentation on his part when the re-fixation was done in year 1996, amount paid to him on account of step up cannot be recovered at this stage, as has been held by the Hon'ble Apex Court in ***Sahib Ram vs. State of Himachal Pradesh,*** 1995(1) Supp. SCC 18. While filing aforesaid reply, petitioner prayed to the competent authority that recovery as pointed out vide letter dated 28.9.2011 may be waived of because recovery cannot be affected at the belated stage as per the judgment rendered by Hon'ble Apex Court in Sahib Ram's case *supra*. Competent authority after having taken note of aforesaid reply filed by the petitioner as well as judgment rendered by Hon'ble Apex Court in Sahib Ram's case *supra*, rejected the claim of the petitioner vide order dated 27.3.2012 (Annexure P-6). Vide aforesaid order, competent authority observed that pay of Sh. G.S.Guleria, Superintending Engineer (petitioner) was stepped up on his request and after having obtained his undertaking dated 5.9.2009 (Annexure R-5). In the aforesaid background, petitioner approached this Court in the instant proceedings, praying therein for the relief(s), as has been reproduced hereinabove.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that request of step up of pay scale came to be made on behalf of the petitioner vide communication dated 12.10.1999 (Annexure R-1). Perusal of aforesaid communication reveals that petitioner after having come to know that person namely, Sh. Rajesh Kamal Sharma, Superintending Engineer, I & PH Circle ,Bilaspur, who is junior to him was drawing more pay in the revised pay scale w.e.f.1.6.2006, requested the department to step up his pay to bring at par with the person namely, Sh. Rajesh Kamal Sharma.

6. Though, Superintending Engineer, I & PH Circle, Reckong Peo was not competent to grant higher time scale to the petitioner because competent authority to grant higher time

scale is the Govt. i.e. Principal Secretary (IPH) to the Government of Himachal Pradesh, but record reveals that Superintending Engineer, I & PH Circle, Reckong Peo inadvertently granted higher time scale to the petitioner vide letter dated 9.12.1999 and as such, no benefit, if any, can be given to the petitioner in terms of the judgment passed by the Hon'ble Apex Court in Sahib Ram's case *supra.*

7. Careful perusal of office order dated 19.3.2011, clearly reveals that pay fixation made in the case of the petitioner pursuant to his request was accepted by the respondent-department subject to the verification by the Audit Office. It specifically stands recorded in the aforesaid communication that if over payment is found as a result of incorrect pay fixation by the audit office, the Government shall have the right to recover the over payment from his any dues without serving any notice to the Officer concerned.

8. Besides above, respondent department while re-fixing the pay of the petitioner also took an undertaking from him, which is available at page No.57 of the paper book (Annexure R-5). Perusal of Annexure R-5 i.e. Form of undertaking given by the petitioner on 5.9.2009, clearly reveals that he undertook before the authority that at the time of re-fixation of his pay or any excess payment detected in the light of discrepancies noticed subsequently or due to any reason, will be refunded by him to the government either by adjustment against future payments due to him or otherwise failing which DDO concerned shall have every right to recover the said amount of over payment in monthly installments from his monthly salary or from any other pay arrears. Needless to say, once the petitioner accepted the grant of step up, natural consequences flowing from such step up are also to be accepted by him being inextricable. Respondents have categorically stated in the impugned order that perusal of Due Drawn Statement has revealed that sum of Rs. 88838/- is recoverable from you and as such, you are liable to refund the same being excess payment.

9. Leaving everything aside, bare perusal of the averments contained in the petition, nowhere suggest that the petitioner has been able to dispute the contention of the respondent department that sum of Rs.88838/- is recoverable from him, rather claim of the petitioner is that since he had not misrepresented at the time of making representation for stepping up to bring his pay at par with the person namely, Rajesh Kamal Sharma, who is/was admitted junior to him, no recovery, if any, can be affected at this stage on account of excess payment.

10. Reply filed by the respondents reveals that the competent authority to grant higher/ time scale of Rs. 14300-400-15900-450-18150 on completion of 14 years of service as Assistant Engineer/ S.D.O/Executive Engineer is the government and not the Superintending Engineer, I & PH Circle, Reckong Peo, but it appears that the petitioner misrepresented to his Superintending Engineer, I& PH Circle, Reckong Peo vide representation dated 12.10.1999 (Annexure R-1) for granting higher/time pay scale of Rs. 14300-400-15900-450-18150 on completion of 14 years of service as Assistant Engineer/S.D.O/Executive Engineer. Superintending Engineer, I& PH Circle, Reckong Peo without there being any authority accepted the representation of the petitioner and granted aforesaid pay scale to the petitioner. Superintending Engineer, I& PH Circle, Reckong Peo after granting higher pay scale to the petitioner raising his pay from Rs. 11380/- per month (as per fitment table) to Rs. 14300/- per month w.e.f.1.1.996, inadvertently granted his annual increment after completion of only one month i.e. w.e.f.1.2.1996, whereas such increment ought to have been granted after completion of 12 calendar months, which action of Superintending Engineer, I& PH Circle, Reckong Peo was in complete violation of Government of India's Orders No.(6) 2 of Fundamental Rule-23(FR-23), which provides that where a pay is fixed at the minimum to the revised/higher pay scale, next annual increment is admissible only after completion of 12 calendar months. In view of the aforesaid statutory rule, it was incumbent upon the petitioner to point out wrong fixation, but he despite having known the rules chose to remain silent. Since petitioner has not raised any dispute with regard to quantum of amount allegedly recoverable from him on account of excess payment, this Court sees no reason to go into the aforesaid aspect of the matter.

11. Mr. Karan Singh Parmar, learned counsel representing the petitioner while placing reliance upon the judgment rendered by Hon'ble Apex Court in ***State of Punjab vs. Rafiq Masih***, (2015)14 Supreme Court Cases 334, vehemently argued that recovery from the retired employees or employees, who are due to retire is impermissible, especially when there was no misrepresentation , if any, on the part of the petitioner at the time of claiming benefit of step up in his favour. No doubt, in the aforesaid judgment passed by Hon'ble Apex Court, it has been held that recovery from retired employees, or employees, who are due to retire within one year of the order of recovery is impermissible in law.

12. But Hon'ble Apex Court in subsequent judgment dated 29th July, 2016 passed in case titled ***High Court of Punjab and Haryana and another versus Jagdev Singh,*** has

clarified that principle enunciated in Proposition (ii) cannot be made applicable to the situation where the officer to whom payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. In the aforesaid judgment Hon'ble Apex Court has held that if the officer has furnished an undertaking while opting for the revised pay scale, he is bound by the undertaking given by him.

13. At this stage, it would be relevant to reproduce para No.9 to 11 of the aforesaid judgment hereinbelow:-

"9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc1. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." (emphasis supplied).

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking".

14. In the case at hand, there is ample material available on record suggestive of the fact that competent authority while passing the order of stepping up of the pay of the petitioner specifically put him to the caveat that pay in question is subject to the verification by the audit office and if any over payment is found as a result of incorrect pay fixation by the audit office, the Government shall have the right to recover the over payment from his any dues without serving any notice. Besides above, petitioner also furnished an undertaking while accepting revised pay scale that any excess payment that may be found as a result of incorrect fixation of pay or any excess payment detected in the light of discrepancies noticed subsequently or due to any excess will be refunded by him to the Government either by adjustment against future payments due to him or otherwise, failing which the DDO concerned shall have every right to recover the said amount of overpayment in monthly installments from his monthly salary or from other pay arrears.

15. Consequently, in view of the aforesaid law laid down by the Hon'ble Apex Court in ***Jagdev Singh's case supra,*** submission of learned counsel representing the petitioner that since pay fixation was done without there being any misrepresentation, no recovery can be effected even, if pay of the employees was wrongly fixed, cannot be accepted. Record of the case reveals that competent authority before issuing order of recovery afforded due opportunity of being heard to the petitioner, who while replying to notice has no where disputed the amount determined by the respondent-department on account of wrong fixation, rather has simply stated that there is no misrepresentation on his part when fixation was done in the year, 1996.

16. Accordingly, in view of the above, the present petition is dismissed alongwith pending applications, if any.

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

Nandi Verdhan ....Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWPOA No.428 of 2019
Reserved on 26.06.2020
Decided on: 30.06.2020

Constitution of India, 1950- Articles 14 & 226- Promotion to higher post- Entitlement- Held, right to be promoted to higher post is not a fundamental right of an employee- However right of being considered for promotion is a fundamental right. (Para 9)

Constitution of India, 1950- Articles 14 & 226- Promotion to higher post- Whether employer can be directed to promote the eligible employee? - Held, Court cannot pass writ of mandamus directing an employer to order promotion of eligible employee simply because vacancy is available- It is prerogative of employer whether to fill or not, the vacant post existing in the establishment- Unless Court is satisfied that employer is intentionally not filling up the post with an ulterior motive to deny promotion to eligible incumbent, it will not interfere in such like matters. (Para 12)

Whether approved for reporting?[11] Yes

For the petitioner : Mr. Prem P. Chaunan, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Mr. Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General.

Ajay Mohan Goel, Judge (Oral)

By way of this petition, which stood filed by the petitioner before the learned Erstwhile Himachal Pradesh Administrate Tribunal and which after abolition of the learned Tribunal, stands transferred to this Court, the petitioner has prayed for the following reliefs:-

> "(a) quash the impugned order A-5 issued arbitrarily, malafide and illegally by the respondents;
>
> (b) Direct the respondents to consider and promote the applicant to the post of Incharge-Technical from the date the post is lying v vacant with all the consequential benefits and arrears of salary etc. alongwith interest thereon @ 18% p.a."

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

The case of the petitioner was that he was initially appointed as Radio Instructor in the year 1968 and he joined as such on 21.06.1968. According to the petitioner, who was 58 years old

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

at the time when the Original Application was filed by him, since his initial appointment, he had not been given any promotion by the Department, though he was due for retirement with effect from 28.02.2006. It was further the case of the petitioner that opportunities for promotion though available to the post of Incharge-Technical, respondents were not promoting him to the post in issue, though five posts of Incharge-Technical were lying vacant in the respondent-Department and there were only five candidates available for being promoted against the posts in issue. It was further the case of the petitioner that despite the fact that five promotional posts were available, respondent-Department had recommended only two names, thus depriving the petitioner of his legitimate claim as well as constitutional and fundamental right of being considered for promotion. It was further the case of the petitioner that earlier also, Shri Ravinder Singh and Shri Subhash Gupta, both Technical Instructors, had filed a writ petition in this Court, claiming reliefs similar to that being claimed by the petitioner, which petitions on transfer to the learned Himachal Pradesh Administrative Tribunal, were finally decided by the learned Tribunal on 23.06.2000, vide Annexure A-3 and pursuant to the directions so issued, Departmental Promotion Committee (DPC) was convened and both the officers names hereinabove were duly promoted vide order dated 04.07.2002.

3. According to the petitioner, earlier also, officer junior to him stood promoted against the post of Technical Officer, while the petitioner was ignored. In this background, petitioner had earlier filed O.A. No.1257 of 2005, titled as Nandi Verdhan Versus State of Himachal Pradesh and Another, in the learned Himachal Pradesh Administrate Tribunal and on the request of the petitioner, learned Tribunal ordered the Original Application to be treated as a representation, so that the case of the petitioner for promotional post could be considered from retrospective date. However, the representation of the petitioner stood rejected arbitrarily by the respondent, leading to the filing of the present case.

4. As per the petitioner, the act of the respondent-Department of not promoting the petitioner was arbitrary as when the DPC to fill up the promotional post was not held every year, then the respondent-Department was bound to follow the instructions contained in the Hand Book on Personal Matters, Vol-1, Chapter 16, which Chapter provided that where the DPC had not been held in any year, then subsequently when the DPC was held, for the year in issue, only those candidates could be considered for promotion, who were eligible at the relevant time and delay in holding the DPC could not expand the zone of consideration. It is on these basis that the petition was filed by the petitioner, praying for the relief already mentioned hereinabove.

5. The petition has been resisted by the respondents, who in the reply(s) filed by them have taken the stand that promotion cannot be claimed as a matter of right and further the promotions are to be made as per rules in vogue and number of posts which the employer intends to fill up by way of promotion, is the prerogative of the employer.

6. Respondents No.1 and 2 have taken the stand in their reply that petitioner had filed O.A. No.1257 of 2005, before the learned Himachal Pradesh Administrate Tribunal, wherein the learned Tribunal was pleased to pass interim orders that the case of the petitioner be considered in the next DPC. The Department convened the next DPC as per the procedure, however, petitioner was not found eligible for promotion as there were officers senior to the petitioner waiting for promotion and it is in this background that the representation of the petitioner was decided by the authority concerned. As per respondents, the representation was decided after affording an opportunity of being heard to the petitioner and after taking into consideration the relevant record. It is further the stand of the respondents that promotions were made strictly on the basis of seniority and the R&P Rules and no illegality was committed by not promoting the petitioner to the next promotional post.

7. Record demonstrates that no rejoinder has been filed by the petitioner to the reply(s) filed by the respondents.

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

9. It is settled law that right to be promoted is not a fundamental right of an employee, though the right of being considered for promotion is a fundamental right. It is borne out from the record that feeling aggrieved by the factum of his not being promoted to the next promotional post, petitioner had earlier filed an Original Application before the learned Himachal Pradesh Administrative Tribunal, details of which have already been mentioned hereinabove and in terms of an interim order passed by the learned Tribunal, a DPC was convened by the employer and the case of the petitioner was considered for promotion, yet he could not be promoted as there were officers senior to him, eligible for promotion. There is nothing on record to demonstrate that the proceedings of the said DPC were challenged by the petitioner.

10. A perusal of the order passed by the Competent Authority, vide which the representation of the petitioner was dismissed, demonstrates that the following weighed with the Competent Authority, while rejecting the representation of the petitioner:-

> "The Education Director has informed that 4 posts of Incharge Technical were created to supervise/inspect the working of Technical Instructors and also to provide promotional avenues to the Technical Instructors. However, with the passage of time and non-availability of students of particular area, further recruitment to the post of Technical Instructors has not been made since 1968. The cadre was for all purposes being declared as dying Cadre. Further at present there is only one Technical Instructor namely the applicant. The Director is of the opinion that there is no need to have Technical Incharge because if the present Technical Instructor is so promoted, then there will be no Technical Instructor left whose work was to be supervised/ inspected. The Director is of the opinion that promoting anybody to the post of Incharge Technical will not enhance the efficiency of the Department.
>
> It has been held by the courts that the Government was always competent to take conscious decision for valid reasons not to fill up posts. Further the courts have held that existence of a vacancy alone cannot sustain a claim to promotion. In view of this the mere existence of the post of Technical Incharge cannot give rise a claim to promotion.
>
> Secondly, the Education Directorate has brought to notice prolonged periods of unauthorized absence by the applicant. These are yet to be settled. It is doubtful if the applicant could be promoted in these circumstances. As regards various alleged wrong doings by the Education Department to benefit other officials, unless very specific allegations are made duly supported by evidence, no action can be taken".

11. Incidently, a perusal of the averments made in the petition demonstrates that there is no express challenge to the findings so returned by the Competent Authority while dismissing the representation of the petitioner.

12. Be that as it may, it is a matter of record that the present petition was filed by the petitioner just a few days before his superannuation and he stood superannuated as far as back in the month of February 2006. As no employee has a fundamental right to be promoted against a promotional post, this Court cannot pass a mandamus, directing an employer to order the promotion of an eligible employee, simply because vacancy was available. Whether or not, the employer intends to fill up a vacant post, is the prerogative of the employer and unless the judicial conscious of the Court is satisfied that the employer is not intentionally filling up the post with an ulterior motive to deny promotion to an eligible incumbent, the Courts do not interfere in such like matters.

13. In the present case, there is nothing on record, from which it can be inferred that the employer purposely did not convene a DPC to promote the petitioner. To the contrary, while deciding the representation of the petitioner in terms of the directions passed by the learned Tribunal, reasons stand spelled out by the Competent Authority, as to why the Department was not filling up the promotional posts. Petitioner has also not been able to spell out in the petition that denial of promotion to him was either an act of colorable excise of powers on behalf of the respondents or was due to some malafide intent.

14. Therefore, in these circumstances, when a conscious decision stood taken by the employer not to fill up the available promotional posts, said decision of the employer does not calls for any interference as the Court does not finds anything arbitrary or illegal in the said decision of the respondent-Department.

15. In view of the findings returned hereinabove, this petition is dismissed. No order as to costs. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

1. CWP No. 3410 of 2019
   Dr. Nitish Paul Sharma …Petitioner.

Versus

Union of India and others ...Respondents.

2. CWP No. 3487 of 2019

Dr. Swati Garg ...Petitioner

Versus

Union of India and others ..Respondents.

3. CWP No.3488 of 2019

Dr. Nishant Dhiman ...Petitioner

Versus

Union of India and others ...Respondents.

4. CWP No. 3490 of 2019

Dr. Vipul ....Petitioner

Versus

Union of India and others ...Respondents.

5. CWP No.3491 of 2019

Dr. Vinay Kumar ...Petitioner

Versus

Union of India and others ...Respondents

6. CWP No. 3492 of 2019

Dr. Jagdeep Singh ...Petitioner

Versus

Union of India and others ...Respondents

7. CWP No. 3493 of 2019

Dr. Bhanuj Pathania ...Petitioner

Versus

Union of India and others ...Respondents

8. CWP No. 3494 of 2019

Dr. Ajay Dadhwal ...Petitioner

Versus

Union of India and others ...Respondents

9. CWP No.3495 of 2019

Dr. Lokesh Thakur ...Petitioner

Versus

Union of India and others ...Respondents

10. CWP No.3496 of 2019

Dr. Gaurav Bhardwaj ...Petitioner

Versus

Union of India and others ...Respondents

11. CWP No. 3497 of 2019

Dr. Pankaj Kumar ...Petitioner

Versus

Union of India and others ...Respondents

12. CWP No. 3498 of 2019

Dr. Chander Kant ...Petitioner

Versus

Union of India and others ...Respondents

13. CWP No. 3499 of 2019

Dr. Sandeep Kumar ...Petitioner

Versus

Union of India and others ...Respondents

14. CWP No. 3500 of 2019

Dr. Dinesh Kumar ...Petitioner

Versus

Union of India and others ...Respondents

15. CWP No.3501 of 2019

Dr. Rakesh Kumar ...Petitioner

Versus

Union of India and others ...Respondents

16. CWP No. 3502 of 2019

Dr. Shivdeep Anand Sharma ...Petitioner

Versus

Union of India and others ...Respondents

17. CWP No. 3503 of 2019

Dr. Satinder Kumar ...Petitioner

Versus

Union of India and others ...Respondents

18. CWP No. 3504 of 2019

Dr. Dherander Sharma ...Petitioner

Versus

Union of India and others ...Respondents

19. CWP No. 3505 of 2019

Dr. Shilpa Bhardwaj ...Petitioner

Versus

Union of India and others ...Respondents

20. CWP No. 3506 of 2019

Dr. Rakesh Kumar ...Petitioner

Versus

Union of India and others ...Respondents

21. CWP No. 3533 of 2019

Dr. Pratibha Sharma ...Petitioner

Versus

Union of India and others ...Respondents

22. CWP No. 3534 of 2019

Dr. Lovepreet Singh ...Petitioner

Versus

Union of India and others ...Respondents

23. CWP No. 3560 of 2019

Dr. Shilpa Rani ...Petitioner

Versus

Union of India and others ...Respondents.

24. CWP No. 3561 of 2019

Dr. Vivek Singh ....Petitioner

Versus

Union of India and others ...Respondents

25. CWP No. 3562 of 2019

Dr. Varun ...Petitioner

Versus

Union of India and others ...Respondents

26. CWP No. 3575 of 2019

Dr. Sonia Sharma ..Petitioner

Versus

Union of India and others ...Respondents

27. CWP No.3576 of 2019

Dr. Ajay Thakur ...Petitioner

Versus

Union of India and others ...Respondents

28. CWP No.3577 of 2019

Dr. Anup Kumar ...Petitioner

Versus

Union of India and others ...Respondents

29. CWP No. 3578 of 2019

Dr. Sakshi Surroch ...Petitioner

Versus

Union of India and others ...Respondents

30. CWP No. 3589 of 2019

Dr. Nidhi Jishtu ...Petitioner

Versus

Union of India and others ...Respondents

31. CWP No.3593 of 2019

Dr. Adarsh Kumar ..Petitioner

Versus

Union of India and others ...Respondents

32. CWP No.3919 of 2019

Dr. Neha Thakur ...Petitioner

Versus

Union of India and others ...Respondents

CWP No. 3410 of 2019 and other connected matters.
Reserved on: 26.6.2020
Decided on: 1st July, 2020

Constitution of India, 1950-Articles 14 & 226- Writ jurisdiction and Court's intervention in policy matters- Principles summarized- Held, Government is entitled to make pragmatic adjustments and make policy decisions which may be necessary or called for under prevalent circumstances- In its power of judicial review, Court cannot sit in judgment over policy matters except on limited grounds i.e. whether policy is arbitrary, malafide, unreasonable or irrational. (Para 15)

Constitution of India, 1950- Articles 14 & 226- Eligibility criteria for a post- Writ jurisdiction and Court's intervention in policy matters- Held, prescribing essential qualifications for appointment to post is something which employer is to decide according to needs and nature of work- It is not for Courts to decide or to lay down the conditions of eligibility. (Para 17)

Cases referred:

Maharashtra Public Service Commission through its Secretary vs. Sandeep Shriram Warade and others (2019) 6 SCC 362);

Whether approved for reporting? [12] Yes

For the Petitioner(s): Mr. Vinay Sharma, Advocate.

For the Respondents: Mr. Rajesh Sharma, Assistant Solicitor General of India, for Union of India.

Mr. Ashok Sharma, Advocate General, with Mr. Ajay Vaidya, Sr. Additional Advocate General for the respondents/State.

Justice Tarlok Singh Chauhan, J.

Since common question of law and facts arise for consideration, therefore, all these petitions were taken up together for consideration and are being disposed of by a common judgment.

2. The petitioners are qualified Ayush Doctors, who possess requisite degree in the field of Ayurved Unani, Homoeopathy etc. and have filed the instant petition assailing therein an advertisement dated 05.11.2019 (Annexure P-1) issued by respondent No.4.

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

3. The precise grievance of the petitioners is that even though they are eligible for admission to six months bridge course for the purpose of filling up of 480 posts of Community Health Officer (for short 'CHO') as advertised, but the respondents have illegally and arbitrarily confined the zone of consideration only to the candidates possessing qualification of B.Sc. Nursing, whereas their counter-parts in other States, more particularly, Punjab, Uttar Pradesh, Haryana, Rajasthan, Maharashtra, Assam, Madhya Pradesh and Bihar Ayush Doctors have been made eligible and, consequently, the action of the respondents is clearly violative of Constitution of India being discriminatory and also violative of the principles of parity.

4. It is on these allegations that the petitioners have prayed for the grant of following reliefs:

> *"(i) Issue a writ of certiorari to quash Annexure P-1 i.e. advertisement issued by respondent No.4.*
>
> *(ii) Issue a writ of mandamus directing the respondent-authorities to consider the candidature of the petitioners for the post of Community Health Officer as per the National Health Mission Policy, 2017 and allow the petitioners to make applications for the bridge course."*

5. Counter affidavit has been filed on behalf of the Union of India in CWP No. 3577 of 2019 titled Dr. Anoop Kumar vs. Union of India and others, wherein it is stated that initially there was a proposal that Public Health and Hospitals being State subject and, therefore, is primary and exclusive responsibility of the State. The implementation of the National Health Mission (for short 'NHM') through the State Health Society is under the exclusive domain of the State and the programme being periodically, only contractual Human Resource is allowed to be engaged through the State Health Society set up under the Mission.

6. It is further averred that the creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees; fall within the exclusive domain of the concerned State.

7. Lastly, it is represented that Public Health and Hospitals being the State subject, the decision for selecting categories from those mentioned in para 11.4 (infra) for the post of CHOs, is the prerogative of the State Government, as suitable to them. Hence, it is upto the State to decide as to which category of persons are required to be extended bridge course for appointment to the post of CHOs.

8. The State of Himachal Pradesh, through its Secretary (Health) alongwith Mission Director, National Health Mission, Himachal Pradesh has filed joint reply wherein it is averred that since there was a pressing need to strengthen health sub centres to provide Comprehensive Primary Care including for Non-Communicable Diseases (NCDs) and further since the global evidence suggested that suitably trained 3-4 years duration service providers could provide considerable primary care, the Government of India in the year 2013 had approved the introduction of a three and half years Bachelor of Science in Community Health (Bsc CH) courses in India as one of the measures to increase the availability of such appropriately qualified Human Resources especially in rural and remote areas.

9. It is further averred that since the uptake for this course had been slow and if some Universities were to start the course, the first batch of professionals would have been available for recruitment only by the end of the fourth year; whereas on the other hand, qualified Ayurveda doctors and B.Sc./GNM qualified nurses were available in the system, who could be trained in Public Health and Primary Care through suitably designed 'Bridge Programs on certificate in Community Health', which qualified Human Resources may function as Mid-Level Health Care Providers and called Community Health Officers (CHOs) and posted at Health Sub Centres; which could be developed as 'Health and Wellness Centres'.

10. It has further been averred that the guidelines of the Central Government merely specified the zone of consideration to include Ayush doctors and it was left for the State Government to finalize as to who were the persons required to act as Community Health Officer and further since the health being a State subject, the decision for selection for individuals for the post of Community Health Officers lies within the purview of the State Government. The State Government after taking well considered decision to select the

eligible candidates with essential qualification as B.Sc Nursing with their registration in the H.P. Nursing Council for undergoing the Bridge Course and on successful completion of such course to be further deployed as Community Health Officer in Health and Wellness Centres.

11. We have heard learned counsel for the parties and have gone through the material placed on record.

12. Clause 11.4 of the National Health Policy, 2017 reads as under:

> *"**11.4. Mid-Level Service Providers**: For expansion of primary care from selective care to comprehensive care, complementary human resource strategy is the development of a cadre of mid-level care providers. This can be done through appropriate courses like a B.Sc. in community health and/or through competency-based bridge courses and short courses. These bridge courses could admit graduates from different clinical and paramedical backgrounds like AYUSH doctors, B.Sc. Nurses, Pharmacists, GNMs, etc. and equip them with skills to provide services at the sub-centre and other peripheral levels. Locale based selection, a special curriculum of training close to the place where they live and work, conditional licensing, enabling legal framework and a positive practice environment will ensure that this new cadre is preferentially available where they are needed most, i.e. in the under-served areas."*

13. A perusal of the Clause 11.4 of the National Health Policy, 2017 as reproduced above, makes it clear that Bridge Courses could admit graduates from different clinical and paramedical backgrounds like Ayush doctors, B.Sc. Nurses, Pharmacists, GNMs etc. and equip them with skills to provide services at the sub-centre and other peripheral levels. The Union of India has left it to the State Government to decide as to which category of the persons are required to be extended bridge course for appointment to the post of Community Health Officer. Now until and unless the decision of the State Government is shown to be arbitrary or contrary to any statutory provision the same cannot be lightly interfered with.

14. The Court while exercising the power of judicial review, cannot be oblivious to the practical needs of the Government and the door should be left open for trial and error for which there has to be a reasonable play in the joints.

15. The jurisdictional limitations are well drawn and the Court in its power of judicial review cannot sit in judgment over the policy matters except on limited grounds, namely, whether the policy is arbitrary, malafide, unreasonable or irrational. The Government is entitled to make pragmatic adjustments and make policy decision(s), which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government, merely because it feels that another decision would have been fairer or wise or more scientific or logical.

16. The principle of reasonableness and non-arbitrariness in Governmental action is the core of our constitutional scheme and structure and the interpretation is always dependant upon the facts and circumstances of the case. The policy in the instant case cannot be termed to be capricious or not informed by reasons or formed on *ipsi dixit* of the respondents.

17. Even otherwise it is more than settled that essential qualifications for appointment to the post are for the employer to decide according to needs and nature of work and it is not for the Courts to lay down the conditions of eligibility, much less it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. (See: ***Maharashtra Public Service Commission through its Secretary vs. Sandeep Shriram Warade and others (2019) 6 SCC 362***).

18. From the records that were made available for the perusal of this Court, it is clearly evident that initially a decision for upgradation of 24 Sub-Centres (12 each in District Kangra and Sirmaur) as Health and Wellness Centres was proposed by the respondents by constituting expert team. This was to see the feasibility and mode of operation before replicating it in rest of the State. The matter was thereafter placed before

the Cabinet alongwith report of the expert. The Cabinet in its meeting held on 04.10.2017 accorded approval to establish 24 Sub-Centres as Health and Wellness Centres. It was thereafter that the respondents decided to upgrade 104 Sub-Centres, 18 Primary Health Centres (PHCs) and 15 Urban Primary Health Centres (UPHCs) as Health and Wellness Centres in Himachal Pradesh on pilot basis and initiated steps for appointment of B.Sc Nurses as the Team Leader/Mid Level Service Providers.

19. Now, it being a policy decision can be interfered with only on well accepted grounds as noticed above.

20. Adverting to the first contention of the petitioners that in other States, Ayush doctors have been included for training and therefore could not be excluded in this State. Suffice it to say, that, the requirements of different States will be assessed by those State Governments and merely because in some of the States, Ayush doctors have been included for extending the bridge course, will not be a ground to question the policy of the State of Himachal Pradesh.

21. The principles of parity are not attracted in the matters of policy, as each State is empowered to formulate its own policy. It is not normally within the domain of any Court to weigh pros and cons of the policy except, as observed above, where it is arbitrary or violative of any constitutional, statutory or any other provisions of law. The Court would dissuade itself from entering into the realm of policy which belongs to executive. The Court cannot strike down a policy merely because it feels that another policy would have been fairer or wiser or more scientific or logical.

22. Adverting to the other contention of the petitioners that the policy is discriminatory in nature, we find that the assessment by the State to restrict a category of person alone to extent the bridge course is neither perverse nor irrational much less arbitrary. The National Health Policy, 2017 or for that matter the National Health Mission, nowhere makes it compulsory for the State Government to invite Ayush doctors to extend bridge course. Therefore, in the given circumstances, until and unless the petitioners point out that their fundamental rights or other rights have been violated or that advertisement (Annexure P-1) is contrary to policy or act or rule, the Court cannot interfere with the advertisement so issued by the respondents. It is for the respondent-State to take decision in this regard.

23. The mode of recruitment/selection and category from which the recruitment/selection is to be made is a policy matters exclusive within the purview and domain of the executive and it is not appropriate for the judicial body to sit in the judgment in the wisdom of the executive in choosing the mode of recruitment/selection in such matters. Furthermore, the mere fact that the chance of the petitioners to take part in the selection process has been curtailed or for that matter even obliterated cannot by itself lead to an inference that the action of the respondents is arbitrary or unreasonable.

24. Similar reiteration of law is to be found in the judgment rendered by the Allahabad High Court in case titled ***Mahendra Singh Yadav and others vs. State of U.P. and others,*** Writ No. 9696 of 2019, decided on 19.9.2019, Madhya Pradesh High Court (Indore Bench) in case titled **Abhishek Parmar vs. State of Madhya Pradesh and another**, W.P. No.23625/2019, decided on 08.11.2019, **Dr. Vinod Gunkar and others vs. State of Madhya Pradesh and others**, Writ Petition No. 24934/2019, decided on 22.11.2019 and **Mohanlal Kumawat and others vs. State of Madhya Pradesh and others**, Writ Petition No. 23548/2019, decided on 25.11.2019.

25. In view of the aforesaid discussion and for the reasons stated above, we find no merit in these petitions and the same are accordingly dismissed, so also the pending application(s), if any. The parties are left to bear their own costs.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. &
HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

M/s Shakun Holdings Private Limited

.....Petitioner

Versus

Union of India and others

.....Respondents

CWP No.1667 of 2020
Reserved on: 16th July, 2020
Decided on: 22nd July, 2020

Reserve Bank of India Act, 1934 (as amended vide Amendment Act 1997)- Sections 45-IA (6) (ii) & 6(iv) (b), proviso- Non-banking Financial Institution (NBFI) failing to maintain Net Owed Fund (NOF) of Rs.200 Lakh in particular year as required under law- Reserve Bank of India (RBI) cancelling its Certificate of Registration (COR) as NBFI- Whether RBI was required to provide an opportunity to NBFI to comply the requirement before cancelling registration under first proviso?- Held, petitioner did not achieve the minimum prescribed limit of NOF within stipulated period and it failed to comply directions issued by RBI under provisions of Chapter-IIIB of Act- COR was cancelled by recourse to Section 45-IA(6)(iv) which does not entail providing of any opportunity to NBFI for complying with provisions violated by it – Section 45-IA(6)(ii) has no applicability in the case- Petition dismissed. (Para 4 & 5)

Cases referred:

Peerless General Finance and Investment Co. Limited and another Versus ReserveBank of India, (1992) 2 SCC 343;
Sudhir Shantilal Mehta Versus Central Bureau of Investigation, (2009) 8 SCC 1;
Southern Technologies Limited Versus Joint Commissioner of Income Tax, Coimbatore, (2010) 2 SCC 548;

Whether approved for reporting?[1] Yes

For the Petitioner: Mr. Bipin C. Negi, Senior Advocate with Mr. Abhishek Khimta, Advocate.

For the Respondents: Mr. Shashi Shirshoo, Central Govt. Counsel, for respondent No.1.

Mr. Neeraj K. Sharma, Advocate, for respondents No.2 to 4.

Jyotsna Rewal Dua, Judge

The Reserve Bank of India has cancelled the Certificate of Registration earlier issued in favour of the petitioner to carry on the business of Non-Banking Financial Institution. The cancellation order has been

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

affirmed by the Appellate Authority, hence, instant writ petition has been preferred.

2. Relevant Facts:-

2(i). Petitioner is a Private Limited Company registered under the Companies Act, 1956. On 23.06.1997, it applied for Certificate of Registration (in short 'CoR') to the Reserve Bank of India (in short 'RBI') for carrying on the business of Non-Banking Financial Institution ('NBFI' in short). Accordingly, the CoR was issued in favour of the petitioner on 17.07.2002.

2(ii). The CoR dated 17.07.2002 was issued by respondents No.2 to 4-RBI under Section 45-IA of the RBI Act, 1934, subject to terms & conditions stipulated therein.Condition No.vi is extracted hereinafter:-

> *"(vi) Your company shall comply with the provisions of the Reserve Bank of India Act, 1934, as applicable to a non-banking financial company, and abide by all the directions, guidelines, instructions or advices of the Reserve Bank of India, as may bein force from time to time."*

The CoR was for carrying on *"the business of non- banking financial institution without accepting public deposits subject to the conditions given on the reverse."* Conditions No.2 and 3 mentioned on the reverse of certificate were as under:-

> *"2. The Certificate of Registration is issued to your company subject to your continued adherence to all the conditions and parameters stipulated under Chapter III B of the Reserve Bank of India Act, 1934.*
>
> ***3.*** *Your company shall be required to comply with all the requirements of the Directions, guidelines/instructions, etc. Issued by the Bank and as applicable to it."*

2(iii). The quantum of Net Owned Fund (in short 'NOF') required by Non-Banking Financial Company (in short 'NBFC') for registration as NBFI under Section 45-IA of the RBI Act is as under:-

> *"[45-IA. Requirement of registration and net owned fund.—*
>
> *(1) Notwithstanding anything contained in this Chapter or in any other law for the time being in force, no non-banking financial company shall commence or carry on the business of a non-banking financial institution without-*
>
> *(a) obtaining a certificate of registration issued under this Chapter; and*
>
> *(b) having the net owned fund of twenty-five lakh rupees or such other amount, not exceeding two hundred lakh rupees, as the Bank may, by notification in the Official Gazette, specify.*
>
> *(2) Every non-banking financial company shall make an application for registration to the Bank in such form as the Bank may specify.*

Provided that a non-banking financial company in existence on the commencement of the Reserve Bank of India (Amendment) Act, 1997 shall make an application for registration to the Bank before the expiry of six months from such commencement and notwithstanding anything contained in sub-section (1) may continue to carry on the business of a non-banking financial institution until a certificate of registration is issued to it or rejection of application for registration is communicated to it.

(3) Notwithstanding anything contained in sub-section (1), a non-banking financial company in existence on the commencement of the Reserve Bank of India (Amendment) Act, 1997 and having a net owned fund of less than twenty-five lakh rupees may, for the purpose of enabling such company to fulfil the requirement of the net owned fund, continue to carry on the business of a non-banking financial institution-

(i) for a period of three years from such commencement; or

(ii) for such further period as the Bank may, after recording the reasons in writing for so doing, extend,
subject to the condition that such company shall, within three months of fulfilling the requirement of the net ownedfund, inform the Bank about such fulfilment.

Provided that the period allowed to continue business under this sub-section shall in no case exceed six years in the aggregate.

.....”

Thus, for registration as NBFI, minimum NOF of Twenty-Five Lakh Rupees, not exceeding Two Hundred Lakh Rupees, as may be specified by the Bank in the Official Gazette, was required by NBFC. However, an NBFC in existence on the commencement of RBI Amendment Act, 1997 and having an NOF of less than Rs.25 Lakh to fulfil the requirement of NOF could carry on the business of NBFI for a period of three years from such commencement or upto a maximum period of six years as the Bank may allow after recording reasons. Meaning thereby that all NBFCs in existence in 1997 and carrying on the business of NBFIs were required to attain the limit of Rs.25-200 Lakhsas NOF notified by the Bank in the Official Gazette, within 3-6 years. Possession of the NOF notified by the Bank was a condition precedent for new registration as NBFI after RBI Amendment Act, 1997.

2(iv). On 27.03.2015, RBI issued a notification specifying Rs.200 Lakhs as NOF required for an NBFC to commence or carry on business of NBFI. This notification further provided that the NBFCs holding CoR, issued by the RBI and having NOF of less than Rs.200 Lakhs can continue to carry on the business of Non-Banking Financial Institution, provided such company achieves NOF of Rs.100 Lakhs before 01.04.2016 and Rs.200 Lakhs before 01.04.2017. Relevant part of the notification is extracted hereinafter:-

“In exercise of the powers under clause (b) of sub-section (1) of section 45-IA of the Reserve Bank of India Act, 1934 (Act 2 of

1934) and on the powers enabling it in that behalf the Reserve Bank of India, in supersession of Notification No. 132/CGM(VSNM)-99, dated April 20,1999, hereby specifies twohundred lakhs rupees as the net owned fund required for a non- banking financial company to commence or carry on the business of the non-banking financial institution.

Provided that a non-banking financial company holding a certificate of registration issued by the Reserve Bank of India and having net owned fund of less than two hundred lakhs of rupees, may continue to carry on the business of non-banking financial institution, if such company achieves net owned fund of,-

i. one hundred lakhs of rupees before April 1,2016; and
ii. two hundred lakhs of rupees before April 1,2017.

2(v). RBI issued a letter on 30.11.2018 to the petitioner-NBFC stating that the petitioner had reported its NOF as Rs.201.50 Lakhs for the year 2016-2017 after adding its investment of Rs.17 Lakhs in equities and Rs.54.41 Lakhs advanced/loaned to its Group Companies. The NOF so calculated by the petitioner in its Balance Sheet for the year ending on 31.03.2017 was not correct. The investment of Rs.17 Lakhs in equities and Rs.54.41 Lakhs (totalling Rs.71.41 Lakhs) after allowance of 10% of owned fund (Rs.20.16 Lakhs), i.e. 71.41 – 20.16 Lakhs = Rs.51.25 Lakhs, was required to be deducted from the owned funds in calculating the NOF. Accordingly, RBI determined the NOF of the petitioner at Rs.150.33 Lakhs in following manner (Calculations part of RBI Letter dated 30.11.2018):-

"Calculation of Net Owned Fund 2016-17
NET OWNED FUND

ITEMS	***Amount in Rs.Lakh***
Paid up Capital	*200.00*
Reserve & Surplus	*1.58*
	201.58
Less Deferred Revenue Expenditure/Deferred Tax Assets (Net Other intangible Assets)	*0.00*
Total (Owned Fund)	*201.58*
Investment in shares of companies in the Same group/Subsidiaries/WoS/JVs/Others	
Other NBI Cs etc.	*17.00*
Book value of debentures bonds outstanding Loans and advances bills purchased and discounted (including H.P. and lease finance)made to and deposits with companies in the same group/Subsidiaries/WoS/JVs/Other	

NBFCs etc.	*54.41*
	71.41
Amount in item 19 in excess of 10% of	
Owned Fund	*51.25*
Net Owned Fund (Tier-I)	*150.33"*

2(vi). In its response to the above referred letter ofRBI, petitioner defended its calculation of NOF in the balance sheet for the year 2016-2017 by placing reliance upon RBI master circular no REF.DBS.FID.NO.C-7/ 01.02.00/2003-04, re-issued with amendments in 2012 DBOD.FID.FIC.No.4/01.02.00/2012-13, where following definition of NOF was given in paragraph No.3.4:-

> *"3.4 Net Owned Funds in respect of NBFCs*
>
> *Net owned funds will consist of paid up equity capital, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of assets but not reserves created by revaluation of assets. From the aggregate of items will be deducted accumulated loss balance and book value of intangible assets, if any, to arrive at owned funds. Investments in shares of other NBFCs and in shares, debentures of subsidiaries and group companies in excess of ten percent of the owned fund mentioned above will be deducted to arrive at the Net Owned Funds. The NOF should be computed on the basis of last audited Balance Sheet and any capital raised after the Balance Sheet date should not be accounted for while computing NOF."*

The reply of the petitioner was that in terms of provisions of circular (extracted above), loans and advances amounting to Rs.54.41 Lakhs advanced by the petitioner to its Group Companies were not to be deducted from its owned funds while calculating the NOF of the petitioner. Therefore, it contended that Rs.150.33 Lakhs plus Rs.54.41 Lakhs (*Loans* and *Advanced* amount)=Rs.204.74 Lakhs,has to be treated as NOF of the petitioner. This amount is over and above the limit of Rs.200 Lakhs prescribed by RBI for carrying out the business of NBFI.

2(vii). Not satisfied with petitioner's reply, the RBI issued a show cause notice to it under Section 45-IA(6) and

58 B of the RBI Act for cancellation of its CoR on the ground that the petitioner did not have NOF of Rs.200 Lakhs as on 31.03.2017, therefore, it did not meet the requirement for carrying on the business of NBFI and was acting in violation of the directions of RBI issued in exercise of its powers under Chapter III B of the RBI Act. Petitioner in its reply dated 15.01.2019, reiterated its stand taken in letter dated 04.12.2018.

2(viii). Observing that reply of the petitioner-company was unsatisfactory with further observation that the petitioner had violated the statutory provisions of Chapter III B of the Act, RBI cancelled the CoR of the

petitioner under Sections 45-IA(6) and 58B of the RBI Act on 22.01.2019. Appeal preferred by the petitioner under Section 45-IA(7) of the RBI Act against the order dated 22.01.2019, was dismissed by the Appellate Authority vide order dated 14.02.2020. Aggrieved, instant writ petition has been preferred.

3. Contentions:-

Mr. B.C. Negi, learned Senior Counsel for the petitioner has canvassed petitioner's case under following two main points:-

(A). RBI had wrongly calculated and thereby arrived atincorrect figure of NOF of the petitioner. The loan and amount advanced by the petitioner to its Group Companies could not be deducted from its owned fund. As on 31.03.2017, the NOF of the petitioner was not less than Rs.200 Lakhs, which was the minimum limit prescribed by RBI for carrying on the business of NBFI, therefore, order dated 22.01.2019, cancelling the petitioner's CoR, as affirmed by the Appellate Authority on 14.02.2020 was bad in eyes of law.

(B). Even if for the sake of argument, petitioner's NOF is assumed to be less than the minimum prescribed limit of Rs.200 Lakh, then also, the proviso after Section 45-IA(6)(iv) of RBI Act provides for giving an opportunity to the petitioner for complying the provisions/conditions on such terms as may bespecified by the Bank. This opportunity has been denied to the petitioner. On this ground also, the impugned order deserves to be quashed and set aside.

4. We may discuss hereinafter the case of the petitioner under the above two points while noticing rival contentions of the parties:-

4(i). Wrong Calculations:-

4(i)(a). Explanation I to Section 45-IA falling under Chapter III B of the RBI Act, defines NOF as under:-

> *"(I) "net owned fund" means-*
>
> *(a) the aggregate of the paid-up equity capital and free reserves as disclosed in the latest balance-sheet of the company after deducting there from—*
> *(i) accumulated balance of loss;*
> *(ii) deferred revenue expenditure; and*
> *(iii) other intangible assets; and*
>
> *(b) further reduced by the amounts representing—*
> *(1) investments of such company in shares of—*
> *(i) its subsidiaries;*
> *(ii) companies in the same group;*
> *(iii) all other non-banking financial companies; and*
> *(2) the book value of debentures, bonds, outstanding loans and advances (including hire-purchase and lease finance) made to, and deposits with,-*
> *(i) subsidiaries of such company; and*
> *(ii) companies in the same group,*

to the extent such amount exceeds ten per cent, of (a) above."

4(i)(b). In terms of the above definition and more specifically in accordance with Clause (b) thereof, inter alia, the investment of the company in the shares of its subsidiaries, group companies, in other NBFCs as well as book value of debentures, bonds, outstanding loans and advances made by the company to its group/subsidiary companies, to the extent such amount exceeds 10% of Owned Fund, are to be deducted from the Owned Funds while calculating its NOF.

In the instant case, petitioner invested Rs.17 Lakh and advanced loan of Rs.54.41 Lakhs to its group/ subsidiary companies. Therefore, under the above extracted definition of NOF, these two amounts to the extent exceeding 10% of the Owned Fund as disclosed in the Balance Sheet of the company were required to be deducted and were accordingly deducted by the RBI for determining NOF of the petitioner. After deducting Rs.20.16 Lakhs (10% of Owned Fund of Rs.201.58 Lakhs) from investment of Rs.17 Lakhs in equities and Rs.54.41 Lakhs (totalling Rs.71.41 Lakhs), Rs.150.33 Lakhs (201.58-51.25) was the figure arrived at by the RBI as NOF of the petitioner. Since this figure was below the minimum prescribed limit of NOF required for carrying on the business of Non-Banking Financial Institution, therefore petitioner's CoR was cancelled.

4(i)(c). Learned Senior Counsel for the petitioner contended that advances and loan amount of Rs.54.41 lakhs advanced by the petitioner to its group/subsidiary companies could not be deducted from its owned fund while calculating its NOF. Learned Senior Counsel makes this submission on the strength of the Master Circular issued by the RBI on 01.07.2015. In Clause 3.4 whereof, Net Owned Fund in respect of NBFCs was described as under:-

"3.4 Net Owned Funds in respect of NBFCs

Net owned funds will consist of paid up equity capital, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of assets but not reserves created by revaluation of assets. From the aggregate of items will be deducted accumulated loss balance and book value of intangible assets, if any, to arrive at owned funds. Investments in shares of other NBFCs and in shares, debentures of subsidiaries and group companies in excess of ten percent of the owned fund mentioned above will be deducted to arrive at the Net Owned Funds. The NOF should be computed on the basis of last audited Balance Sheet and any capital raised after the Balance Sheet date should not be accounted for while computing NOF."

In the description of NOF given in the Master Circular dated 01.07.2015, there is no specific reference to advances and loans advanced by NBFC to its group/ subsidiary companies. Learned Senior Counsel

argued that Clause 3.4 of the Circular though, inter alia, provides for deduction of investment made by NBFC in favour of its group/subsidiary companies while calculating its NOF, however, it does not provide for deduction of loans advanced by the NBFC to its group/subsidiary companies from its owned fund to calculate NOF. Relying upon this circular, learned Senior Counsel submitted that Rs.54.41Lakhs advanced/loaned by the petitioner to its group companies could not be deducted from its Owned Fundwhile calculating its NOF. Therefore, Rs.150.33+54.41 Lakhs will bring the NOF of the petitioner at Rs.204.74 Lakhs, i.e. within the limit set by the RBI for grant of registration to carry on the business of NBFI. Accordingly, he prayed for quashing of the impugned cancellation order.

4(i)(d). We may observe that in the writ petition, petitioner has not made any effort to justify its calculation of NOF given in its Balance Sheet for the year 2016-17. This contention raised during hearing of the writ petition doesnot find mention in the body of the writ petition, therefore, has not been responded by RBI in its reply filed to the writ petition. However, in its letter dated 04.12.2018 submitted in response to Bank's letter dated 30.11.2018 and in its reply dated 15.01.2019 to the show cause notice dated 03.01.2019, the petitioner had specifically relied upon the above extracted circular to justify its calculations of NOFmade in the Balance Sheet for the year ending on 31.03.2017. In its appeal preferred under Section 45-IA(7) of the RBI Act, the petitioner again defended its calculations in arriving at NOF on the strength of Master Circular of RBI (*already extracted above*).

4(i)(e). Even though the writ petition does not contain any pleadings seeking applicability of circulars in question over the provisions of the RBI Act in calculating NOF, yet since this question was raised by it before the authorities, therefore, we have gone through the provisions of the Master Circular relied upon by the petitioner for justifying its calculations and determination of NOF in its Balance Sheet for the year 2016-17. The heading of the circular is 'Master Circular-Exposure Norms for Financial Institutions'. Further under its heading 'Application', the Circular states as under:-

> *"Application*
>
> *To all the all India Financial Institutions viz. Exim Bank, NABARD, NHB and SIDBI".*

A bare perusal of the circular relied upon by the petitioner makes it evident that NOF described therein only pertains to Exposure norms to be followed by All India Financial Institutions namely Exim Bank, NABARD, NHB and SIDBI. NOF described therein cannot be read for

calculating NOF of petitioner NBFC. The NOF of petitioner has to be calculated only in terms of Section 45-IA of RBI Act. Petitioner has not disputed investment of Rs.17 Lakhs and loans of Rs.54.41 Lakhs advanced by it to its Group Companies. Therefore, these amounts in excess of 10% of Owned Fund have been justifiably deducted by RBI while determining Rs.150.33 Lakhs as NOF of the petitioner.

In view of the above discussion, there is no need to refer to the judgments cited by learned Senior Counsel for the petitioner, viz. ***Peerless General Finance and Investment Co. Limited and another Versus Reserve Bank of India, (1992) 2 SCC 343; Sudhir Shantilal Mehta Versus Central Bureau of Investigation, (2009) 8 SCC 1; and Southern Technologies Limited Versus Joint Commissioner of Income Tax, Coimbatore, (2010) 2 SCC 548,*** seeking enforcement of the circular over and above the provisions of RBI Act. Point is answered accordingly.

4(ii). Learned Senior Counsel for the petitioner next contended that even if the NOF of the petitioner was determined as falling short of the limit prescribed by the RBI, then, also under the following Section 45-IA(6) and

proviso coming thereafter in the RBI Act, it should have been granted an opportunity to make good the deficiency:-

> *"(6) The Bank may cancel a certificate of registration granted to a non-banking financial company under this section if such company-*
>
> *(i) ceases to carry on the business of a non-banking financialinstitution in India; or*
> *(ii) has failed to comply with any condition subject to which thecertificate of registration had been issued to it; or*
> *(iii) at any time fails to fulfil any of the conditions referred to inclauses (a) to (g) of sub-section (4); or*
> *(iv) fails-*
> *(a) to comply with any direction issued by the Bank under the provisions of this Chapter; or*
> *(b) to maintain accounts in accordance with the requirements of any law or any direction or order issued by the Bank under the provisions of this Chapter; or*
> *(c) to submit or offer for inspection its books of account and other relevant documents when so demanded by an inspecting authority of the Bank; or*

(v) has been prohibited from accepting deposit by an order made by the Bank under the provisions of this Chapter and such orderhas been in force for a period of not less than three months:

Provided that before cancelling a certificate of registration on the ground that the non-banking financial company has failed to comply with the provisions of clause (ii) or has failed to fulfil any of the conditions referred to in clause (iii) the Bank, unlessit is of the opinion that the delay in cancelling the certificate of registration shall be prejudicial to public interest or the interest of the depositors or the non-banking financial company, shall given an opportunity to such company on such terms as the Bank may specify for taking necessary steps to comply with such provision or fulfilment of such condition:

Provided further that before making any order of cancellation of certificate of registration, such company shall be given a reasonable opportunity of being heard."

4(ii)(a). Learned Senior Counsel argued that CoR of the petitioner was cancelled since the petitioner failed to comply with the condition subject to which the CoR was issued to it. As such, CoR of the petitioner has to be presumed to have been cancelled under Section 45-IA(6)(ii) of the RBI Act. Cancellation of CoR under Section 45- IA(6)(ii) attracts the proviso to the section, which in turn provides for grant of an opportunity to the petitioner for taking necessary steps for complying with provisions and fulfilling the required conditions.

Rebutting this submission, learned counsel for the respondent-RBI contended that CoR of the petitioner was not cancelled under the provisions of Section 45-IA(6)(ii), but by taking recourse to Section 45-IA(6)(iv). The proviso relied by the petitioner is not applicable in caseof cancellation of CoR under Section 45-IA(6)(iv). Therefore, no opportunity can be granted to the petitioner to make good the non-compliance.

4(ii)(b). In its notification dated 27.03.2015, the RBI had specified Rs.200 Lakhs as minimum NOF required by an NBFC to commence or carry on business of NBFI. The then existing NBFCs holding CoR for carrying on business of NBFI were given timeline upto 01.04.2016 for achieving NOF of Rs.100 Lakhs and upto 01.04.2017 for attaining NOF of Rs.200 Lakhs. Petitioner NBFC did not achieve the minimum prescribed limit of

NOF within the stipulated period. It failed to comply with the directions issued by the

Bank under the provisions of Chapter III B of RBI Act. Therefore, no opportunity for complying with the directions could be granted to it as the CoR was cancelled by taking recourse to Section 45-IA(6)(iv). Reliance by petitioner upon Section 45-IA(6)(ii) seeking further opportunity is misplaced. Even otherwise, inadequate NOF falling short ofprescribed limit, as calculated in undisputed Balance Sheet of the petitioner NBFC for the period ending on 31.03.2017 cannot be made adequate or brought within the prescribed parameters three years later. The clock in such matters cannot be turned back. Otherwise also, sufficient opportunity had already been granted by the Bank in the notification dated 27.03.2015 to achieve prescribed NOF,

i.e. to comply with the directions.

5. What comes out from above discussion is that:-

(a). Master Circular relied upon by the petitioner for calculating its NOF is not applicable to it. NOF of the petitioner for the year ending on 31.03.2017 (2016-17) is required to be and justifiably determined by RBI in accordance with Explanation I of Section 45-IA of the RBI Act.

(b). Since NOF of the petitioner-NBFC determinedunder the applicable provisions of RBI Act fell short of minimum limit of Rs.200 Lakhs

prescribed by RBI for carrying on the business of NBFI, therefore, its CoR was cancelled by RBI taking recourse to Section 45-IA(6)(iv) of the Act.

(c). The CoR of the petitioner was cancelled by RBI under the provisions of Section 45-IA(6)(iv) of the RBI Act, which does not entail providing any opportunity for complying with the provisions/ conditions violated by the petitioner. Otherwise also, sufficient opportunity had already been granted by the RBI in the notification dated 27.03.2015 to achieve prescribed NOF, i.e. to comply with its directions. In any case, shortfall in NOF in the Balance Sheet of the petitioner for the year 2016-17 cannot be rectified three years later in 2020.

In view of the above, we do not find any merit in the instant writ petition and the same is accordingly dismissed alongwith pending miscellaneous application(s),if any.

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

Deepak Verma
....Petitioner

Versus

Director General of Prisons, Himachal Pradesh and another
....Respondent.

CRMMO No.191 of 2020
Date of Decision: June 30, 2020

Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968- Section 3(1)(c) and 3(2)- Extension of parole for doing agricultural operation- Court directions, whether can be issued?- Held, grant or refusal of parole or furlough to prisoner is an administrative function of Government or Competent Authority prescribed under the Act- Court cannot enter into shoes of such Authority to perform administrative functions- Court cannot direct Authorities to grant parole or extend its period qua a prisoner- Petition seeking directions to Authorities to extend period of parole, dismissed. (Para 18, 19 & 22)

Cases referred:

Asfaq v. State of Rajasthan & others, (2017) 15 SCC 55;
Poonam Lata v. M.L. Wadhawan & another, (1987) 3 SCC 347;
Sunil Fulchand Shah v. Union of India & others, (2000) 3 SCC 409;

Whether approved for reporting? Yes.

For the Petitioner	**:**	Ms Sheetal Vyas, Advocate, through Video Conferencing.
For the respondent	**:**	Mr. Shiv Pal Manhans, Additional Advocate General, Mr. R.P. Singh, Mr. Raju Ram Rahi & Mr. Gaurav Sharma, Deputy Advocates General, through Video Conferncing.

Vivek Singh Thakur, Judge

Petitioner, in the instant petition, is a life convict in a case under Sections 302, 323 & 34 of Indian Penal Code (hereinafter for short 'IPC') and Section 27 of the Arms Act and is serving his sentence in Lala Latpat Rai District & Open Air Correctional Home, Dharamshala, Himachal Pradesh (hereinafter referred to as 'Jail').

2. The petitioner was temporarily released on parole for 42 days, vide order dated 8.5.2020, issued by the Deputy Superintendent of the Jail, with direction to report back to the Superintendent of Jail, on 21.7.2020, before Lock-Up.

3. Petitioner has approached this Court, by way of present petition, seeking relief to extend his parole leave for sixty days more, on the ground that he has completed about 17 years of imprisonment and on account of good conduct he has been permitted to work outside the Jail and, thus, before pandemic he had been working as Goldsmith in a shop and also as a Tutor of students, under the authorized scheme to work outside the Jail. According to the petitioner, he was granted parole leave due to COVID-19 and in the past he had never misused his liberty, while working outside the Jail or during the parole leave granted in five years.

4. It is case of the petitioner that he got married during the period of conviction and now is father of a 1½ year old daughter and that there is nobody to look-after his wife and kid, and further that he owns agricultural land, but there is none to work thereupon and there is no other source of income of his family and due to COVID-19 and small child, his wife is unable to work and also that due to COVID-19, no other work except working on agricultural land is available to the petitioner outside

the Jail and now the agricultural activity is the only source to maintain his family and, thus, he has applied to the Director General of Prisons for extension of parole leave, but no information has been received by him till filing of the present petition and apprehending rejection of his application, he has approached this Court.

5. Lastly, it is canvassed that in view of CORONA Pandemic, the Supreme Court has also favoured decongestion of Jails and, thus, praying for taking lenient view, extension of 60 days of parole leave has been advocated.

6. In the State of Himachal Pradesh, temporary release of prisoners for good conduct, on certain conditions, is governed by Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968 (hereinafter referred to as 'Act'). In the Act temporary release of prisoners has been provided in Sections 3 and 4. Temporary release under Section 3 is commonly known as 'Parole', extension whereof is being sought by the petitioner, whereas Section 4 provides temporary release of prisoners on furlough, which is not in issue in present case.

7. Section 3(1) of the Act provides temporary release of prisoners on certain grounds for a period specified in Section 3(2) of the Act, if the Government is satisfied that:

(a) a member of the prisoner's family has died or is seriously ill; or

(b) the marriage of the prisoner's son or daughter is to be celebrated; or

(c) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence; or

(d) it is desirable so to do for any other sufficient cause.

8. Clause (c) of Section 3(1) provides temporary release of prisoners for agricultural operations, where prisoner has no friend or a member of family prepared to help him in this behalf in his absence. According to Section 3(2)(c), the prisoner, who is to be released on the ground specified in Section 3(1)(c) of the Act, i.e. for agricultural operations, may be released for a period of not exceeding six weeks, i.e. 42 days.

9. In response to the notice, respondent No.1 Director General of Prisons & Correctional Services, Himachal Pradesh [in short 'DGP(P)], has imparted instructions to the Advocate General alongwith copy of Radio Wireless Message, dated 10.6.2020, communicating rejection of request of petitioner for extension of parole. Copy of such information, conveying rejection of extension request, has also been endorsed to the petitioner. Instructions, alongwith communication of rejection, have been taken on record.

10. It is submitted in the instructions that the petitioner was released on parole w.e.f. 9.5.2020 to 20.6.2020, for 42 days, and he was under obligation to surrender on 21.6.2020, but till the date of imparting instructions, dated 26.6.2020, he had not surrendered and further that by not surrendering despite rejection of his application dated 4.6.2020 moved for extension of his parole for 42 days, he has committed the prison offence, under Section 9 of the Act.

11. It has specifically been stated in the instructions that considering the lower vulnerability of people of Himachal Pradesh to COVID-19, Government of Himachal Pradesh has resumed inter-district movement of people and public/private transport w.e.f. 1.6.2020, and the Offices of the Government are also working in full strength and all the Jails of Himachal Pradesh are safe and no case of COVID-19 has been reported so far and the Department is taking full precautions for protection of prisoners and prison staff and, thus, there is no merit in the application for extension.

12. It appears from the contents of instructions, imparted by DGP(P), that request before him for extension of parole was for 42 days only that too on the basis of spread of COVID-19, whereas in present petition, petitioner has prayed for extension of 60 days for carrying out agricultural operations.

13. From contents of release order, dated 9.5.2020 (Annexure A-1), read with provisions of Section 3 of the Act, it appears that the petitioner has been released for carrying out agricultural operations, as he has been released temporarily, i.e. on parole, for maximum period of six weeks, as available for release to carry out agricultural operations.

14. There is no provision for extension of parole period beyond the period prescribed under Section 3(2) of the Act. Therefore, after expiry of the period of parole, which is maximum in the present case, petitioner is supposed to surrender before the Jail authorities. There is no bar for filing successive and subsequent application for temporary release on parole for agricultural purpose or any other purpose. Section 3(1)(d) provides temporary release, if it is desirable to do so for 'any other sufficient cause', but under this clause maximum period of temporary release, as provided in Section 3(2)(b) of the Act is four weeks. In any case, 'sufficient cause' is to be assessed by the concerned authority as it is an act to be performed by the competent authority under the Act.

15. Dealing with a case of parole under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA Act), the Apex Court, in ***Poonam Lata v. M.L. Wadhawan & another,*** **(1987) 3 SCC 347,** has held that the Court has no power to substitute its opinion to the administrative functions, like abridging or enlarging the detention and it would not be open to the Court to reduce the period of detention by admitting a detenu on parole, rather the only power which is available to the Court is, to quash the order in case it is found to be illegal and the Court would have no jurisdiction either under the Act or under general principle of law or in exercise of extraordinary jurisdiction, whether it is under Article 226 or Article 32 of the Constitution to deal with the duration of period of detention. The same principle will be applicable with respect to the question of determining the period of parole which is governed by specific Act.

16. In another case of parole under the COFEPOSA Act itself, in ***Sunil Fulchand Shah v. Union of India & others,*** **(2000) 3 SCC 409** (hereinafter referred to as), the Apex Court has held that parole, stricto sensu, may be granted by way of a temporary release as contemplated under the COFEPOSA Act by the Government of its functionaries, in accordance with the parole rules or administrative instructions framed by the Government and this function is administrative in character and shall be subject to the terms of the rules or the instructions, as the case may be, and, therefore, for securing release on parole, a detenu has, therefore, to approach the concerned authorities or the jail authorities for grant of parole which shall be subject to terms and conditions imposed by the concerned authority as per law. It is further held that Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, and temporary release of a detenu can only be ordered by the Government or an officer subordinate to the Government, whether Central or State. It is also clarified by the Supreme Court that bar of judicial intervention to direct temporary release of detenu would not affect the jurisdiction of High Court under Article 226 of the Constitution or of the Supreme Court under Article 32, 136 or 142 of the Constitution to direct temporary release of detenu, where request of detenu to be released on parole for a specified reason and/or for a specified period, has been, in opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made, but it has been observed that such jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that Court leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.

17. In ***Asfaq v. State of Rajasthan & others,*** **(2017) 15 SCC 55,** explaining object of release on parole, it has been observed that amongst the various grounds on which parole can be granted, the most important ground, which stands out, is that a prisoner should be allowed to come out for some time so that he is able to maintain his family and social contact, with objective of reformation of the convict. It has further been observed that provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails, and the main purpose of such provisions is to afford to them an opportunity to solve their personal and family

problems and to enable them to maintain their links with society, and even citizens of this country have a vested interest in preparing offenders for successful re-entry into society. The Court also observed that those who leave prison without strong networks of support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources, have a significantly higher chance of failure, and that when offenders revert to criminal activity upon release, they frequently do so because they lack hope of merging into society as accepted citizens and furloughs or parole can help prepare offenders for success in merger in the society, and the public purpose in granting parole or furlough, ingrained in the reformation theory of sentencing, alongwith other competing public interests, has also to be kept in mind while taking decision of granting or refusing parole or furlough and further that all prisoners are not appropriate for grant of furlough or parole as the society must isolate those who show patterns of preying upon victims. It is also observed that formulation of guidelines/enactment of law on parole by various State Governments is in order to bring out objectivity in the decision making and to decide appropriately as to whether parole needs to be granted in a particular case or not and such a decision should be taken in accordance with guidelines framed or statute enacted.

18. Where there is statute providing provision of release of convict on parole, the scope of intervention by the Court is limited to judicial review of grant or refusal of parole under Article 226 or 32 of the Constitution, as the case may be. It is obvious for the reason that grant or refusal of parole or furlough is an administrative function of Government or the competent authority prescribed under relevant Act, Rules, Regulations or Guidelines and, normally, the Court should not enter in shoes of such authority to perform administrative function. However, at the same time, the Courts are there for judicial review of omission and/or commission of the authority, warranting judicial interference of the Court on various valid grounds, like failure in performing duty; arbitrary exercise of power or acting beyond legal powers, etc.

19. In present case, petition has been preferred for extension of parole leave, which is purely an administrative function to be performed by the concerned authority in accordance with the Act and the Rules framed thereunder. So far rejection of application of petitioner is concerned that has not been assailed herein. Neither prayer has been made nor any material is available on record so as to adjudicate the legality of the order passed by the authorities, rejecting the application of the petitioner for extension of parole. Application for extension of parole period and order of rejection thereof have not been placed on record either by the petitioner or by the respondent.

20. Under Section 3 of the Act, in all eventualities, highest period of parole is in case of temporary release for carrying on agricultural operations, which is six weeks and in all other cases the maximum period is either two weeks or four weeks. Petitioner has availed maximum period of parole, i.e. six weeks available for carrying out agricultural operations. Two parole periods available, under different clauses of Section 3(1) of the Act, may also be clubbed and period of parole provided under Section 3(2) of the Act may either be clubbed or added or may be coincided and run concurrently, depending upon prevailing circumstances.

21. In present case, as a matter of fact, parole granted to the petitioner stands expired on 20.6.2020 and he was under obligation to surrender on 21.6.2020 but he has not done so. Learned counsel for the petitioner submits that there was a sufficient cause, including filing of the present petition, for not surrendering on specified date and also petitioner was waiting for decision on his application for extension of parole as he has never received rejection order dated 10.6.2020.

22. Section 8 of the Act provides that on expiry of the period for which a prisoner is released under this Act, the prisoner shall surrender himself to the Superintendent of Jail from which he was released. Section 8(2) of the Act provides ten days further time to the prisoner to surrender before the Superintendent of Jail and, thereafter, on failure to surrender within ten days, his arrest by any Police Officer, without warrant and remand to undergo the unexpired portion of his sentence. Section 8(3) of the Act provides that in case prisoner surrenders himself to the Superintendent of Jail within a period of ten days of the date on which he was to surrender and satisfies the Superintendent of Jail that he was prevented by any sufficient cause from surrendering himself immediately on the expiry of period for which he was released, penalty may not be imposed upon him. On failing to make out a sufficient cause for delayed surrendering, after affording him reasonable opportunity of being heard,

penalty can be imposed upon petitioner, as provided in the Act. Therefore, reason for not surrendering by the petitioner, on due date, is to be explained satisfactorily to the Superintendent of Jail from which he has been released and he, not only is having liberty and is under obligation but also is entitled to render explanation for delayed surrender, as per statutory provisions. Thus, the petitioner has to immediately surrender himself to the Superintendent of Jail concerned and follow the procedure, as provided in the Act.

In view of the provisions of law and ratio laid down by the Supreme Court, I find no merit in present petition and, thus, rejecting the prayer of the petitioner, it is disposed of, with direction to the petitioner to immediately surrender before the jail authorities, with liberty to the petitioner to renew his request for parole, with justifiable reasons as available to him, as per provisions of law, as applicable and in case of receiving such request of the petitioner, the authority concerned is directed to consider the same sympathetically and compassionately without being influenced by the observations made in this judgment and also without being annoyed by the filing of the present petition, but considering the request and facts and circumstances stated therein, purely on its own merit.

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

Dinesh Kumar @ Billa ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 924 of 2020
Reserved on: 2nd July, 2020
Date of Decision: 6th July, 2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 22 & 29- Regular bail- Grant of- Petitioner alleged to have sold 209 capsules containing 125.72 gms. of prohibited substance to co-accused 'RR'- Held, only material on record is regarding exchange of one or two phone calls between petitioner and 'RR'- Investigation is silent about history of such phone calls and other calls received by petitioner from some other numbers- Confession of 'RR' implicating petitioner is inadmissible- Recovery of capsules did not take place directly from him- His presence being a permanent resident of district Kangra, can always be secured- Rigors of Section 37 of Act not attracted - Petition allowed- Bail granted. (Para 6, 20, 27 & 28)

Cases referred:

Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence, (2018) 8 SCC 271;
Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565;
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240;
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42;
Union of India v. Merajuddin, (1999) 6 SCC 43;
Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549;
Satpal Singh v. State of Punjab, (2018) 13 SCC 813;
Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705;
Bijando Singh v. Md. Ibocha, 2004(10) SCC 151;
Babua v. State of Orissa, (2001) 2 SCC 566;
N.C.B.Trivandrarum v. Jalaluddin, 2004 Law Suit (SC) 1598;
Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798;
N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721;
Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624;
Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84;
Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738;

Whether approved for reporting?[13] ***YES***.

For the petitioner : Mr. Sanjay Dutt Vasudeva, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G., & Mr. Ram Lal Thakur, Asstt. A.G.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

The petitioner, who is under arrest from 22nd May 2020, for selling 209 capsules to the main accused Rakesh Kumar, from whose possession the Police had recovered the same on 17th Mar 2020, has come up before this Court seeking bail.

2. Based on a First Information Report (FIR), the police arrested the petitioner, in FIR No. 52 of 2020, dated 17.3.2020, registered under Sections 22 & 29-61-85 of the NDPS Act, in Police Station Dharamshala, District Kangra, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

3. Earlier, the petitioner filed a petition under Section 439 CrPC before Special Judge-II, Kangra at Dharamshala, HP. However, vide order dated 16.6.2020, the Court dismissed the petition, because in the opinion of the Court, the Petitioner could not cross the rigors of S. 37 of NDPS Act.

4. Mr. Nand Lal Thakur learned Additional Advocate General had filed the status report through e-mail, printout of which is available on file. He further submits that he had sent a copy of the status report to learned counsel for the petitioner on WhatsApp number.

5. I have read the status report(s) and heard Mr. Sanjay Dutt Vasudeva, Advocate for the petitioner, Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State of H.P.

FACTS:

6. The gist of the facts apposite to decide this petition would suffice that the Police had arrested the main accused Rakesh Rana for possessing 94 capsules of WE WECARE and 115 capsules of SPM PRX WOCKHARDY and in all 209 capsules, which weighed 125.72 grams. After arrest of the main accused on 17.3.2020, in his interrogation, he revealed to the police that he is a drug dependent and he has purchased the capsules from one Dinesh Kumar, the petitioner herein. Due to the spread of Covid-19 disease, the police did not arrest the accused Dinesh Kumar and arrested him only on 22nd May, 2020.

PREVIOUS CRIMINAL HISTORY

7. As per the police report the accused Dinesh Kumar involved himself in the following cases:

1). FIR No. 150/16, dated 20.11.2016 under section 20-61-85 of NDPS Act, in Police Station, Shahpur;

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

2) FIR No. 60/17, dated 2.4.2017, under section 21-61-85 of NDPS Act and 18 C of the Drugs and Cosmetic Act, Police Station, Shahpur; and

3) Fir No. 158/16, dated 5.6.2016 under Section 341, 323, 506, read with Section 34 IPC, Police Station Shahpur

8. According to learned Counsel for the petitioner, these offences mentioned in these FIRs are not that serious, to deny him all future bails, in similar offences. He further submits that conditions may be put that in case the petitioner repeats the offence, this bail may be canceled.

SUBMISSIONS:

9. The learned counsel for the bail petitioner submits that the allegations are false and concocted.

10. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contends that the investigating officer has collected sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

11. Mr. Sanjay Vasudeva very vehemently argued and also drew attention to the orders of this Court in Budhi Singh v. State of H.P., CrMPM 595 of 2020; Manohar Lal v. State of H.P., CrMPM 126 of 2018; Thakur Dass v. State of H.P., CrMPM 167 of 2010; Stynder Singh v. State of Himachal Pradesh, 2010(1) SimLC 490; and Nisar Ahmed Thakkar v. State of H.P., CrMPM 672 of 2008.

ANALYSIS AND REASONING:

12. 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, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

13. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows,

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

14. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, Supreme Court in Para 16, holds,

> The delicate light of the law favours release unless countered by the negative criteria necessitating that course.

15. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also

> contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

16. 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 offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

17. In the present case, as per the contentions of the State, the quantity of substance seized is commercial quantity. Given the legislative mandate of S. 37 of NDPS Act, the Court can release a person, accused of an offence punishable under the NDPS Act for possessing a commercial quantity of contraband only after passing its rigors. Section 37 of the Act is extracted as under: -

> "37. Offences to be cognizable and non-bailable.
>
> (1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

18. Reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before a person/accused of possessing a commercial quantity of drugs or psychotropic substance, is to be released on bail.

19. The first condition is to provide an opportunity to the Public Prosecutor and clear her stand on the bail application. The second stipulation is that the Court must

be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Be that it may, if such a finding is arrived at by the Court, then it is equivalent to giving a certificate of discharge to the accused. Even on fulfilling one of the conditions, the reasonable grounds for believing that during the period of bail, the accused is not guilty of such an offence, the Court still cannot give a finding or assurance that the accused is not likely to commit any such crime. Thus, the grant of bail or denial of bail for possessing commercial quantity would depend on facts of each case.

20. The investigation reveals that there was a phone call on 16th March, 2020, between the main accused and the bail petitioner. The other evidence agianst the bail petitioner is the confession of the main accused that he has purchased the capsules from him. Given the mandate of Section 25 of the Indian Evidence Act, the confession of co-accused shall not be proved. Regarding exchange of phone calls, the investigation is silent about the history of such phone calls and that the petitioner had phone calls from other numbers, who were such persons. In the given facts, the solitary evidence of one or two phone calls would not be a hindrance to deny the bail given the mandate of Section 37 of the NDPS Act.

21. JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT:

a) In **Union of India v. Merajuddin**, (1999) 6 SCC 43, a three Judges Bench of Supreme Court while cancelling the bail, observed in Para 3, as follows,

> The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure."

b) In **Customs, New Delhi v. Ahmadalieva Nodira**, (2004) 3 SCC 549, a three Judges Bench of Supreme Court holds,

> 7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

c) In **Satpal Singh v. State of Punjab**, (2018) 13 SCC 813, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 CrPC, without reference to Section 37 of the NDPS Act.

d) In **Narcotics Control Bureau v Kishan Lal**, 1991 (1) SCC 705, Supreme Court

holds,

> 6. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails.

e) In **Babua v. State of Orissa**, (2001) 2 SCC 566, Supreme Court holds,

> **[3]** In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view.

f) In **Bijando Singh v. Md. Ibocha**, 2004(10) SCC 151, Supreme Court holds,

> 3. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider

the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act.

g) In **N.C.B.Trivandrarum v. Jalaluddin**, 2004 Law Suit (SC) 1598, Supreme Court observed,

> 3. ...Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes the bail application, the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

h) In **Union of India v. Shiv Shanker Kesari**, (2007) 7 SCC 798, Supreme Court holds,

> 6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and. that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.
>
> 7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.
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> 8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable'. Reason varies it, its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See : Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987)4 SCC 497 and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt Ltd and another [(1989)1 SCC 532].
>
> 9. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice &., Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that.

> 10. The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See : Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (2003)6 SCC 315)."
>
> 11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.
>
> 12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

i) In **N.R. Mon v. Md. Nasimuddin**, (2008) 6 SCC 721, Supreme Court holds,

> 9. ...The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case hand the High Court seems to have completely overlooked underlying object of Section 37.

j) In **Union of India v. Rattan Mallik @ Habul**, (2009) 2 SCC 624, Supreme Court holds,

> 14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

k) In **Union of India v. Niyazuddin & Anr**, (2018) 13 SCC 738, Supreme Court holds,

> 7. ...Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said Section. They are :- (1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail.
>
> 8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.
>
> 9. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.

l) In **Sujit Tiwari v. State of Gujarat**, 2020 SCC Online SC 84, in the given facts, Supreme Court granted bail, by observing,

> 10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the few *WhatsApp* messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through *WhatsApp* with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

> 11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers.
>
> 12. We, however, feel that some stringent conditions will have to be imposed upon the appellant.

SUM UP:

22. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities in the NDPS Act, the following fundamental principles emerge:

a) **The limitations on granting of bail come in only when the question of granting bail arises on merits.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

b) **In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment.** [Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738].

c) **Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence.** [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721].

d) **The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

e) **Twin conditions of S. 37 are cumulative and not alternative.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

f) **If the statements of the prosecution witnesses are believed, then they would not result in a conviction.** [Babua v. State of Orissa, (2001) 2 SCC 566].

g) **At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail.** [Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624].

h) **While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty.** [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798].

i) **In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC.** [Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705].

j) **Bail must be subject to stringent conditions.** [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].

23. The difference in the order of bail and final judgment is similar to a sketch and a

painting. However, some sketches would be detailed and paintings with a few strokes. Satisfying the rigors of S. 37 of the NDPS Act is candling the infertile eggs.

24. In **Surinder Kumar Khanna** v. **Intelligence Officer Directorate of Revenue Intelligence, (2018) 8 SCC 271**, Supreme Court holds,

> 13. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused.

25. Given the factual matrix, it is for the Investigating Officer to look into the aspect of non-searching of his house and conduct further investigation per law, if she so desires and thinks appropriate.

26. The report under Section 173(2) CrPC does not restrict the police's powers to investigate further, by following the law. Needless to say, that the Prosecution has all the rights of further investigation under S. 173(8) CrPC, following the law. However, the discussions mentioned above, take the case out of the rigors of S. 37 of the NDPS Act and makes out a case for bail.

27. The recovery did not take place directly from the petitioner. Suffice to say that the petitioner has crossed the riders of Section 37 of the NDPS Act.

28. The petitioner is a permanent resident of District Kangra, therefore, his presence can always be secured.

29. After considering the fact that the main accused from whom the police had recovered the capsules for which the present petitioner stands arraigned as co-accused, has already been released on bail, coupled with the situation that the only admissible evidence between the main accused and the bail petitioner being a couple of phone calls on the day when the main accused was arrested, and the fact that at the time of arrest the I.O. did not seek search warrant of his house or associate the police official of the concerned jurisdiction to search his house to trace similar kind of capsules and other contraband from his house, cummulatively would not be sufficient to deny him bail. Another factor is the lock-down due to Covid-19 disease did not prohibit the police to arrest the accused as such the reasons to explain the delay in arrest is not supported by any guidelines of the State or Central Government, which prohibits the police to conduct the investigation. Therefore, in the cumulative effect of all these factors, the petitioner is entitled to bail.

30. Without commenting on the merits of the evidence collected so far, the confession against co-accused is prima-facie inadmissible, and the points mentioned above would create reasons to make this Court believe that till now, the petitioner has made out a case for bail. To fulfill the second part of Section 37 of the NDPS Act, this Court can impose stringent conditions to ensure and satisfy that the accused does not repeat the offence.

31. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. Suffice it to say that due to the reasons mentioned above, and keeping in view the nature of allegations, this Court believes that further incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose:

32. To ensure that he does not get an opportunity to commit an offence while on bail and the Court is putting the following stringent conditions and this bail shall be subject to the strict terms.

33. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 50,000/, (INR Fifty thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The petitioner to give security to the concerned Court(s), for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The petitioner shall give details of AADHAR number, phone number(s) (if available), WhatsApp number (if available), e-mail (if available), personal bank account(s) (if available), on the reverse page of the personal bonds and the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

c) The Attesting officer shall on the reverse page of personal bonds, mention the permanent address of the petitioner along with the above-mentioned information, whatever is available.

d) The petitioner shall join the investigation as and when called by the Investigating Officer or any superior officer.

e) The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.

f) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

g) Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

h) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

i) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/E-Mail.

j) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

k) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

l) In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred

must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

m) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

n) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

o) The petitioner shall, within ten days of his release from prison, procure a smartphone, and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned before. He shall keep the phone location/GPS always on the "ON" mode. Before replacing his mobile phone, he shall produce the existing phone to the SHO/I.O. of the police station and give details of the new phone. Whenever the SHO, I.O., or any officer of the concerned Police Station, ask him to share his location, then he shall immediately do so. The petitioner shall neither clear the location history nor format his phone without permission of the concerned SHO/I.O. or any officer of the concerned Police Station.

p) During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity, then it shall be open for the State to apply for cancellation of this bail order.

q) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

r) The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

s) The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

34. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

35. The officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular.

36. The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

37. The officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents, and mention details on the reverse page of the personal bonds.

38. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

39. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

40. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

41. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

42. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

43. In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

44. While deciding the propositions of law involved in this matter, I have considered all the similar orders/judgments pronounced by me. Thus, this order is more comprehensive and up to date. Consequently, given above, all previous judgments/orders passed by me, where the proposition of law was similar, or somewhat similar, be not cited as precedents.

45. The petition stands allowed in the terms mentioned above. All pending applications, if any, stand closed.

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

Randhir Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 961 of 2020
Reserved on: July 6, 2020
Date of Decision: July 9, 2020

Code of Criminal Procedure, 1973 (Code)_- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)-** Section 21- Recovery of 27.65 gms. of heroin from joint possession of petitioner and co-accused- Bail – Grant of- State objecting grant of bail on ground of accused having a criminal history- Held, recovered contraband falls in intermediate quantity- Rigors of Section 37 of Act are not attracted- Petitioner in custody since long- Further incarceration is neither warranted nor will achieve any purpose- His presence can be ensured during trial- Bail granted subject to stringent conditions in view of previous criminal history of petitioner. (Para 11, 12, 16, 18 & 19)

Cases referred:

Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565;
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240;
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42;

Whether approved for reporting?[14] ***YES***.
For the petitioner: Mr. Govind Korla, Advocate.

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

For the respondent: Mr. Nand Lal Thakur, Addl. A.G. and Mr. Ram Lal Thakur, Asstt. A.G. for the respondent/State.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

An under-trial prisoner, who is in custody since 12.09.2019, has come up before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC), seeking bail, under Section 21 of Narcotics Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), for jointly possessing 27.65 grams of Diacetylmorphine (Heroin), with the other accused, who already stands released on bail.

2. The police arrested the petitioner, in FIR Number 111 of 2019, dated 12.9.2019, registered under Sections 21 and 22 of the NDPS Act and Section 201 IPC, in Police Station Damtal, District Kangra, HP, disclosing cognizable and non-bailable offenses.

3. Earlier, the petitioner filed a petition under Section 439 CrPC before, learned Special Judge-I, Kangra at Dharamshala, Distt. Kangra, HP. However, vide order dated 2.11.2019, the Court had dismissed the same as withdrawn.

4. I have read the status report(s) and heard Learned Counsel for the parties.

FACTS:

5. The gist of the First Information Report and the status report is that on 12.9.2019, Police Party was on patrolling duty within the jurisdiction of Police Station Damtal, Distt. Kangra, HP, to detect crime. At about 4.30 p.m., when the Police Party reached near the Gate of Ram Gopal Mandir, Damtal Bazar, then the police noticed two persons riding on motorcycle. On noticing the Police, the said persons reversed their motorcycle and drove it on the opposite direction. However, because the driver of the motorcycle was perplexed, he could not control the same, which fell down. On this, reasons to believe arose in the mind of the police officials that they might be having some contraband substance or some illegal articles. The driver told his name as Dalip Kumar and the other person told his name as Randhir Kumar (petitioner herein). After that the police associated two persons as independent witnesses and in their presence the police asked them for the reason they tried to run away and asked them to show the documents of the motorcycle. However, they were trying to avoid all the questions in the inquiry. This arose suspicion in the mind of the Investigating Officer, and in the presence of the independent witnesses he opened the seat of the motorcycle and noticed one polythene packet. On opening the same, police recovered a substance which *prima facie,* appeared to be Heroin. The police tested the same with the help of drug detection kit, which detected positive for heroin. On weighing the same, it measured 9.56 grams. Police also found one another polythene pouch which had 24.29 grams of Heroin. However, when the Police were conducting the proceedings then petitioner Randhir Kumar suddenly took the contraband and threw it on the road. Police again tried to lift the substance from the road and was able to retrieve 18.9 grams of Heroin. Subsequently, the Police party also complied with the procedural requirements under the NDPS Act and the CrPC and arrested the petitioner.

PREVIOUS CRIMINAL HISTORY

6. As per the counsel for the petitioner as well as the status report petitioner has a large number of criminal cases. He was convicted in two cases under the NDPS Act by the Addl. Sessions Judge Jullundhar, Punjab, which were in relation to FIR No. 230 of 2013, dated 28.8.2013 and FIR No. 2 of 2013, dated 1.1.2013, both registered at Police Station Phillaur, Jullandhar, Punjab. The accused was acquitted in two cases under the NDPS Act by the Addl. Sessions Judge Jallundhar, Punjab, which were in relation to FIR No. 215 of 2014, dated 27.7.2013 and FIR No. 51 of 2017, dated 14.3.2017. Learned Counsel for the Petitioner submits that conditions may be put that in case the petitioner repeats the offence, this bail may be canceled.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the allegations against the petitioner are false and he has nothing to do with the said allegations. He further states that petitioner has to shoulder responsibility of his family and also submitted that his bail petition be considered on humanitarian grounds in view of the spread of the Covid-19 pandemic.

8. On the contrary, Mr. Nand Lal Thakur, learned Additional Advocate General, contends that the investigating officer has collected sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

ANALYSIS AND REASONING:

9. 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, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. 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 offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

11. 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. 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.

12. In the present case, the quantity of substance seized is less than the commercial quantity. Therefore, the bail application stands on different parameters and is similar to bail petitions under regular statutes.

13. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows,

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

14. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, Supreme Court in Para 16, holds,

> The delicate light of the law favours release unless countered by the negative criteria necessitating that course.

15. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

16. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. Suffice it to say that due to the reasons mentioned above and keeping in view the nature of allegations, this Court believes that further incarceration of the accused during the trial is neither warranted nor will achieve any significant purpose.

17. Thus, without commenting on the merits of the evidence collected so far, in the cumulative effect of all the factors mentioned hereinbefore, the petitioner makes out a case for bail.

18. The petitioner is a resident of Village Ganna Pind, P.O. Haripur Khalsa, Tehsil Phillaur, Distt. Jullandhar, Punjab. Hence his presence can be secured.

19. To ensure that the petitioner does not get an opportunity to commit an offence while on bail and the Court is putting the following stringent conditions and this bail shall be subject to the strict terms.

20. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 50,000/, (INR Fifty thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The petitioner to give security to the concerned Court(s), for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The petitioner shall give details of AADHAR number, phone number(s) (if available), WhatsApp number (if available), e-mail (if available), personal bank account(s) (if available), on the reverse page of the personal bonds and the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

c) The Attesting officer shall on the reverse page of personal bonds, mention the permanent address of the petitioner along with the above-mentioned information, whatever is available.

d) The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.

e) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

f) Once the trial begins, the appellant shall not in any manner try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

g) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

h) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/E-Mail.

i) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

k) In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

m) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the police station of this FIR, and also to the concerned Court.

n) During the pendency of the trial, if the petitioner commits any offence under NDPS Act, even if it involves small quantity, then it shall be

open for the State to apply for cancellation of this bail order.

o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

21. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

22. The learned counsel for the petitioner, as well as the attesting officer, in whose presence the petitioner puts signatures on personal bond, shall explain all conditions of this bail order to the petitioner, in vernacular.

23. The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

24. The officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents, and mention details on the reverse page of the personal bonds.

25. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on furnishing bail bonds in the terms described above.

26. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

27. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

28. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

29. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

30. In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

31. While deciding the propositions of law involved in this matter, I have considered all the similar orders/judgments pronounced by me. Thus, this order is more comprehensive and up to date. Consequently, given above, all previous judgments/orders passed by me, where the proposition of law was similar, or somewhat similar, be not cited as precedents.

32. The petition stands allowed in the terms mentioned above. All pending applications, if any, stand closed.

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

Om Parkash ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1084 of 2020
Reserved on: 09th July, 2020
Date of Decision: 10th July, 2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1983 (Act)**- Sections 18, 20 & 37- Bail in a case registered for recovery of commercial quantity of 'charas' and intermediate quantity of 'opium' from a car driven by 'TR'- Petitioner allegedly sold contraband to 'TR' and also supervised its transportation through another accused 'SS'- Held, petitioner was using cell number of his father at the relevant time- There were 11 calls between him and co-accused 'TR' on that particular date- 'TR' misled Investigating Officer by revealing wrong name of petitioner as 'RS'- CCTV footage showing petitioner and 'TR' taking food together at one place- Material on record showing involvement of petitioner in the case- Rigors of Section 37 of Act are attracted- Petitioner is not entitled for bail- Petition dismissed. (Para 6 & 23 to 30)

Cases referred:

Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565;
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42;
State of Rajasthan, Jaipur v. Balchand, AIR 1977 SC 2447;
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240;
Union of India v. Merajuddin, (1999) 6 SCC 43;
Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549;
Satpal Singh v. State of Punjab, (2018) 13 SCC 813;
Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705;
Babua v. State of Orissa, (2001) 2 SCC 566;
Bijando Singh v. Md. Ibocha, 2004(10) SCC 151;
N.C.B.Trivandrarum v. Jalaluddin, 2004 Law Suit (SC) 1598;
Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798;
N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721;
Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624;
Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738;
Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84;

Whether approved for reporting?[15] ***YES***.

For the petitioner: Mr. Vinod Chauhan, Advocate.

For the respondent: Mr. Nand Lal Thakur and Mr. Ashwani Sharma, Additional Advocates General,with Mr. Ram Lal Thakur, Asstt. A.G. & Mr. Rajat Chauhan, Law Officer.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

The petitioner, who along with the main accused, is under incarceration from 25th Sep 2019, for allegedly selling 6 kilograms and 324 grams of charas, and 413 grams of opium, and after that supervising its transportation through another accused, has again come up before this Court seeking bail, on the grounds that this Court has granted bail to one of his co-accused.

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

2. Based on a First Information Report (FIR), the police arrested the petitioner, in FIR No.83 of 2019, dated 27.5.2019, registered under Sections 18, 20 & 29 of the of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), read with S. 181, 192, 196 of Motor Vehicles Act, 1860, (MV Act), in Police Station, Jogindernagar, District Mandi, Himachal Pradesh, disclosing cognizable and non-bailable offenses.

3. The petitioner filed a petition under Section 439 CrPC before Special Judge (I), Mandi, District Mandi, HP. However, vide order dated 31.10.2019, the Court dismissed the petition, because, in the opinion of the Court, the petitioner could not cross the rigors of S. 37 of the NDPS Act. After that, the petitioner filed a bail petition under Section 439 CrPC in this Court. Vide order dated Feb 28, 2020, passed in CrMPM No. 29 of 2020, this Court had dismissed the said petition because the petitioner and the main accused Tule Ram, from whose possession the Investigator had recovered the charas, had made multiple phone calls between them, which calls immediately preceded such seizure.

4. The Petitioner has now come up before this Court seeking bail on parity because this Court has granted bail to co-accused Satish Kumar.

5. I have read the status report(s) and heard Ld. Counsel for the parties.

FACTS:

6. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

a) On 26th May 2019, the Police party headed by inspector/in charge of Police Station Jogindernagar, District Mandi, had erected/laid a barrier on National Highway No.154. At around 8.15 p.m., one car came from the side of Mandi towards Jogindernagar. The Inspector signaled the driver of the said car to stop, and on this, the driver of the car brought it to a halt and parked it on the side of the road. After this, the Inspector checked the said car, which was Maruti Alto, and told him to show the car's documents. On this, the driver of the vehicle became perplexed and could not produce the registration certificate and other records of the car. He also started stammering and was extremely baffled. On inquiry, he revealed his name as Tule Singh.

b) The body language and gesture of said Tule Singh raise suspicion in the mind of the Investigating Officer, (I.O.), that he was most likely possessing some contraband or drugs. After that, the I.O. sent one of the constables to bring an independent witness, who returned after 20 minutes and brought two persons Rakesh Kumar and Gaurav Kumar for being associated as independent witnesses for the ensuing search. In the presence of these witnesses, the I.O. searched the vehicle, and below the front left seat, they noticed one cloth bag. The Police took it out and opened it. It had three taped packets. On opening these three packets, the Police detected charas.

c) Similarly, the Police recovered a bag from the dickey of the said car. This bag also contained one polythene, and one envelop and further contained five taped packets. On opening, the Police recovered charas from four packages and opium from one pack.

d) On weighment, the first packet contained 3kg & 35 grams charas and the second packet contained 3kg & 289 grams charas and also 413 grams opium. After that, the police put back the charas and the opium in the same packets and in a similar way and sealed the same. After that, the police completed the other procedural requirement of the NDPS Act and CrPC and proceeded to arrest the accused. The police also took into possession of said Alto Car.

e) After that, on the spot itself, the I.O. made inquiries from Tule Ram, and upon this, he confessed before the Police that persons, namely Ram Singh alias Om Parkash (bail petitioner), s/o Tek Singh, R/o Village Manhon, P.O. Palahach, Tehsil Banjar; Tanu R/o Village Manhon, P.O. Palahach, Tehsil Banjar; and Satish Singh S/o Kishore Singh, R/o Village Dhanpatan, P.O. Matlahar, Tehsil Jawali, District Kangra are also involved. He further told the I.O. that they were escorting the Alto Car in Satish Singh's white color Scorpio. Immediately on receipt of such information, the I.O. informed Police Post Ghattu, District Mandi, to detain the said vehicle.

f) On this H.C. Swami Nand of Police Post, Ghattu informed that they had detained such vehicle, and in this Scorpio, only one person, namely Satish Singh was present and none-else. H.C. Swami Nand further told the I.O. that Satish Singh had said to him that those two persons have alighted from the vehicle at Jogindernagar. After that, the I.O. arrested Tule Singh and Satish Singh, and sent the report to the police station to register the FIR mentioned above.

g) In the investigation police found that Satish Singh had visited the present bail petitioner Om Parkash @ Ram Singh at a place known as Palahach (Banjaar) and had purchased the said Charas and Opium from Om Parkash. After that these persons had hired the taxi of Tule Singh and told him that they had to carry this charas & opium to Jogindernagar. On this Tule Singh agreed to transport the same to Jogindernagar by charging rupees ten to twelve thousand as fare. It further came in investigation that another person namely Tiwan Singh @ Tanu was also present with Om Parkash @ Ram Singh. It further came investigation that accused Satish Singh, Om Parkash and Tiwan Singh had carried the charas and the opium up to the vehicle of Tule Singh. It further transpired that while travelling, these people were regularly in touch with Tule Singh on his mobile. The police also conducted the CDR and CAF of the mobile phones and conducted financial investigation of these persons.

h) The investigation further reveals that while driving, these people kept on talking to Tule Singh. It further came in the investigation that on the evening of 26th May 2019, all these persons had taken food together in one place.

i) Subsequently, it transpired in investigation that Tule Singh had misled the Police and told the incorrect name of Om Parkash by wrongly naming him as Ram Singh. After that on 25.09.2019, the Police arrested the bail petitioner Om Parkash @ Ram Singh.

j) The Police procured call details between accused persons. The Police also procured the CCTV footage.

k) Subsequently, the police sent the charas and opium mentioned above to SFL Junga, which tested positive for charas and opium after conducting the scientific examination.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that this Court has granted bail to co-accused Satish, hence the petitioner is also entitled for bail on the grounds of parity. He also places reliance upon to the orders of this Court in Budhi Singh v. State of H.P., CrMPM 595 of 2020; Thakur Dass v. State of H.P., CrMPM 167 of 2010; Stynder Singh v. State of Himachal Pradesh, 2010(1) SimLC 490; and Nisar Ahmed Thakkar v. State of H.P., CrMPM 672 of 2008.

8. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contends that this Court had granted bail to Satish Singh after discussing evidence against him. Such order was because, in the opinion of the Court, the evidence against Satish Singh was not sufficient, and thus, he was able to cross the rider of S. 37 of the NDPS Act. Learned Additional Advocate General further states that the Police have collected sufficient evidence against bail petitioner Om Parkash. He contended that the main accused Tule Singh had misled the investigator by telling the wrong name of the bail petitioner, by naming him as Ram Singh, which shows his direct involvement with the main accused, from whose possession the Police had recovered the contraband. Learned Additional Advocate General further states that the bail petitioner Om Parkash and the main accused had been continuously in touch with each other through phone calls and such call details form part of the Police report. Mr. Nand Lal Thakur, also relies upon the decision of this Court in Manohar Lal v. State of H.P., CrMPM 126 of 2018.

ANALYSIS AND REASONING:

9. Pre-trial incarceration needs justification depending upon the statutory restrictions, heinous nature of the offence, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows,

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

11. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

12. In **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, Supreme Court holds,

> 2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative.
>
> 3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime.

13. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, Supreme Court in Para 16, holds,

> The delicate light of the law favours release unless countered by the negative criteria necessitating that course.

14. In Dataram Singh v. State of Uttar Pradesh, (2018) 3 SCC 22, Supreme Court holds,

> 1. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception.
>
> 6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.

15. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in its schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule. 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 offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One Lac, and bail is subject to the riders mandated in S. 37 of NDPS Act.

16. In the present case, as per the contentions of the State, the quantity of substance seized is commercial quantity. Given the legislative mandate of S. 37 of NDPS Act, the Court can release a person, accused of an offence punishable under the NDPS Act for possessing a commercial quantity of contraband only after passing its rigors. Section 37 of the Act is extracted as under: -

> "37. Offences to be cognizable and non-bailable.
>
> (1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

17. Reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before a person/accused of possessing a commercial quantity of drugs or psychotropic substance, is to be released on bail.

18. The first condition is to provide an opportunity to the Public Prosecutor and clear her stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Be that as it may, if such a finding is arrived at by the Court, then it is equivalent to giving a certificate of discharge to the accused. Even on fulfilling one of the conditions, the reasonable grounds for believing that during the period of bail, the accused is not guilty of such an offence, the Court still cannot give a finding or assurance that the accused is not likely to commit any such crime. Thus, the grant of bail or denial of bail for possessing commercial quantity would depend on facts of each case.

19. <u>JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT</u>:

a) In **Union of India v. Merajuddin**, (1999) 6 SCC 43, a three Judges Bench of Supreme Court while cancelling the bail, observed in Para 3, as follows,

> The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure."

b) In **Customs, New Delhi v. Ahmadalieva Nodira**, (2004) 3 SCC 549, a three Judges Bench of Supreme Court holds,

> 7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

c) In **Satpal Singh v. State of Punjab**, (2018) 13 SCC 813, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections <u>438</u> or <u>439</u> CrPC, without reference to Section <u>37</u> of the NDPS Act.

d) In **Narcotics Control Bureau v Kishan Lal**, 1991 (1) SCC 705, Supreme Court holds,

> 6. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic

> Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails.

e) In **Babua v. State of Orissa**, (2001) 2 SCC 566, Supreme Court holds,

> **[3]** In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view.

f) In **Bijando Singh v. Md. Ibocha**, 2004(10) SCC 151, Supreme Court holds,

> 3. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act.

g) In **N.C.B.Trivandrarum v. Jalaluddin**, 2004 Law Suit (SC) 1598, Supreme Court observed,

> 3. ...Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes

> the bail application, the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

h) In **Union of India v. Shiv Shanker Kesari**, (2007) 7 SCC 798, Supreme Court holds,

> 6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and. that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.
>
> 7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.
>
> 8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable'. Reason varies it, its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See : Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987)4 SCC 497 and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt Ltd and another [(1989)1 SCC 532].
>
> 9. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice &., Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that.
>
> 10. The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See : Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (2003)6 SCC 315)."

> 11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.
>
> 12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

i) In **N.R. Mon v. Md. Nasimuddin**, (2008) 6 SCC 721, Supreme Court holds,

> 9. …The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case hand the High Court seems to have completely overlooked underlying object of Section 37.

j) In **Union of India v. Rattan Mallik @ Habul**, (2009) 2 SCC 624, Supreme Court holds,

> 14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

k) In **Union of India v. Niyazuddin & Anr**, (2018) 13 SCC 738, Supreme Court holds,

> 7. …Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences

enumerated under the said Section. They are :- (1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail.

8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.

9. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.

l) In **Sujit Tiwari v. State of Gujarat**, 2020 SCC Online SC 84, in the given facts, Supreme Court granted bail, by observing,

10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the few *WhatsApp* messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through *WhatsApp* with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on

> 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers.
>
> 12. We, however, feel that some stringent conditions will have to be imposed upon the appellant.

SUM UP:

20. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities in the NDPS Act, the following fundamental principles emerge:

a) **The limitations on granting of bail come in only when the question of granting bail arises on merits.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

b) **In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment.** [Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738].

c) **Apart from granting opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence.** [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721].

d) **The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

e) **Twin conditions of S. 37 are cumulative and not alternative.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

f) **If the statements of the prosecution witnesses are believed, then they would not result in a conviction.** [Babua v. State of Orissa, (2001) 2 SCC 566].

g) **At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail.** [Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624].

h) **While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty.** [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798].

i) **In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC.** [Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705].

j) **Bail must be subject to stringent conditions.** [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].

21. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes. Satisfying the rigors of S. 37 of the NDPS Act is candling the infertile eggs.

22. In this case the report under Section 173(2) stands filed. In the final police report, it has been mentioned that the bail petitioner had talked with Tule Singh, from whose car, the Police had seized the contraband. Tule Ram had talked from his mobile number 80917-85144 with the Petitioner Om Parkash on his mobile number number 85447-14658, which is in the name of Tek Singh, father of petitioner Om Parkash @ Ram Singh. In fact, the petitioner Om Parkash @ Ram Singh, at that time, was using the phone taken in the name of his father. The address of said Tek Singh s/o Sohan Lal as mentioned on the prepaid customer application form, which is at page No. 71 of the police report, is Ward No. 1, Manhaon, P.O. Kalwari, Distt. Kullu, HP. It is not the case of the learned counsel for the petitioner that Tek Singh s/o Sohan Lal is not father of the bail petitioner Om Parkash @ Ram Singh.

23. Perusal of the call details as mentioned at page numbers 67 and 68 of the police reports reveals that on May 26, 2019, eleven phone calls were made between Tule Singh and Om Parkash @ Ram Singh. Accused Tule Singh from whose possession police had recovered the charas was using phone No. 80917-85144. Investigation also revealed that petitioner Om Parkash @ Ram Singh was using the phone of his father Tek Singh and the said phone number was 85447-14658. It is for this reason the Investigating Officer did not arrest Tek Singh but instead arrested Om Parkash @ Ram Singh @ Kaka. Perusal of the call details reveals that on May 26, 2019 before accused Tule Singh was arrested, he and the petitioner had talked with each other on as many as eleven occasions. There is exchange of calls between phone numbers 80917-85144 of Tule Singh and 85447-14658 which was used by petitioner Om Parkash @ Ram Singh.

24. Thus, there is a substantial difference in the evidence available against the accused Satish Singh, whom this Court had granted bail, primarily because the perusal of the phone records showed no calls exchanged between Tule Singh and Satish Singh, which is not the case with the present bail petitioner.

25. Another reason to deny bail is that the main accused Tule Singh had misled the investigator by telling the wrong name of the bail petitioner, by naming him as Ram Singh, which shows his direct involvement with the main accused.

26. Given above, the petitioner has failed to cross the rigors of S. 37 of the NDPS Act. The evidence against Satish Singh was lacking and it had crossed the rigors of S. 37 of NDPS Act, so far as it relates to Satish Singh. The line of distinction between the evidence collected against Satish Singh and the present bail petitioner is not thin but huge.

27. Without commenting on the merits of the evidence collected so far, this Court has reasons to believe that the petitioner has failed to cross the hurdle of S. 37 of NDPS Act, and is not entitled for bail.

28. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. Suffice it to say that due to the reasons mentioned above, and keeping in view the nature of allegations, no case for bail is made out in favour of the petitioner.

29. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

30. Given the above reasoning, in my considered opinion, no case for bail is made out at this stage. Resultantly, the present petition stands dismissed. All pending applications, if any, stand closed.

31. While deciding the propositions of law involved in this matter, I have considered all the similar orders/judgments pronounced by me. Thus, this order is more comprehensive and up to date. Given above, all previous decisions/orders passed by me, where the proposition of law was similar, or somewhat similar, and also those passed under Section 37 of NDPS Act, be not cited as precedents.

Petition dismissed.

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

1. **CRMPM No.944/2020**

Freed ....Petitioner

Versus

State of H.P. ....Respondent.

2. **CRMPM No.945/2020**

Khalid ....Petitioner

Versus

State of H.P. ....Respondent.

3. **CRMPM No.946/2020**

Salman ....Petitioner

Versus

State of H.P. ....Respondent.

4. **CRMPM No.947/2020**

Rakib ....Petitioner

Versus

State of H.P. ....Respondent.

5. **CRMPM No.948/2020**

Firoz Khan ....Petitioner

Versus

State of H.P. ....Respondent.

6. **CRMPM No.949/2020**

Tazim ....Petitioner

Versus

State of H.P. ....Respondent.

7. **CRMPM No.950/2020**

Mubeen ....Petitioner

Versus

State of H.P. ....Respondent.

8. **CRMPM No.951/2020**

Sahrukh ....Petitioner

Versus

State of H.P. ....Respondent.

9. **CRMPM No.952/2020**

Arif Ali ....Petitioner

Versus

State of H.P. ....Respondent.

CRMPM No.944 to 952 2020
Reserved on : June 30, 2020
Date of Decision: July 6, 2020

Code of Criminal Procedure, 1973 (Code)- Section 438- Application for pre-arrest bail- Duty of Court- Held, for granting or rejecting anticipatory bail, Court must assign reasons. (Para 16).

Code of Criminal Procedure, 1973 (Code)- Section 438- Anticipatory bail- Parameters relevant for consideration- Held, it would be necessary on part of the Court to see culpability of accused, his involvement in commission of organized crime and whether he possessed requisite mens rea- Factors specifically mentioned in Section 438 of Code also need to be taken in to consideration at time of deciding bail application. (Para 18 & 22)

Code of Criminal Procedure, 1973 (Code)- Section 438- Pre-arrest bail in a case of attempted murder by an unlawful assembly etc.- Held, incident happened in broad day light between members of two communities, wherein two persons were beaten by mass gathering which was drawn to spot by making phone calls- Persons who came to rescue victims also assaulted- Victims who managed to flee from spot were chased and again beaten along with those who came to rescue them – Presence and involvement of petitioners in incident is evident from CCTV footage- Accusation against petitioners not false- Their custodial interrogation is necessary- Petitions except of one police Head Constable 'K', dismissed. (Para 23 to 25, 29, 30, 35, 47, 50 & 54)

Cases referred:
State of M.P. & another v. Ram Kishna Balothia & another, (1995) 3 SCC 221;
Gurbaksh Singh Sibbia & others v. State of Punjab, (1980) 2 SCC 565;
Savitri Agarwal and others v. State of Maharashtra and another, (2009) 8 SCC 325;
Siddharam Satlingappa Mhetre v. State of Maharashtra and others, (2011) 1 SCC 694;
Bhadresh Bipinbhai Sheth v. State of Gujarat and another, (2016) 1 SCC 152;
Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others, (2017) 16 SCC 775;
Prem Giri v. State of Rajasthan, (2018) 6 SCC 571;
Prem Giri v. State of Rajasthan, (2018) 12 SCC 20;
Dataram Singh v. State of Uttar Pradesh and another, (2018) 3 SCC 22;
P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;
Pokar Ram v. State of Rajasthan and others, (1985) 2 SCC 597;

Whether approved for reporting? Yes.

For the Petitioners	**:**	Mr. Kush Sharma and Mr. Gobind Korla, Advocates.
For the respondent	**:**	Mr. Ashok Sharma, Advocate General, with Mr. Shiv Pal Manhans & Mr. Hemant Vaid, Additional Advocates General.

Vivek Singh Thakur, Judge

These bail applications, filed by petitioners under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), seeking anticipatory bail, apprehending their arrest, in case FIR No.78 of 2020, dated 22.6.2020, registered, under Sections 147, 148, 149, 323, 307 & 341 of the Indian Penal Code, in Police Station Majra, District Sirmour, Himachal Pradesh, adjudicated on the basis of common record and submissions, are being decided together by this common judgment.

23. Section 438 of the Cr.P.C., as existing on date, reads as under:

> **"438. Direction for grant of bail to person apprehending arrest. -** (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors, namely:--

(i) the nature and gravity of the accusation;

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

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

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under subsection (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).**"**

24. It is noticeable that there was no specific provision in the Code of Criminal Procedure, 1898, empowering the Court to grant bail to a person apprehending his arrest, as this provision was introduced, for the first time, in the Cr.P.C. in 1973. Necessity of such provision was felt by the Law Commission of India long ago, in the year 1969, by observing in its 41st Report (Volume-I) in Para-39.9, as under:

"The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter."

25. The Central Government had, in principle, accepted the suggestion made by the Law Commission of India, by introducing Clause 447 in the Draft Bill of the Cr.P.C. of 1970, whereby expressed powers on the High Court and the Court of Session to grant anticipatory bail, were proposed to be conferred.

26. In its 48th Report (1972), in Para-31, the Law Commission of India, had commented on the proposal as under:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous

petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

27. Ultimately, Section 438 of the Cr.P.C. came in existence, in the shape of unamended Section 438, in 1973, as under:

"438. (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section, and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including.

(i) a condition that the persons shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-sec. (1)."

28. Existing provision of Section 438 of the Cr.P.C. has come into existence, on substitution of its sub-section (1) by the new sub-sections (1), (1-A) and (1-B), by way of amendment vide Code of Criminal Procedure (Amendment) Act, 2005.

29. Section 438 of the Cr.P.C. is a right provided for a person to approach the trial Court or the Court of Session, seeking direction to enlarge him on bail, in the

event of his arrest, in a case wherein he apprehends his arrest on accusation of having committed a non-bailable offence.

30. Commenting upon the right provided under Section 438 of the Cr.P.C., the Supreme Court in ***State of M.P. & another v. Ram Kishna Balothia & another,*** **(1995) 3 SCC 221**, has observed that it is essentially a statutory right conferred long after the coming into force of the Constitution, but with clarification that it cannot be considered as an essential ingredient of Article 21 of the Constitution.

31. Dealing with a case under unamended Section 438, a five-Judges Constitution Bench of the Apex Court in ***Gurbaksh Singh Sibbia & others v. State of Punjab,*** **(1980) 2 SCC 565,** has clarified few points as under:

> "35. Section 438 (1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe' that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has somesort of a vague apprehension that 'some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested S. 438 (1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.
>
> 36. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for grant-in such relief. It cannot leave the question for the decision of the Magistrate concerned under S. 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.
>
> 37. Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under S. 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F. I. R. is not yet filed.
>
> 38. Fourthly, anticipatory bail can be granted even after in F. I. R. is filed, so long as the applicant has not been arrested.
>
> 39. Fifthly, the provisions of S. 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under S. 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested."

32. The Apex Court in ***Savitri Agarwal and others v. State of Maharashtra and another,*** **(2009) 8 SCC 325,** dealing with a post-amendment case, referring Constitution Bench Judgment passed in ***Gurbaksh Singh Sibbia's*** case has observed as under:

"24. While cautioning against imposition of unnecessary restrictions on the scope of the Section, because, in its opinion, over generous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the Courts are required to keep in mind while dealing with an application for grant of anticipatory bail:

(i) Though the power conferred under Section 438 of the Code can be described as of an extraordinary character, but this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

(ii) Before power under sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the Section.

(iii) The observations made in *Balchand Jain v. State of M.P.,* (1976) 4 SCC 572, regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot be treated as conclusive on the point. There is no warrant for reading into Section 438, the conditions subject to which bail can be granted under Section 437(1) of the Code and therefore, anticipatory bail cannot be refused in respect of offences like criminal breach of trust for the mere reason that the punishment provided for is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

(iv) No blanket order of bail should be passed and the Court which grants anticipatory bail must take care to specify the offence or the offences in respect of which alone the order will be effective. While granting relief

under Section 438(1) of the Code, appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed.

(v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

(vi) An anticipatory bail can be granted even after an FIR is filed so long as the applicant has not been arrested.

(vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

(viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage.

(ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but the Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of FIR in respect of the matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonable short period after the filing of the FIR."

33. In ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others,*** **(2011) 1 SCC 694**, following ***Gurbaksh Singh Sibbia's*** case, the Supreme Court has pointed out the following factors and parameters, which can be taken into consideration at the time of dealing with anticipatory bail:

"(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

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

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

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

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

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

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

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

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

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

34. In ***Bhadresh Bipinbhai Sheth v. State of Gujarat and another,*** **(2016) 1 SCC 152,** the Supreme Court, in addition to reiterating the factors and parameters, delineated in the judgment in ***Siddharam Satlingappa Mhetre's*** case, has further culled out the following principles for the purpose of dealing with a case of anticipatory bail under Section 438 of the Cr.P.C.:

> **"25.1** The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

25.2 The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

25.3 It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

25.4 There is no justification for reading into Section 438 CrPC the limitations mentioned in Section 437 CrPC. The plentitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 CrPC to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

25.5 The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

25.6 It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

25.7 In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

25.8 Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

25.9 No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.**"**

35. A three Judges Bench of the Supreme Court of India, for two divergent views in various judgments of the Supreme Court, on the issue that as to whether an anticipatory bail should be for a limited period of time or not, vide judgment in ***Sushila Aggarwal & Others v. State (NCT of Delhi) & another,*** reported in **(2018) 7 SCC 731,** had referred the matter to Larger Bench of the Supreme Court for authoritative decision.

36. In **Special Leave Petition (Criminal) Nos.7281 of 2017 and 7282 of 2017, decided on 19.1.2020,** titled as ***Sushila Aggarwal & Others v. State (NCT of Delhi) & another,*** {**2020 SCC Online SC 98**}**,** a five-Judges Bench (Constitution Bench) of the Supreme Court of India, at the time of deciding matter referred to Larger Bench of the Supreme Court for authoritative decision, has finally concluded as under:

"FINAL CONCLUSIONS:

139. In view of the concurring judgments of Justice M.R. Shah and of Justice S. Ravindra Bhat with Justice Arun Mishra, Justice Indira Banerjee and Justice Vineet Saran agreeing with them, the following answers to the reference are set out:

(1) Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr. PC should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc.

(2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

140. This court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438, Cr. PC:

(1) Consistent with the judgment in Shri *Gurbaksh Singh Sibbia and others v. State of Punjab*, (1980) 2 SCC 565 , when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(2) It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

(3) Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(5) Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

(6) An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(7) An order of anticipatory 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 person who seeks and is granted pre-arrest bail.

(8) The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. *Sibbia* (supra) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v Deoman Upadhyaya,* AIR 1960 SC 1125."

(9) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, noncooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.

(10) The court referred to in para (9) above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(11) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr*, (2011) 6 SCC 189; *Jai Prakash Singh*

(supra) *State through C.B.I. vs. Amarmani Tripathi*, (2005) 8 SCC 21. This does not amount to "cancellation" in terms of Section 439 (2), Cr. PC.

(12) The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors*, (2011) 1 SCC 694 (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 and subsequent decisions (including *K.L. Verma v. State & Anr*, (1998) 9 SCC 348 ; *Sunita Devi v. State of Bihar & Anr*, (2005) 1 SCC 608 ; *Adri Dharan Das v. State of West Bengal*, (2005) 4 SCC 303 ; *Nirmal Jeet Kaur v. State of M.P. & Anr*, (2004) 7 SCC 558 ; *HDFC Bank Limited v. J.J. Mannan*, (2010) 1 SCC 679 ; *Satpal Singh v. the State of Punjab*, 2018 SCC Online (SC) 415 and *Naresh Kumar Yadav v Ravindra Kumar*, (2008) 1 SCC 632 which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

37. It is also settled that for granting or rejecting anticipatory bail, assigning reason(s) for that is must. The Supreme Court has set aside the anticipatory bail granted/ rejected without assigning any reason. {**See: *Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others,* (2017) 16 SCC 775; *Prem Giri v. State of Rajasthan,* (2018) 6 SCC 571;** and ***Prem Giri v. State of Rajasthan,* (2018) 12 SCC 20}.**

38. Fundamental of criminal jurisprudence postulates 'presumption of innocence', meaning thereby that a person is believed to be innocent until found guilty and grant of bail is the general rule and putting a person in jail or in prison or in correction home, during trial, is an exception and bail is not to be withheld as a punishment and it is also necessary to consider whether the accused is a first time offender or has been accused of other offences and, if so, nature of such offence and his or her general conduct also requires consideration. Character of the complainant and accused is also a relevant factor. Reiterating these principles, the Apex Court in ***Dataram Singh v. State of Uttar Pradesh and another*, (2018) 3 SCC 22,** has also observed that however it should not be understood to mean that bail should be granted in every case, and the grant or refusal of bail is entirely within the discretion of the Judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately.

39. While consideration a bail application, it would be necessary on the part of the Court to see culpability of the accused and his involvement in the commission of organized crime, either directly or indirectly, and also to consider the question from the angle as to whether applicant was possessed of the requisite *mens rea*. Interim bail, pending investigation, can be granted, keeping in view the facts and circumstances of the case.

40. It would be proper to also refer case law cited by learned Advocate General, before turning up to the submissions made by learned counsel for the parties, including Advocate General.

41. Reliance has been placed by learned Advocate General on Paras 5 & 6 of pronouncement of the Apex Court in ***Pokar Ram v. State of Rajasthan and others,* (1985) 2 SCC 597,** wherein it has been observed that relevant considerations governing the Court's decision in granting anticipatory bail, under Section 438 Cr.P.C., are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher Court and bail is sought during pendency of the appeal. Further that three situations in which the question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant considerations on which the Court should exercise its discretion, one way or

the other, are substantially different from each other. Observations in Para-6, based on ***Gurbaksh Singh Sibbia's*** case, are as under:

> "6. The decision of the Constitution Bench in *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565: (AIR 1980 SC 1632) clearly lays down that 'the. distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.' Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued he shall be released on bail. A direction under S. 438 is intended to confer conditional immunity from the touch as envisaged by S. 46(1) or confinement. In Para 31, Chandrachud, CJ clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice that 'in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant, on bail in the event of his arrest would generally be made. It was observed that 'it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no. fear that the applicant will abscond.' Some of the relevant considerations which govern the discretion, noticed therein are the nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State", are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.' A caution was voiced that 'in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it'."

42. Another case law cited by the learned Advocate General is a judgment passed by the Apex Court in ***P. Chidambaram v. Directorate of Enforcement***, **(2019) 9 SCC 24.** Learned Advocate General has referred to Paras 69 to 77, under the Heading captioned: 'Grant of anticipatory bail in exceptional cases', which read as under:

> **"Grant of Anticipatory bail in exceptional cases**
>
> **69.** Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

70. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

71. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "....except according to a procedure prescribed by law." In *State of M.P. and another v. Ram Kishna Balothia*, (1995) 3 SCC 221, the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under: (SCC p.226, para 7)

> "7. .....We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:
>
> > 'We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.'

In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. *Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21*." (emphasis supplied)

72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

73. The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to

confront the accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an in-built safeguard against arbitrary exercise of power of arrest by the investigating officer. Submitting that custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed reliance upon *State v. Anil Sharma*, (1997) 7 SCC 187; *Sudhir v. State of Maharashtra*, (2016) 1 SCC 146; and *Directorate of Enforcement v. Hassan Ali Khan*, (2011) 12 SCC 684.

74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In *State v. Anil Sharma*, (1997) 7 SCC 187, the Supreme Court held as under: (SCC p.189, para 6)

> "6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation- oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

75. Observing that the arrest is a part of the investigation intended to secure several purposes, in *Adri Dharan Das v. State of W.B.*, (2005) 4 SCC 303, it was held as under: (SCC p.313, para 19)

> "19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the

> jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

76. In *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694, the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

77. After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State of Bihar*, (2012) 4 SCC 379, the Supreme Court held as under: (SCC p.386, para 19)

> "19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu v. P.T. Manokaran*, (2007) 4 SCC 434, *State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain*, (2008) 1 SCC 213 and *Union of India v. Padam Narain Aggarwal*, (2008) 13 SCC 305.)"**”**

43. Section 438 of the Cr.P.C. in itself provides certain factors, referred supra, for taking into consideration at the time of deciding bail applications under this Section, which are inclusive in nature. Some of other such principles, factors and parameters to be taken into consideration by the Court at the time of adjudicating an application under Section 438 of the Cr.P.C. have been elaborated and explained in pronouncements referred supra.

44. As per status report filed by the respondent-State, the incident, according to statement of complainant Avinesh, recorded under Section 154 Cr.P.C., had taken place when complainant Avinesh alongwith his brother Rakesh were purchasing some articles from a shop in Gulabgarh Chowk, and Abid Ali had started quarrel with Rakesh, without any reason, by saying that why Rakesh was staring at him and when he was asked not to quarrel he (Abid) had brought a stick from the vehicle and started beating them and had also called other persons from neighbourhood, through his mobile phone, and when complainant and his brother had run from the spot to save them they were chased and beaten by Abid Ali, Mobin, Shahrukh, Fareed, Feroz, Salman, Salamat, Khalid son of Iqbal, Raqib Ali, Arif, Tanzim, etc. and not only those two persons but their family members and relatives, who had come to rescue them, were also beaten by the assailants. According to status report, victim Saurav was referred to Post Graduate Institute of Medical Sciences and Research, Chandigarh (PGI) for further management, in view of severe head injury with life threatening condition, as per discussion with Medical Specialist, and thereafter he remained under treatment at PGI till 26.6.2020, whereafter he has been transferred to Dr. Y.S. Parmar Government Medical College, Nahan and Dinesh, Sanjay and Chaman

are also under treatment in the said College, whereas Manoj, Gaurav, Dharmender and Avinesh are under treatment in Civil Hospital at Paonta Sahib.

45. It is further in status report that HC Mohammed Khalid, despite being member of Police Department, has been found involved in the incident by leading his community and earlier also he was found involved in a case under Prevention of Corruption Act, whereabout FIR No.4 of 2018, dated 12.1.2018, had been registered in Police Station Kala Amb, District Sirmour.

46. As stated in the status report, and also submitted by learned Advocate Genera, at the place of incident population of assailants is in majority and complainants are in minority and for that reason majority community used to threaten and terrorise the community in minority, and the incident has have its great impact on the communal harmony and the minority population is showing resentment by demonstrating in the area and for tension in the area there is also threat to the lives of accused and, thus, their enlargement on anticipatory bail will not only hamper the investigation, which is at initial stage, but also cause disturbance in the communal harmony.

47. MLCs of the petitioners i.e. of the complainant as well as accused persons, available in the police record, were written in such a manner that it was not possible to read these MLCs and to make out anything about the injuries recorded by the Doctor and his opinion in that regard and these MLCs were appearing to be incomplete in all respects and were not readable irrespective of making various attempts. On 02.07.2020, these documents were returned to learned Advocate General with a request to assist the Court by reading the same and convey relevant extract thereof to the Court. Despite making the best of all their efforts, neither learned Advocate General nor the police officer present in the Court was in a position to make any submission with respect to observation/ notes/writings of the Doctor on these MLCs and learned Advocate General had expressed, as was also felt by the Court, that it was not possible, at all, to read these MLCs and only Doctor, who had written these would be able to explain these documents. Therefore, respondent-State was directed to make available to the Court complete, legible and readable documents, including medical record like latest MLCs etc. of the parties. In sequel thereto, readable typed relevant abstract of MLCs of parties has been produced with record by the respondent-State.

48. Persons, namely, Abid and Salamat out of five accused arrested by the police are having injuries. These injuries alongwith opinion are as under:-

1. Abid Khan S/O Salamat Ali MLC No.257:

Injuries noted at the time of examination:

1. Small superficial cut lacerated wound of sixe 1* 1 cm over occipital region.

2. Pain over old surgical site of left foot.

3. Pain with mild swelling over left forearm.

Final Opinion:

As per NCCT Head suggestive of no acute brain injury. As per repeated confirmatory opinion doctor orthopaedician from DR YSPGMC Nahan has not given any written opinion. Hence final opinion remains reserved. The nature of injury is previous (old), as per Xray report.

2. Salamat Ali S/O Shabeer Ahmed MLC No.258
Injuries noted at the time of examination:

1. Small superficial cut lacerated would of size 1 * 1 cm over frontal region of head.

2. Small cut lacerated wound of size 1 * 1 cm over left parietal region of head.

Final Opinion:

NCCT head suggestive of subgaleal hematoma with air pockets in frontal, parietal and temporal region. Hence patient need physician/neurologist opinion regarding subgaleal hematoma in brain.

49. Injuries received by complainant party as recorded in MLCs are as under:-

1. Saurav S/O Deepak MLC No. 251:

Injuries at the time of examination:

Complaint of severe headache with history of loss of consciousness for few minutes with no history of vomiting.

Final Opinion:

As per NCCT head suggestive of extradural hematoma with overlying subgaleal hematoma with small heamorrhagic contusions over left parietal region.

Patient referred to PGI Chandigarh in view of severe head injury and life threatening condition as per case seen by Medical Specialist CH Poanta Sahib. Hence the nature of injury is grievous.

2. Chaman Lal S/O Raju Ram MLC No.249:

Injuries at the time of examination:

1. Red colour bruise over left side of neck region with superficial cut lacerated would of size 1 * 1 cm over occipital region of head.

2. Bruise with abrasion over left arm.

3. Pain with restricted movement over bilateral hip joint.

Patient referred to Dr YSPGMC for further Orthopadedic Management.

3. Sanjay S/O Dharmender MLC No.250:

Injuries at the time of examination:

1. Pain over chest.

2. Swelling and pain, over upper lip.

3. Severe headache s/o head injury.

4. No other visible injury seen at the time of examination.

Referred to Higher Center/PGI Chandigarh for further Orthopaedic Management.

4. Abhinesh S/O Virender MLC No.252:

Injuries seen at the time of examination:

1. Complaint of lower backache with pain with slight restriction of left hand thumb. Pain over left arm.

2. Complaint of headache with history of loss of consciousness for half an hour.

3. No visible injury seen at the time of examination.

Final Opinion will be given after case summary.

5. Gaurav (male) S/O Deepak Kumar MLC No. 247

Injuries at the time of examination:-

1. Pain present over left arm with c/o lower backache.

2. No visible injuries seen at the time of examination.

3. Advised:-Review to Orthopaedician for further needful.

6. Dinesh Kumar S/O Virender Singh MLC No.245

1. Patient is in altered sensorium.

4. Pupils bilateral equally sluggish to light.

5. Injuries seen at the time of examination:

6. Cut lacerated wound of size 3.6*0.3*0.1 cm on forehead reddish in colour.

7. Abrasion of 0.8*0.3 cm on right hand dorsal aspect reddish in colour.

Final Opinion:

On NCCT head no significant abnormality detected in brain Parenchyma and no bony injury.

Hence injury no.1 and injury no.2 are simple in nature.

7. Dharmender S/O Jagat Ram MLC No.246:

1. Patient is in altered sensorium

2. Pupils bilateral equal sluggish to light

3. Injuries seen at the time of examination:

4. Cut lacerated wound of size 2.8*0.3*0.1 cm on forehead reddish in colour.

Final Opinion:

On CT Scan no significant abnormality in brain and soft tissue hematoma in left frontal region.

Thus injury No.1 is simple in nature.

8. Manoj Kumar S/O Danu Ram MLC No. 248

Injuries:

Severe headache with pain over bilateral hip region. No visible injury noted at the time of examination with H/O vomiting 2-3 episodes.

Final Opinion:

24.6.2020

As per NCCT head suggestive of no abnormality. Xray PELVIS with B/L suggestive of no abnormality. Hence the nature of injury is simple.

9. Virender S/O Jagat Ram MLC No. 256:

Injuries seen at the time of examination:

1. Complaint of lower backache.
2. No visible injury noted at the time of examination.
3. Hence nature of injury is simple.

10. Rakesh S/O Deepak Kumar MLC No. 261:

Injuries noted at the time of examination:

1. Red colour bruise over back of left shoulder with bruise over lower back with pain.

Final Opinion:

The nature of injury is simple.

50. From medical record, it is evident that except Saurav all others from both sides have received simple injuries. Whereas, nature of injuries of Saurav was found to be severe head injury and life threatening condition as per case seen by Medical Specialist CH Paonta Sahib and, thus, has been opined as grievous in nature.

51. Respondent-State as well as petitioners have put reliance upon respective video recording of CCTV camera produced in Court in pen-drives and, on their insistence, video clippings of CCTV footages of the incident have also been displayed and watched in the open Court.

52. On viewing both the clippings, it is apparent that both the video footages are of one and the same incident, but with a difference that beginning part of the incident recorded in CCTV footage produced by the State is not there in the CCTV footage produced on behalf of the petitioners. Otherwise, both the video footages are recording of one and the same incident, but apparently recorded by different cameras.

53. In the video footage produced by the State, the incident has been recorded in a camera fixed in house of one Maya Ram, from the front side of a vehicle, which was being driven by Abid and stopped in front of the shop, stated to be of Kabul accused, wherein incident had started, whereas the CCTV footage produced on behalf of the petitioners is recorded by a camera fixed in the shop of Kabul accused, covering the view of road in front of shop and is on left side (conductor side) of the vehicle and it is a footage of later part of the incident which is also recorded in the CCTV footage produced by the State but from another angle. In both footages a tractor arriving at spot at the end of recordings is clearly visible. Be that as it may, one fact is evident from the video clipping that incident had taken place in the broad day light and in a Chowk in presence of a large number of people, some of which are participants and others are silent spectators.

54. It is also noticeable that time of recording in both CCTV footages, with respect to a particular event is different and this difference is of about ten minutes. It is claimed by petitioners that Police did not collect the CCTV footage relied upon by them deliberately, but this plea has been rebutted by the State by producing on record interrogation of Rangzeb @ Auranzeb son of Kabul Hussain and Kabul Hussain @ Tuffail Mohammad, in whose shop CCTV was installed. As per record, Rangzeb @ Auranzeb has revealed that his father is running a retail shop on Gulab Garh Chowk, whereas he (Rangzeb) uses to work at home and drives a vehicle and as and when his father is not available he uses to sit in the shop and CCTV cameras, installed in their shop, are without recording facility, because they had not replaced the DVR of the cameras, which had damaged long ago and, therefore, they are not having any footage of recording of CCTV camera fixed in their shop. Kabul Hussain has also responded in the same manner with respect to availability of footage of recording by CCTV cameras fixed in his shop.

55. CCTV footage relied upon by petitioners herein is a recording by a camera with respect to which Kabul Hussain and his son Rangzeb @ Aurangzeb (accused) are claiming that it was not having facility of recording for want of replacement of damaged DVR. But now CCTV footage is available with petitioners or recording done by the same camera. How camera recorded the incident without DVR and if recording facility was there then it is a case of not only withholding the evidence but also tampering with it as in CCTV footage produced in Court beginning of incident has been omitted, which, in fact, had occurred in front of this camera, that footage may be against the petitioners. When this camera had recorded later part of incident then first part must have been recorded in it. But the said part has been withheld and a selective portion of recording has been produced in Court, however, from the police entire recording has been withheld. It appears that petitioners and arrested accused, in order to derail or confuse investigation, are trying to withheld or create or tamper evidence. This possibility is also fortified with variance in time of recording of the same footage in two CCTV footages. All this warrants custodial interrogation of persons directly involved in commission of offence.

56. It is visible in video recording produced by the State that in the beginning a vehicle is stopped in front of a shop/tin shed and its driver, stated to be Abid, comes out from the driver side, goes to opposite side of the vehicle and enters the shop, probably of Kabul, and thereafter within few seconds he comes back and takes out a rod in his hand and at the same time makes call on mobile phone and returns to the shop. In the meanwhile, persons which, apart from young boy also include women and elders, start coming and running towards the place of incident. By that time, two persons are pulled from the shop and taken towards the driver side of the vehicle and those two persons surrounded by large number of persons are given beatings. Gathering of persons on the spot keeps on increasing. One or two women can also be seen moving in violent mode having sticks in their hands. Thereafter, one person, alleged to be Dinesh, comes on spot alone with a stick in his hand but he does not succeed to rescue the two persons. In between, one of the two persons, who are being beaten, runs away from the spot and some of young boys present on the spot chase him on foot as well on bike/motorcycle. In later part of the clipping, one more person, who appears to be belonging to the side of complainant, comes on the spot, but

immediately on his arrival he is thrashed and the other person coming behind him to save him is also thrashed. During this thrashing of these two persons, one person claimed to be Khalid, one of the petitioners and a Police Head Constable, posted in Women Cell, Nahan, overpowers one of the assailants and appears to be advising him not to participate but thereafter said Khalid continues to be part of the gathering on the spot. In the second clipping, he is leaving the spot, after incident is over, alongwith a small kid and a woman, probably his family, in a direction opposite to the road leading to spot of second part of incident taken place in field.

57. Video clipping of CCTV footage produced by the petitioners contains the later part of the incident in which two persons, who have already been taken to driver side of the vehicle, are not visible in the clipping, but it appears that portion of incident wherein persons coming to rescue the victims are being thrashed has been recorded.

58. According to learned Advocate General, it is one part of the incident and another episode of the incident had taken place in the fields and near house of one Anwar, wherein complainant and his brother Rakesh were chased and rounded by the assailants in the fields, when they had run from the spot after releasing themselves from the clutches of assailants, and were beaten in the fields and not only those two but the other family members etc., who had come to rescue them, were also beaten with sticks and stones and in that incident one Saurav had suffered severe head injury, which was dangerous to his life.

59. Mr. Kush Sharma, learned counsel for the petitioner has placed reliance on ***Siddharam Satlingappa Mhetre's*** case and has submitted that in present case also there is false and random accusation and implication of petitioners, despite the fact that they were not involved in the present case and further that no overt act on their part has been alleged in the case and no direct involvement of the petitioners in the incident is indicated either in the FIR or in evidence collected by the Investigating Officer and the accusation has been made only with the object to falsely implicate them and other accused based on political influence, at the instance of complainant who happens to be member of a Political Party. It is also submitted that Abid Ali and his father, namely Salamat, have been falsely implicated in this case, whereas the said persons were beaten by complainant alongwith other miscreants and when the aforesaid persons went to the Police Station in order to register a complaint against the complainant and other persons who had attacked and beaten them, instead of registering FIR at their instance, the Police officials illegally kept them in police custody since 21.6.2020 and falsely lodged FIR dated 22.6.2020 against them as well as against the petitioners herein and few others, and the petitioners are completely innocent and are being involved in false case at the instance of some interested persons, whereas petitioners have nothing to do with commission of alleged offences and they have not committed any offence, much less offences under Sections 147, 148, 149, 323, 307 & 341 of the Indian Penal Code ('IPC' for short).

60. Alternatively, it is also canvassed on behalf of the petitioners that in any case, if, for argument sake, prosecution story is admitted to be true and correct, even then on the basis of complaint, statements and medical record, no case under Section 307 IPC is made out and ingredients to attract Section 307 IPC, like intention to cause murder or knowledge or conspiracy, preparation and commission of offence under Section 307 IPC, are missing, and there is no evidence that the incident was preplanned, rather it had happened at the spur of moment and no rivalry between the parties has come on record and the conduct of Investigating Officer is also not fair as he is collecting selective evidence at the instance of the complainant.

61. Learned counsel for the petitioner, further submits that incident, in fact, had started by one Dinesh, who had attacked Abid and his father Salamat, causing injuries to them, which is evident from Medico Legal Certificates (MLCs) of Abid and Salamat, issued on the basis of medical examination conducted at the instance of the police after their arrest. Further that police is randomly picking up anybody and arresting him without ascertaining involvement, which is evident from the fact that arrested five persons also include old persons, whereas in the video clipping no aged person is found to be involved. Further that video clipping being relied upon by the police, is blurred and not having clear vision of persons present on the spot and in those clippings, it is difficult to ascertain the identity of persons present and involved in the incident. Further that allegation of the police that petitioner Khalid, was leading

his community to beat complainant party, is also incorrect and contrary to the video clippings itself, wherein he can be seen separating the persons, who were fighting and, thus, he was not involved in the incident at all, but has been implicated only for his unplanned but unfortunate presence on the spot. It is also submitted on behalf of the petitioner that communal angle being given to the incident by the police is false as the Deputy Commissioner, Nahan, himself has issued a statement that it was a quarrel between two boys and nothing more than that.

62. Reliance has also been placed by the petitioners on proceedings of a meeting conducted under Chairmanship of Sub-Divisional Magistrate (Civil). Copy of proceedings, wherein members of two communities had participated has been placed on record. Referring these proceedings, it is submitted that SDM, Paonta Sahib, had convened a meeting on 23.06.2020 between two parties in order to resolve/compromise between them with respect to clash taken place between two groups on 21.06.2020. In these proceedings, it has been recorded that both groups, participating in meeting, were in agreement that incident happened on 21.06.2020 at Gulabgarh, was an unfortunate incident. First party, expressing regret has informed that in future no such incident would be repeated and second party also, regretting for the incident, had condemned it. It is also recorded in the minutes that someone by circulating a message on Facebook was trying to give a communal colour to the incident, which was also condemned by the first party with request to remove it from the Facebook immediately and not to circulate any wrong message in future. As per proceedings, in this meeting, local Member of Legislative Assembly (MLA) was also a special guest. In the last, it is recorded in it that parties have requested the SDM that as and when injured persons would come back from PGI, both parties would sit together and by entering into an agreement in a harmonious meeting, would resolve the dispute and SDM will be informed accordingly and for that purpose, participants representing both the parties have also been named in the proceedings of the meeting.

63. It is also submitted on behalf of the petitioners that Deputy Commissioner has also constituted another Committee to resolve the dispute and maintain harmony in the society. Further that petitioners Mobin and Salman are Engineers, whereas, petitioner Feroz is a Post Graduate in Commerce and Khalid is a serving police official and they are well qualified and responsible educated persons. It is also submitted that all petitioners are law abiding permanent residents of the area and there is no possibility of their fleeing from justice and they are ready to abide by any term and condition imposed upon them by the Court for enlarging them on bail. Thus, it has been prayed that it is a fit case for enlarging the petitioners on bail.

64. It is also submitted by learned counsel for the petitioners that video clipping produced and relied upon by the prosecution is not clear. Whereas, in video clipping produced by the petitioners, which is in circulation in the area, visibility is very clear and from that it is clear that none of the petitioners was involved in the incident and further that petitioner Khalid can also be seen in it leaving the spot alongwith wife and small child on the Motorcycle, but not indulging in beating the complainant as alleged.

65. Learned Advocate General has opposed the grant of anticipatory bail on the ground that custodial interrogation in present case is necessary to ascertain the genesis of the incident and find out real cause of the incident and motive behind the commission of offence and, therefore, effective interrogation could only be possible during custody of petitioners and in view of nature, gravity and impact, it is not a fit case for enlarging the petitioners on anticipatory bail. Referring ***P. Chidambaram's*** case, he has asserted that anticipatory bail is not to be granted as a matter of rule and it has to be granted only when Court is convinced that exceptional circumstances exist to resort to extraordinary remedy and in present case no exceptional circumstance, in favour of petitioners, exists, rather record proves that they are not entitled for extraordinary remedy of anticipatory bail.

66. Learned Advocate General has also submitted that weapon of offence, like rod and sticks, are also yet to be recovered from the accused persons and there is possibility of riots in the area, in view of the atmosphere prevailing in the area on account of incident, which has terrorized the entire population of the area, petitioners would be able to allure or threaten the witnesses, which would definitely hamper the investigation, which is at initial stage and also there is every possibility of tampering with or vanishing the evidence by the petitioners.

67. It is submitted by learned Advocate General that on the basis of CCTV Footage obtained from the house of Maya Ram some photographs have been developed, wherein petitioners Abid, Shahrukh Khan, which clearly established the presence and involvement of Abid, Salamat, Shahrukh, Mobin, Khalid and one Naseem in the incident. It is further submitted by him that process of identifying all persons is undergoing and for that purpose custodial interrogation of the petitioners is very much necessary. It is also submitted by learned Advocate General that it may be possible that some of the accused persons may not be visible in the CCTV Footage, however, he submits that it would not lead to the conclusion that petitioners are not involved in commission of offence as CCTV Footage, available with police, pertains to only one part of the incident, whereas, second part of the incident had taken place beyond the reach of the camera of CCTV, in the fields and complainant has clearly named the accused persons in the FIR and all the petitioners have been specifically named in the FIR, which was recorded without any delay after the incident.

68. From the aforesaid facts and circumstances, it is evident that real cause of quarrel is yet to be ascertained, which can be disclosed by the accused persons. Though, it is claimed in the status report that persons of majority community in the area use to threat and terrorize persons of minority community in the area for having dominating population, but nothing has been produced to substantiate this plea. Any observation in this regard, at this stage, would be premature and hasty, for material placed before me. Learned counsel for the petitioners has also denied any communal angle in the incident, however, it is evident from the minutes of meeting held by SDM relied upon by the petitioners, that on account of incident communal harmony has been disturbed and for that reason only necessity of constitution of Peace Committees and holding meetings of two communities has been considered by the local Administration. It is also informed on behalf of the petitioners that the Deputy Commissioner has also formed another Committee for maintaining peace and harmony between two communities.

69. Leaving aside the communal angle and considering this incident as an incident between two groups only, from the material before me, it is apparent that incident had taken place in broad daylight, where two persons were beaten in presence of mass gathering by calling other assailants through mobile call and out of that mass gathering some persons were actively participating and some persons were silently either supporting or viewing the incident as some appeared to be silent spectators. Persons, who came to rescue the victims, were also beaten on the spot and victims who managed to flee from the spot were also chased and beaten alongwith those, who came to rescue them. Such incidents are blur on the civilized society. Even if, there was a grudge against the victims, assailants would not have taken law in their hands, but should have reported to the appropriate authority or their elders so as to resolve the issue. Tendency to settle the dispute in the street is contrary to the aim of establishment of 'Rule of Law' and to form a civilized society. The means and manner to resolve dispute in present case, are definitely highly depricable.

70. Contrary to the statement made on behalf of the petitioners, it is not a case where the fight has taken place between two persons at spur of moment, but as is evident from the CCTV Footage, friends/persons were called on telephone in order to beat complainants and thereafter in presence of huge gathering they were beaten alongwith their rescuers. Impact of such incident on society can be estimated without any doubt. The incident may or may not be communal riot, but it is definitely a riot in presence of large gathering where not only common men are present, but a police Head Constable is also amongst the gathering, who was having edge on the parties particularly on the assailants as appears from the video clipping that despite his overpowering and separating one assailant from participating in the riot, he was spared by the assailants, but it is also noticeable that he is not saving the victims from others, but trying to separate one of the assailant from the incident, who may be his near and dear or this petitioner may be well wisher of that person. Being a police man, what was expected from Khalid, was that he should have informed the police and he should not have remained silent spectator, but preventer of the incident as well as informer to the police, but from record, it appears th police was informed by one victim Dinesh.

71. Every fight between two persons of different religions or castes is not always a religious or caste fight, but definitely such fights many of times may take shape of communal riot and for the material placed before me, such possibility cannot be ruled out in present case.

72. It is also a fact that five persons, who were arrested by the police as accused, have been remanded by the Magistrate for police custody for custodial interrogation.

73. As held by the Apex Court, there is difference of factors, parameters and points to be considered at the time of adjudicating bail applications under Sections 438, 439 as well as 437 Cr.P.C. Person may be entitled for bail under Sections 437 and 439 Cr.P.C., in a given case, but may not be entitled for anticipatory bail under Section 438 Cr.P.C., various reasons, including those discussed supra.

74. From the material placed before me, it cannot be said that ex-facie no case is made out at all against the petitioners and accusation has been made with object of injuring or humiliating them by having them so arrested. Though, it is stated by petitioners that the case has been registered, based on political influence, at the instance of the complainant, who happens to be a Member of a Political Party, but nothing material is available on record so as to construe it and also from record it cannot be said that no incident had taken place at all. Occurrence of the incident as well as impact thereof on the society is clearly evident from the status report as well as minutes of meeting held by SDM and also CCTV footages relied and produced by parties.

75. I am of the opinion that provisions of Section 438 Cr.P.C. providing anticipatory bail are not available for the petitioners, except Khalid, in given facts and circumstances of the present case. They may be entitled for regular bail under Section 437 and/or 439 Cr.P.C. but not anticipatory bail. Their custodial interrogation appears to be necessary.

76. In the light of above discussion, without commenting on merit of evidence available on record, I find that not only balance of convenience, but balance of justice and larger public interest, in comparison to private interest of the petitioners, except Khalid, is against the prayer made by the petitioners, as investigation is at a initial stage.

77. So far as Khalid is concerned, on collective consideration of two CCTV footages, he has been found present on spot, and a person like him claimed to be he, has been seen leaving the spot alongwith two others, i.e. one child and a lady and he is active on the spot. For material before me, his conduct is not above board but at the same time, for his role available on record, on the basis of limited evdiecne, as investigation is at initial state, he appears to be entitled for anticipatory bail, at this stage. As such, he is ordered to be enlarged on bail on his furnishing a personal bond in the sum of `50,000/- with one surety in the like amount to the satisfaction of the Arresting Officer, subject to the following conditions:

(i) That accused-petitioner Khalid shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;

(ii) that he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that he shall not obstruct the smooth progress of the investigation/trial;

(iv) that he shall not commit the offence similar to the offence to which he is accused or suspected;

(v) that he shall not misuse his liberty in any manner;

(vi) that he shall not jump over the bail;

(vii) that he shall not leave the territory of India without information. Further, he shall provide his mobile and/or landline contact numbers alongwith his address of residence and place of working and shall keep on informing the change therein, if any, to the Police/Court.

78. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the accused-petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice.

79. In case petitioner Khalid violates any or the conditions imposed upon him, his bail shall be liable to be cancelled. In such an eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

80. In case, on the basis of evidence being and to be collected by Police, custodial interrogation of petitioner Khalid is warranted, in accordance with law, the respondent-State is at liberty to apply for cancellation of anticipatory bail granted to petitioner Khalid.

81. Accordingly, all the petitions, except CRMPM No.945 of 2020, titled as *Khalid v. State of H.P.,* are dismissed, but at the same time, I feel it also necessary to observe that petitioners are not entitled for bail under Section 438 Cr.P.C., but they have liberty as well as right to file application(s) under Section 437 or 439 Cr.P.C., as the case may be, if advised so for grant of bail and such application(s) are to be and must be decided by the Courts on the basis of principles, factors and parameters, applicable for deciding those application(s) without being uninfluenced by observations made in present petitions, which have been made for dealing with anticipatory bail applications preferred under Section 438 Cr.P.C.

82. As noticed supra, it was difficult not only for Court, but to learned Advocate General as well as Police Officer present in the Court to read the observations and findings recorded by the Doctor in all MLCs. As learned Advocate General had expressed his inability to read the documents and submitted that only Doctor, who had written those MLCs would be able to read and explain them, case was adjourned, enabling the respondent-State to produce readable extract of MLCs. Therefore, to avoid such situation in future, causing wastage of time and energy, it is necessary to direct the Director (Health Services), Himachal Pradesh, to issue instructions/advisory/guidelines to the Doctor(s) to record their observations, findings and opinions in MLCs and other documents of medical examination in such a manner that it is at least readable so as to construe the meaning thereof and enable the Court as well as others involved in adjudication of MLCs to understand correct meaning of the information in such documents.

83. Copy of relevant Paras No.26 and 61 of this jhudgment, for compliance, be sent to the Director of Health Services, Himachal Pradesh.

84. Observations made hereinabove shall not affect the merits of the case in any manner and are strictly confined for the disposal of the present bail applications.

All the applications stand disposed of, with a direction to the Registry to place copy of this judgment on each of the connected applications. Police record returned.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS JUSTICE JYOTSNA REWAL DUA, J.

Hamco Industries Private Limited …Petitioner.

Versus

The Kangra Central Cooperative Bank Ltd. and others Respondents.

CWP No. 2399 of 2020
Reserved on: 11.8.2020

Decided on: 18.8.2020

Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 (Act)- Sections 13(4), 17(1), 17(2) and 18- **Security Interest (Enforcement) Rules, 2002 (Rules)**- Rules 6(2) and 8(6)- E-auction of movable and immovable secured assets of defaulter- Confirmation thereof- Whether e-auction proceeding can be assailed by person who was merely a participant in it?- Writ jurisdiction- Petitioner contending that as it is neither borrower nor the secured creditor therefore, remedy under Section 17 of Act is not available to it and grievances can only be redressed by way of writ jurisdiction- Held, against the measures taken under Section 13(4) by the secured creditor to recover secured debt, remedy provided is under Section 17 of the Act- Remedy is available not only to borrower but to 'any person' aggrieved against such measures including auction proceedings- Section 17 (2) of Act empowers Debt Recovery Tribunal to consider whether such measures taken under Section 13(4) by secured creditor were in consonance with provisions of Act and Rules thereunder- Petitioner has alternative statutory remedy by way of appeal and writ petition cannot be entertained- Petition dismissed. (Para 4 to 6)

Cases referred:

Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. (2018) 3 SCC 85;
ICICI Bank Limited and others Vs. Umakanta Mohapatra and others (2019) 13 SCC 497;

Whether approved for reporting?[1] Yes.

For the petitioner. : Mr. R.L. Sood, Senior Advocate with Mr.

Arjun Lall, Advocate.

For the respondents : Mr. Rakesh Kumar Thakur, Advocate, forrespondents No.1 to 3.

Mr. Ajay Vaidya and Mr. Shivank SinghPanta, Advocates, for respondent No.4.

Mr. Ashwani Prashar, AGM and AuthorizedOfficer-respondent No.3, in person.

Jyotsna Rewal Dua *(J)*

Whether auction proceedings conducted under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 and Rules framed thereunder can be challenged in writ jurisdiction of this Court by a person, who though participated in the auction proceedings, but was neither the borrower nor the secured creditor, is the question, which needs to be adjudicated before merits of the matter can be ventured into.

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

2. Bare **minimum facts** required to be noticed at this stage:-

2(i) Respondent No.6 had availed several credit facilities from respondents No.1 & 2 (The Kangra Central Cooperative Bank Limited). It defaulted in meeting its financial obligation towards the bank, therefore, the respondents-bank taking recourse to SARFAESI Act, decided to sell the secured-movable and immovable properties of respondent No.6, by holding E-auction of the same.

2(ii). The E-auction notice for sale of secured movable/immovable assets under the SARFAESI Act read with proviso to Rule 6(2) and Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, was issued for 03.07.2020. Petitioner participated in the E-auction alongwith others. On culmination of auction proceedings, specified LOT- B of the secured assets was allotted to respondent No.4. Sale of Lot-B was statedly confirmed in favour of respondent No.4 on 14.07.2020.

2(iii). Petitioner, a participant in the auction proceedings, instituted instant writ petition *inter alia* praying for quashing and setting aside the E- auction proceeding held on 03.07.2020, primarily on the ground that respondent bank failed to conduct auction proceedings in accordance with law and declared terms and conditions governing the E-auction.

3. Contentions at this stage:-

3(i) Learned counsel for the appearing respondents raised preliminary objection with respect to maintainability of the instant writpetition. It was contended that an alternate, efficacious, statutory remedy is available to the petitioner under Section 17 of the SARFAESI Act, whereunder petitioner is required to seek redressal of its grievance from the Debts Recovery Tribunal having jurisdiction in the matter. Without availingthe statutory remedy in terms of Section 17 of the SARFAESI Act, the petitioner has directly approached this Court, therefore, the writ petition is not maintainable and is liable to be dismissed.

3(ii). Learned senior counsel for the petitioner submitted that the remedy provided under Section 17 of the SARFAESI Act is not available to the petitioner and therefore

petitioner is within its right to invoke the extraordinary jurisdiction of this Court. He further submitted that the petitioner is neither the borrower nor the secured creditor. Petitioner is also not aggrieved by respondent bank's exercise of right to auction the secured assets, a measure covered under Section 13(4) of the SARFAESI Act. However, petitioner is aggrieved only against the alleged illegal mode and manner of conducting the auction proceedings. According to learned Senior Counsel, raising/redressal of such grievance at the behest of participant of auction proceedings does not fall within the ambit of Section 17 read with Section 13(4) of the SARFAESI Act and therefore he contends that the writ petition is maintainable.

4. The above submissions lead to following two questions:-

(a) Whether alternate statutory remedy under the provisions of SARFAESI Act is available to the petitioner for redressal of its grievance raised in the instant writ petition and;

(b) If yes, whether petitioner is entitled to invoke extraordinaryjurisdiction of this Court without exhausting the alternate statutory remedy. **4(i) First question:-**

4(i)(a) It would be appropriate at this stage to extract hereinafterrelevant provision of Section 17 of the SARFAESI Act.

"17. **Application against measures to recover secured debts** (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the applicationby the borrower and the person other than the borrower.

Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditorfor not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the timebeing......

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder "

The above extract makes it evident that remedy provided under Section 17 of the SARFAESI Act is against the measures taken by a secured creditor in terms of Section 13(4) of the Act to recover the secured debt. This remedy is available not only to the borrower, but also to 'any person' aggrieved against such measures. Petitioner, a participant in the auction proceedings, would therefore fall within the word 'any person' used in Section 17 (1) of the Act. Further Section 17(2) of the Act empowers learned Tribunal to consider whether any of the measures referred to in Section 13(4) as taken by the secured creditor were in consonance with the provisions of the Act and Rules framed thereunder or not.

4(i)(b) Section 13(4) of the Act.

Whether holding of auction and conduct of auction proceedings, would fall within the scope of 'measures' referred in Section 13(4) of the Act is the next related question. Section 13(4) of the SARFAESI Act reads as under:-

"(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secureddebt, namely:-

(a) *Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or* ***sale for realising the secured asset;***
(b) Take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment ***or sale*** *for realising the secured asset;*
Provided that the right to transfer by way of lease, assignment and sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debts:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower, which is relatable to the security or debts;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
(d) require at any time by notice in writing, any person who has acquiredany of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, somuch of the money as is sufficient to pay the secured debt."

In terms of above provision, a secured creditor for recovery of its secured assets can take recourse to various measures indicated in Section 13(4) of the Act including taking possession of secured assets of the borrower, the right to transfer the assets by way of lease, assigning or sale. Notifying the auction and conducting the auction proceedings are steps in furtherance of sale of secured assets for realising the secured debt. Therefore, conduct of auction proceedings would fall within the scope of measures contemplated in Section 13(4) of SARFAESI Act.

4(i)(c) Additionally it may be noticed here that the impugned auction proceedings were initiated by the respondent-bank under the Security Interest (Enforcement) Rules, 2002 (in short referred to as the Rules) framedin exercise of powers conferred by Section 38(1)(b), Section 38(2) read with Section 13(4)(10)(12) of the SARFAESI Act.

Rule 4 of these Rules lays down the procedure to be followed after issue of demand notice for realising the amount by adopting any one or more of measures specified in Section 13(4) of the Act for taking possession of movable secured assets. Rule 5 pertains to valuation of movable secured assets and Rule 6 pertains to actual sale of movable secured assets. Rule 7 provides for issue of sale certificate on sale of movable secured assets. Similarly, a complete mechanism is provided for sale of secured immovable assets under Rule 8 & 9. Rule 6 & 8 under which recourse was taken by therespondent bank for conducting E-auction are extracted hereinafter:-

> ***"Rule: 6. Sale of movable secured assets.***
>
> *(1) The authorised officer may sell the moveable secured assets taken possession under sub-rule (1) of rule 4 in one or more lots by adopting any of the following methods to secure maximum sale price for the assets,to be so sold-*
>
> *(a) obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or*
>
> *(b) inviting tenders from the public; or*
>
> *(c) holding public auction including through e-auctionmode; or*
>
> *(d) by private treaty.*
>
> *(2) The authorised officer shall serve to the borrower a notice of thirtydays for sale of the movable secured assets, under sub-rule (1):* Provided that if the sale of such secured assets is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix II-A to be published in two leading news papers, including one in vernacular language having wide circulation in the locality.
>
> Provided further that if sale of movable property by any one of the methods specified under sub-rule (1) fails and the sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower for any subsequent sale.
>
> *(3) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the secured creditors and the proposed purchaser.*
>
> *(4) The authorised officer shall upload the detailed terms and conditionsof the sale of the movable secured assets on the web-site of the secured creditor, which shall include,*
>
> *(a) details about the borrower and the secured creditor;*
>
> *(b) complete description of movable secured assets to be sold withidentification marks or numbers, if any, on them;*
>
> *(c) reserve price of the movable secured assets , if any, and the time andmanner of payment;*
>
> *(d) time and place of public auction or the time after which sale by anyother mode shall be completed;*
>
> *(e) deposit of earnest money as may be stipulated by the secured creditor;*
>
> *(f) any other terms or conditions which the authorised officer considersit necessary for a purchaser to know the nature and value of movable secured assets.*
>
> **8. Sale of immovable secured assets** (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(2A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule(2) of Rule 8.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody orin the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule

(1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fixthe reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:--

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

PROVIDED that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given inAppendix IV-A to be published in two leading newspapers; including one in vernacular language having wide circulation in the locality.

(7) Every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the web-site of the secured creditor, which shall include;-

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other terms and conditions, which the authorised officer considers itnecessary for a purchaser to know the nature and value of the property.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the secured creditors and the proposed purchaser in writing parties in writing."

Rule 9 provides for time of sale, issue of sale certificate anddelivering of possession etc. in the following manner:-

Rule: 9. Time of sale, Issue of sale certificate and delivery of possession, etc.

(1) *No sale of immovable property under these rules, in first instance shall take place before the expiry of thirty days from the date on which thepublic notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) of rule 8 or notice of sale has been served to the borrower:*
Provided further that if sale of immovable property by any one of the methods specified by sub rule (5) of rule 8 fails and sale is required to be conducted again, the authorized officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.

(2) *The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the securedcreditor:*
Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule

(5) of rule 8:

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) *On every sale of immovable property, the purchaser shall immediately,*
i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent. of the amount of the sale price, whichis inclusive of earnest money deposited, if any, to the authorized officer conducting the sale and in default of such deposit, the property shall be sold again;

(4) *The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period [4][as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.*
(5) *In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor] and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.*
(6) *On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.*
(7) *Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determinedby him.*
Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, fromdate of finalisation of the sale.

(8) *On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the*

persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

(9) *The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.*

(10) *The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."*

It is evident from the above Rules that measure of sale of secured assets of the borrower, adopted by the secured creditor under Section 13(4)of the SARFAESI Act for realising the secured debts is inclusive of the methods/modes adopted for such sale as well as complete proceeding in furtherance of such modes till their logical conclusion. Therefore sale of movable/immovable secured assets by E-auction, the mode/manner of conducting the auction as well as actual conduct of auction proceedings would fall within the scope of Section 13(4) of the Act.

4(i)(d) In ***(2018) 1 SCC 626*** titled ***Agarwal Tracom Private Limited Vs. Punjab National Bank and others,*** the question for consideration before Hon'ble Apex Court was whether remedy of auction-purchaser in challenging the action of secured creditor in forfeiting the deposit lies in filing an application under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal or in filing writ petition under Articles 226 & 227 of the constitution of India. It was held that auction purchaser falls within the definition of 'any person' specified under Section 17(1) and that Section 17(2) of the Act empowers the Tribunal to examine all the issues arising out of measures taken under Section 13(4) including the measures taken by the secured creditor under the Rules for disposal of secured assets. Relevant paras from the above referred judgment are reproduced hereinafter:-

"**26**. Reading of the aforementioned Sections and the Rules and, in particular, Section 17(2) and Rule 9(5) would clearly go to show that an action of secured creditor in forfeiting the deposit made by the auction purchaser is a part of the measures taken by the secured creditor under Section 13(4).

27. The reason is that Section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower. The expression "provisions of this Act and the Rules made thereunder" occurring in sub-sections (2), (3), (4) and (7) of Section 17 clearly suggests that it includes the action taken under Section 13(4) as also includes therein the action taken under Rules 8 and 9 which deal with the completion of sale of the secured assets. In other words, the measures taken under Section 13 (4) would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of secured assets is fully complied with by the secured creditor. It is for this reason, the Tribunal has been empowered by Section 17(2),(3) and

(4) to examine all the steps taken by the secured creditor with a view to find out as to whether the sale of secured assets was made in conformity with the requirements contained in Section 13(4) read with the Rules or not?

29. *In our view, therefore, the expression "any of the measures referred to in*

Section 13(4) taken by secured creditor or his authorized officer" in Section 17(1) would include all actions taken by the secured creditor under the Rules which relate to the measures specified in Section 13(4).

30. *The auction purchaser (appellant herein) is one such person, who is aggrieved by the action of the secured creditor in forfeiting their money. The appellant, therefore, falls within the expression "any person" as specified under Section 17(1) and hence is entitled to challenge the action of the secured creditor (PNB) before the DRT by filing an application under Section 17(1) of the SARFAESI Act."*

Accordingly remedy under Section 17 of the SARFAESI Act is definitely available to 'any person' in respect of auction proceedings allegedly having been conducted illegally. Petitioner therefore has a statutory alternate remedy available to it under Section 17 of the SARFAESI Act for redressal of its grievance raised in the instant writ petition. Point is answered accordingly.

4(ii) Second question:-

4(ii)(a) Hon'ble apex court in ***(2018) 3 SCC 85*** titled as ***Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C.***, held that writ petition filed by an aggrieved party without exhausting the statutory remedy available under the SARFAESI Act and Recovery of Debts Due to Banks and Financial Institution Act is not maintainable. The broader principles of law enunciated in the judgment are:-

1. The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non erformingassets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication.

2. The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18.

3. High Court should not entertain the writ petition in view of the adequate alternate statutory remedies available under the SARFAESI Act. Such writ petitions should be dismissed at the threshold on the ground of maintainability.

4. High Court will not ordinarily entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. This rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. While dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind

that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasijudicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

5. *High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Whirlpool Corpn.*
v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd . and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

Hon'ble Supreme Court further observed that It was a matter of serious concern that despite repeated pronouncements, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. It was hoped that in future the High Courts would exercise their discretion in such matters with greater caution, care and circumspection.

In (2019) 13 SCC 497 titled as ***ICICI Bank Limited and others Vs. Umakanta Mohapatra and others.*** The above legal position was reiterated in following manner:-

> " 2. Despite several judgments of this Court, including a judgment by Hon'ble Mr. Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C .,(2018) 3 SCC 85, the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders infavour of persons who are NonPerforming Assets (NPAs).3. The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:
>
> " 17. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works(P) Ltd.and Another, (1997) 6 SCC 450, observing:
>
> "32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

4. The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside.

Relying upon above judgments, this Court vide judgment dated 20.03.2020 dismissed CWP No.1362/2020, titled as M/s Himalaya Pack & Print and others vs. Punjab and Sind Bank

and others, which was instituted by the borrower against the rejection of its case for One Time Settlement after the bank approached the concerned District Magistrate under the SARFAESI Act for delivery of possession.

4(ii)(b) Learned Senior counsel for the petitioner relying upon the judgment passed by the Hon'ble Apex Court in ***(2020) 2 SCC 442*** titled as ***Balkrishna Ram Vs. Union of India & another,*** contended that rule of alternate remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion is not a ground to hold that it has no jurisdiction. Reliance has been placed upon following para-14 of the judgment.

> "14. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a rule of prudence and not a rule of law. The writ courts normally refrain from exercising their extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by the AFT. One must also remember that the alternative remedy must be efficacious and in case of a NonCommissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is not the law laid down in L. Chandra Kumar."

Reliance has also been placed upon judgment in **2010 (8) SCC 110** titled ***Union of India Vs. Satyavati Tandon,*** to contend that rule of exhaustion of alternate remedy is a rule of discretion and not one of compulsion.

Learned senior counsel for the petitioner also relied upon **(2014) 5 SCC 651** titled as ***J. Rajiv Subramaniyan & Another Vs. Pandiyas & others*** to contend that respondent-bank was duty bound to conduct the auction in accordance with mandate of law and in not doing so, it failed to discharge its public duty. For enforcement of this public duty, discretion for invoking extraordinary jurisdiction under article 226 of the Constitution of India should be exercised.

4(ii)(c) Hon'ble Apex Court in Mathew K.C's. case (supra) as well as in ICICI Bank Limited's case (supra) has clearly held that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions and provides remedy of appeal under Section 17 to any person aggrieved against the measures adopted by the secured creditor under Section 13(4) of the SARFAESI Act before the Debts

Recovery Tribunal followed by right to appeal before the Appellate Tribunal under Section 18. It has been clearly directed in the aforesaid judgments that in view of adequate alternate statutory remedyavailable to the aggrieved person, the writ petition cannot be entertained. We do not find any extraordinary circumstances in the instant case justifyingany departure from the settled route of alternate statutory remedy. Second point is answered accordingly.

5 In view of foregoing discussions, we hold that:-

(a) Petitioner, a participant in the impugned auction proceedings falls within the definition of 'any person' specified under Section 17(1) of the SARFAESI Act & hence is entitled to challenge the impugned action of secured creditor before the Debts Recovery Tribunal.

(b) Challenge to auction proceedings on the ground of same having been conducted in violation of mandate of law/terms and conditions, falls within the term 'measures taken by secured creditor' under Section 13(4) of the Act read with Rules 6, 8 & 9 of the Security Interest (Enforcement) Rules.

(c) Section 17(2) of the Act empowers the Debts Recovery Tribunal to examine all the issues arising out of measures taken by the secured creditor under Section 13(4) of the Act & Rules framed thereunder.

(d) On the ground of availability of alternate, statutory remedy to the petitioner in filing application under Section 17(1) of the SARFAESI Actbefore the Tribunal, instant writ petition is therefore not maintainable.

Instant writ petition is therefore dismissed as not maintainable alongwith all pending application(s).

While availing the alternate, statutory remedy, it shall be open to the petitioner to seek exemption of the time period spent by it in pursuing instant writ petition from being counted towards limitation. We hope and trust that such prayer shall be sympathetically considered by the learned Tribunal.

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

Shri Rameshwer Prashad ....Petitioner.

Vs.

State of Himachal Pradesh and others ....Respondents

CWPOA No. 133 of 2019
Date of Decision: 27.08.2020

Constitution of India, 1950- Articles 14 & 226- Claim regarding regularization as Supervisor (Class-III) instead of Beldar from due date- Writ jurisdiction- Petitioner contending that he ought to have been regularized as Supervisor from due date at par with persons who were engaged on daily wages after him- Held, petitioner accepted his regularization as Beldar without protest by tendering his joining- Pursuant to orders passed in earlier Writ, his representation

was rejected by Competent Authority on April 6, 2012- And cause of action after adjudication of said representation accrued in favour of petitioner on 6.4.2012- No cogent reason mentioned in petition as to why he did not assail order passed by Competent Authority within reasonable time from date of passing of order- Petition is badly hit by delay and laches and is dismissed. (Para 2 & 6)

Whether approved for reporting?[16] *Yes.*

For the petitioner: Mr. Virender Singh Kanwar, Advocate.

For the respondents: M/s Somesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(a) That the respondents may be directed to treat the applicant at par with the other similarly situated persons mentioned in the representations made by the applicant to the respondent No. 2.*
>
> *(b) That the respondents may kindly be directed to regularize the applicant as Supervisor Class-III from the due date."*

2. Primarily, the petitioner is aggrieved by his regularization as Beldar, which took place on 01.01.2001, purportedly on the ground that persons who were engaged on daily wages after him, were designated and regularized as Store-keepers/Class-III employees. It is further the case of the petitioner that earlier also, he approached this Court by way of a writ petition in the year 2011, which was ordered to be treated as representation and vide office order dated 06.04.2012, the same stood dismissed.

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

4. The relevant portion of order dated 06.04.2012 (Annexure A-4), which has been passed by the competent authority on the representation of the petitioner, pursuant to the earlier order passed by this Court in the petition so filed by the petitioner, i.e., CWP No. 3177 of 2011, reads as under:

> *"....And whereas the Hon'ble High Court in CMP No. 11270 of 2011 clarified that the representation referred to in the judgment shall be decided by the second respondent. Therefore, as per direction of Hon'ble High Court, the representation of the petitioner Shri Rameshwar Prasad (Annexure P-1), the record furnished by Superintending Engineer, 4th Circle Shimla as well as by Executive Engineer, HPPWD Shimla Division II has also been considered. Perusal of said record reveals that petitioner Sh. Rameshwar Prashad was initially engaged in the Public Works Department during August, 1990 as Beldar and worked as such till 31.07.1996. Thereafter he worked as Work Inspector w.e.f. 1.8.1996 to 27.2.2003. Since he has not completed 8 years daily wage service in the higher post of Work Inspector, he was offered appointment in the lower post of Beldar by taking into account service rendered in both the categories vide Executive Engineer, Medical College Division Shimla office order No. PW-*

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

MCD-EA-II-DW/2002/6316-22 dated 28.2.2003 to which he also joined on 28.02.2003 without any protest. After scrutiny of record, I have found that the present petitioner has been regularized strictly in accordance with the regularization policy as well as ratio laid down by the Hon'ble High Court in Gauri Dutt case. In so far as the cases quoted by the petitioner in his representation Annexure P-1 is concerned, ti has already been admitted by the department that regularization in these cases have not been done according to the rule/regularization policy and the Superintending Engineer, 4th Circle Shimla has already been directed to look into the matter. The petitioner has no right to force the department to extent the same benefit to him as given inadvertently to other candidates in contravention to the rules/policy.

Hence the representation of Shri Rameshwar Prashad is considered and rejected being devoid of any merit."

5. A perusal of order dated 06.04.2012 demonstrates that upon completion of requisite years of service, the services of the petitioner were regularized on the post of Beldar and he accepted the same by joining as regular employee on 28.02.2003 without any protest. It is further borne out from this order that the orders of regularization of other employees, which were so pointed out by the petitioner, as per the Department, were not found to be inconsonance with the Regularization Policy and accordingly, Superintending Engineer, 4th Circle, Shimla was directed to look into the matter.

6. Be that as it may, in my considered view, if the petitioner was really aggrieved by his regularization against the post of Beldar in the year 2003, then he ought to have had approached the Court within some reasonable time. However, the first petition raising his grievance in this this regard was filed by the petitioner in the year 2011. This Court in its wisdom directed the same to be treated as representation. The appropriate authority passed orders upon the said representation of the petitioner in obedience of the order so passed in the earlier writ petition on 06.04.2012, meaning thereby that cause of action after adjudication of said representation accrued in favour of the petitioner to assail the order so passed by the competent authority on 06.04.2012. Yet, the petitioner slept over the matter for four years and filed this petition in the year 2016. There is no cogent reason mentioned in the petition as to why the petitioner could not assail the order passed by the competent authority within some reasonable time as from the date of passing of order dated 06.04.2012. The explanation given at the Bar by learned counsel for the petitioner that the petitioner was repeatedly representing the authority, in my considered view, does not comes to the rescue of the petitioner, because it is settled law that representations can not cure the defect of delay and latches. This petition, undoubtedly, is badly hit by delay and latches, as there is no explanation given in the petition as to why the petitioner did not assail the order passed by the competent authority on 06.04.2012 within some reasonable period. Further, on merits also, this Court finds no infirmity with the order so passed by the authority concerned of regularization of the petitioner against the post of Beldar, as it is not in dispute that upon his being regularized as such, no objection was raised by the petitioner that he should not have been regularized against the post of Beldar. In this view of the matter, as there is no merit in the petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Rajesh Kumar ....Petitioner.

Vs.

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

CWPOA No. 156 of 2019
Date of Decision: 24.08.2020

Constitution of India, 1950- Articles 226- Order of attachment of salary and recovery therefrom amount of GPF fraudulently withdrawn by petitioner while working as Senior Assistant in the establishment- Challenge thereto by way of writ petition- Held, petitioner without any request from employees concerned, illegally and fraudulently withdrew amount from GPF accounts of 'SD' and 'PL'- On complaint, he did not respond to show cause notice issued to him by the Department in this regard implying that contents of notice impliedly admitted by him- No other material on record showing that amount withdrawn by him was actually paid to 'SD' and 'PL'- Order of Director, Education attaching his salary and effecting recovery of withdrawn amount with interest not bad- Petition dismissed. (Para 5 to 7)

Whether approved for reporting?[17] *Yes.*

For the petitioner: Mr. Vijay Bhatia, Advocate.

For the respondents: M/s Somesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, for respondents No. 1 to 3.

Mr. Varun Chandel, Advocate, for respondent No. 4.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

"I. That the respondents may be directed to quash the Annexure P-5 dated 25.11.2014 and further directed to stop the recovery."

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

The petitioner was serving as a Senior Assistant in Government Senior Secondary School, Hatwar in the year 2004-2005. A complaint was lodged by the Headmaster of the said School, *inter alia*, on the ground that the petitioner had withdrawn an amount of Rs.1,60,000/-(rupees one lac and sixty thousand only), i.e., Rs.1,00,000/- from the GPF account of Smt. Shakuntala Devi and Rs.60,000/- from the GPF account of Smt. Pushp Lata fraudulently and in an unauthorized manner, though there was no request of the employees concerned with regard to the withdrawal of said amount.

3. Upon receipt of the complaint, the petitioner was called upon to show cause as to what was his response with regard to the allegation so levelled against him. Record demonstrates that the petitioner did not submit any response to the said Show-cause Notice, purportedly on the ground that as he all of a sudden fell ill, he could not respond to the Show-cause Notice. Thereafter, vide order dated 25th November, 2014 (Annexure P-5), which has been impugned by way of present petition, the Director of Higher Education, H.P., ordered that Rs.1,60,000/- plus interest be recovered from the petitioner by way of attachment of his 1/3rd salary per month and the same be paid under proper receipt every month in equal amount both to Smt. Shakuntala Devi and Smt. Pushp Lata till the recovery of their respective embezzled amount with interest of 3% over and above the prevailing rate of interest on GPF.

4. Feeling aggrieved, the petitioner has filed this petition.

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

6. Learned counsel for the petitioner though has vehemently argued that the act of the petitioner was *bonafide* as the GPF was got released by him on a request which was so

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made by the employees concerned, however, no material has been placed on record from which it can be inferred that the amount having been withdrawn by the petitioner was paid to the employees concerned, i.e., Smt. Shakuntala Devi and Smt. Pushp Lata. Incidentally, none of them has been made a party in this petition. Besides this, the Court fails to understand as to why the petitioner did not respond to the Show-cause Notice. It appears that the excuse being put forth by the petitioner that the same could not be done by him on account of ill health, was just a concocted story. I say so for the reason that in case the petitioner on the particular date was not in a position to submit his response, then prudence demanded that he should have made a request to the officer for extension of time to submit his response, which has not been done.

7. One more contention which has been raised by learned counsel for the petitioner is that as no proceedings were initiated in consonance with the provisions of CCS (CCA) Rules, 1965, therefore also, order dated 25th November, 2014 (Annexure P-5) is bad in law and not sustainable. In my considered view, there is no merit in the contention of learned counsel for the petitioner for the simple reason that the provisions of CCS(CCA) Rules are attracted when disciplinary proceedings are to be initiated against a delinquent employee. In the present case, it is not as if some disciplinary proceedings were initiated against the petitioner. There was an allegation levelled against the petitioner that he had fraudulently withdrawn money from the GPF accounts of two employees. A Show-cause Notice was issued to him by the senior officer calling upon him to put forth his version. This was not done by the petitioner, meaning thereby that the contents of the Show-cause Notice impliedly stood admitted by him. In these circumstances, this Court finds no infirmity in the order dated 25th November, 2014 (Annexure P-5), which was passed by the authority concerned, whereby the petitioner was called upon to pay back the amount of GPF, which was fraudulently embezzled by him from the GPF accounts of the the abovementioned employees.

8. Accordingly, as there is no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

M/s Digital Vision ....Petitioner

Versus

State of Himachal Pradesh and others. ...Respondents

CWP No.2572 of 2020

Reserved on: 6th August, 2020

Decided on: 14th August, 2020

Drugs and Cosmetics Rules, 1945 (Rules)- Rule 85(2)- Suspension of Drug Licence and issuing 'stop manufacturing order' by Competent Authority against pharmaceutical unit- Procedural requirement- Held, power to suspend drug licence and issuing 'stop manufacturing order' can be exercised by the Competent Authority only in accordance with law- Petitioner Company had submitted replies to various show cause notices issued to it by the Competent Authority- Replies of petitioner not shown to have been considered- Without setting forth reasons required to be enumerated under Rule 85(2), manufacture/ sale of other formulations or drugs cannot be ordered where adulterated ingredient found in one drug alone, was not being used in other drugs - Nor drugs manufacturing licence could be suspended altogether in exercise of powers under Rule 85(2). (Para 6)

Cases referred:

Kranti Associates Private Limited and another Versus Masood Ahmed Khan and others, (2010) 9 SCC 496;

Whether approved for reporting?[1] Yes.

For the Petitioner: Mr. K.D. Shreedhar, Senior Advocate

with Ms. Tanvi Chauhan, Advocate.

For the Respondents: Mr. Ajay Vaidya, Senior Additional Advocate General, for respondentsNo.1 to 4-State.

Mr. Shashi Shirshoo, Central Govt.Counsel, for respondent No.5.

Jyotsna Rewal Dua, Judge

On the ground that a specific batch of COLDBEST-PC Syrup, one of the drugs manufactured by the petitioner-firm, was found to be adulterated with

Diethylene Glycol, the respondent-Department in exercise

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of powers conferred by Rule 85(2) of the Drugs and Cosmetics Rules, 1945, on 15.02.2020 issued to the petitioner, a Show Cause Notice-cum-Stop Manufacturing Order of COLDBEST-PC Syrup and all other similar drug compositions, later on observing that provisions of Drugs and Cosmetics Act and Rules framed thereunder were not being adhered to, followed it with another Show Cause Notice-cum-Stop Manufacturing Order issued on 17.02.2020 for all the drugs under its Drugs Manufacturing Licences and finally issued an office order dated 02.03.2020, suspending Drug Manufacturing Licences of the petitioner. Appellate Authority, though did not interfere with these orders, however, already manufactured finished products wherein Propylene Glycol was not used were allowed to be sold after verification by the Department. Aggrieved against these orders and repeated issuance ofvarious show cause notices, instant writ petition has been preferred by the petitioner.

2. Facts:-

2(i). Petitioner-firm was issued following licences on17.06.2008 to manufacture for sale or for distribution drugs (Tablets, Capsules and Oral liquid dosage forms):-

(a). Drugs other than those specified in Schedule C and C(1) and X, vide Form-25 in terms of Rule 70 of Drugs & Cosmetics Rules (in short 'the Rules').

(b). Drugs specified in Schedule C and C(1) excluding those

specified in Schedule X, vide Form-28 in terms of Rule 76 of the Rules.

Both licences were valid till 16.06.2013. Vide retention letter dated 20.12.2018, these licences have beenretained upto 16.06.2023.

2(ii). On 10.09.2014, the respondents gave approval to the petitioner to manufacture the drug in question, i.e. COLDBEST-PC Syrup. This is a prescription drug and falls under Schedule G of the Drugs and Cosmetics Act and Rules framed thereunder. The drug is a Fixed Dose Combination (FDC) of Paracetamol, Phenylephrine Hydrochloride and Chlorpheniramine Maleate.

2(iii). For manufacturing COLDBEST-PC Syrup, petitioner claims to be using excipient Propylene Glycol (in short 'PG') for dissolving Paracetamol. Petitioner claims to have purchased the raw material PG of Batch Nos.2085, 2123 and 2116 against invoice dated 16.09.2019, from one M/s Thakur Enterprises of Ambala Cantt, who statedly claimed that PG under aforesaid batches was manufactured by M/s Manali Petrochemicals at Chennai.

2(iv). After procuring raw material PG, the petitioner- firm, *inter alia,* manufactured 5575 bottles of COLDBEST-PC Syrup, under Batch No.DL5201 in September, 2019. Batch size of this manufactured drug was about 360 litres, wherein about 94.5 kg of PG was statedly used.

2(v). Entire DL5201 batch of COLDBEST-PC Syrup was sold by the petitioner to its distributor M/s Shiva Medical Hall, Ambala Cantt. Haryana, which further sold the drug to various licensed dealers/stockists. According to the petitioner, 3447 bottles out of total stock of 5575 bottles of the drug in question belonging to Batch No.DL5201 have been consumed in eight States of Jammu & Kashmir, Uttar Pradesh, Tamil Nadu, Haryana, Himachal Pradesh, Meghalaya, Andhra Pradesh and Uttarakhand.

2(vi). Vide its letter dated 15.02.2020, the Controller Drugs, Drugs & Food Control Organization, J&K (Jammu) informed State Drugs Controller, Himachal Pradesh about some infant mortalities in Ramnagar area of District Udhampur in the State of Jammu & Kashmir. The letter further conveyed that PGIMER, Chandigarh had given them to understand that COLDBEST-PC Syrup manufactured by the petitioner-Firm in Batch No.DL5201 was impure as Diethylene Glycol (in short 'DEG') was found in it. Accordingly, request was made to the Drug Controller, Himachal Pradesh to carry out inspection of the petitioner's Unit for evaluating the aspect of impurity as well as for recalling the drug irrespective of batch in larger publicinterest.

2(vii). Acting on the basis of above communication, the Assistant Drugs Controller-cum-Drugs Licensing Authority, District Sirmour, in exercise of powers under Rule 85(2) of the Drugs & Cosmetics Rules (in

short 'the Rules') on 15.02.2020 itself issued to the petitioner a show cause notice-cum-Stop Manufacturing Order of COLDBEST-PC Syrup and all the drugs having similar formula/ composition under generic name or any other brand name. Manufacturing and sale of the drug formulation in question under generic name or any brand name during stop manufacturing period was to be viewed as violation of various provisions of Drugs and Cosmetics Act. On the same day, the Drug Inspector, District Sirmour, collected five samples of COLDBEST-PC Syrup including one sample under Batch No.DL5201 alongwith one sample of PG from the premises of petitioner.

2(viii). On 17.02.2020, the Drug Inspector, Nahan directed the petitioner to produce certain specified record including stock registers reflecting use of PG. Petitioner vide its communication of even date, expressed its inability to produce the desired record that day and stated that the same can be made available in three days. Observing that record was immediately required by the investigation team specially constituted by the respondents, the Assistant Drugs Controller-cum-Drugs Licensing Authority, Nahan, 'keeping in view the seriousness of the matter in public interest' on 17.02.2020, issued a show cause notice-cum- stop manufacturing order to the petitioner in respect of its Drug Manufacturing Licenses. The show cause notice was issued with respect to not producing the desired record. Manufacturing and sale by the petitioner of any of its drug formulations during stop manufacturing period was to be considered as violation of various provisions of Drugs and Cosmetics Act. This show cause notice/stop manufacturing order was issued in exercise of powers under Rule 85(2) of the Rules.

2(ix). Some record was supplied by the petitioner on 20/22.02.2020. The show cause notices and stop manufacturing orders dated 15.02.2020 and 17.02.2020 were replied by the petitioner. The investigation team under supervision of State Drugs Controller, Himachal Pradesh, submitted its spot/interim report dated 17.02.2020 and after enumerating 20 point observations therein drew following conclusions:-

> *"The investigation team has drawn the samples of 5 batches of Coldbest-PC syrup, including impugned drugs, Propylene Glycol, BN-1A1912057 and all the syrup available in finished good material in which propylene glycol was used have been freezed in Form 15 and samples have been drawn under Section 23 of Drugs and Cosmetics Act 1940 and rules 1945 made thereunder and the documents with respect to the impugned drugs has been seized under from 16 under Section*
>
> *23 of Drugs and Cosmetics Act 1940 and rules 1945 made thereunder.*
>
> *The State Licensing Authority has issued Stop manufacturing order vide no.HFW-H(Drugs)58/08/Camp-I dated 17-02-2020.*

Also, the detail investigation is required at M/s Thakur Enterprises 180, LalKurti Bazar, Ambala Cantt-133001 and M/s Manali Petrochem Limited, Chennai and to link the supply chain and further wait for report of samples drawn under section 23 of Drugs and Cosmetics Act 1940 and Rules 1945 made thereunder.

Further, the detail investigation is also required at M/s Digital Vision, 176, Mauza Ogli, Nahan Road, Kala Amb, Tehsil-Nahan, Distt. Sirmour after the reports are received from laboratory of the samples drawn and scrutinization of all records for root cause analysis.

Further, the detailed investigation report with root cause analysis will be submitted accordingly."

On the basis of this report, another show cause notice-cum-stop manufacturing order was issued on 25.02.2020, dire

20 observations noticed in the interim report dated 17.02.2020 pointing out various violations/discrepancies atits end. Petitioner responded to letter dated 25.02.2020 videits communication dated 28.02.2020.

2(x). On 02.03.2020, Government Analyst, Regional Drugs Testing Laboratory (in short 'RDTL'), Chandigarh sent the test/analysis reports of three samples of COLDBEST-PC Syrup Batch No.DL5201, drawn from the States of Jammu & Kashmir and Haryana. In all the three reports, the drug was found to be adulterated with DEG, apoisonous chemical and dangerous to public health. Accordingly, the reports declared the drug as not of standard quality. On the basis of these test reports, respondents issued an office order on 02.03.2020 in exercise of the powers under Rule 85(2) of the Drugs andCosmetics Rules, suspending the Drugs Manufacturing Licences of the petitioner-firm till further orders. Petitioner was directed neither to manufacture nor to sell any drugs during the suspension period. Also FIR No.21/2020 was registered on 02.03.2020 at Police Station Kala Amb, District Sirmour, under Section 18(a)(i), 17A & 27(a) of Drugs & Cosmetics Act and Section 308 of Indian Penal Code.

2(xi). Respondent Authorities had collected five samples of COLDBEST-PC Syrup from petitioner's premises on 15.02.2020 alongwith one sample of PG. The analysis reports of these samples were submitted by RDTL, Chandigarh. Following tabulation gives the gist of these

reports:-

COLDBEST-PC Syrup

Date of Report	*Batch No.*	*Sample No.*	*Result*

5.3.2020	***B.No.5201***	*NHN/19/94*	***Standard Quality. However, sample was not tested for DEG due to insufficient quantity.***
1.4.2020	*DL 5872*	*NHN/19/95*	*Standard Quality. Tested negative for DEG*
1.4.2020	*DL 2831*	*NHN/19/96*	*Standard Quality. Tested negative for DEG*
1.4.2020	*DL 4302*	*NHN/19/97*	*Standard Quality. Tested negative for DEG*
1.4.2020	*DL 5028*	*NHN/19/98*	*Standard Quality. Tested negative for DEG*

Propylene Glycol

Date of Report	*Batch No.*	*Sample No.*	*Result*
16.3.2020	*BN-1A 1912057*	*NHN/19/99*	*Standard Quality PG*

The PG sample (NHN 19/99) tested by the RDTL, Chandigarh and found to be of standard quality was not supplied by M/s Thakur Enterprises, but was manufactured in China. Samples No.NHN 19/95, 19/96, 19/97 and 19/98 of COLDBEST-PC Syrup were found to be of standard quality and did not contain DEG. But these samples were not of the batch in question. Sample No.NHN 19/94 drawn from batch in question, i.e. DL5201, though was analyzed to be confirming to standards, but could not be tested for presence of DEG due to insufficient quantity of sample.

2(xii). An appeal was preferred by the petitioner under Rule 85(3) of the Drugs and Cosmetics Rules for settingaside the office order dated 02.03.2020 and show cause notices/stop manufacture/sale orders dated 15.02.2020, 17.02.2020 and 25.02.2020. Learned Appellate Authorityheld that the action taken by the Assistant Drugs Controller-cum-Licensing Authority, Sirmour at Nahan, was on the basis of gravity of the offence and record/letters/ reports received by him from various agencies from time to time. In absence of (i) final investigation report in FIR No.21/2020 and (ii) final report of Central Drugs Laboratory (in short 'CDL'), Kolkata, the appellate authority-cum-Additional Chief Secretary (Health) to the Government of Himachal Pradesh declined to interfere with the impugned orders/notices. Petitioner, however, was permitted to sell stocks of 26 drug formulations whose samples collected from petitioner's premises on 17.02.2020were declared by RDTL, Chandigarh as of standard quality. Additionally, the already manufactured finished products of the petitioner-firm, wherein propylene glycol was not used, were also permitted to be sold after verification by the Department. Feeling aggrieved, instant writ petition has been preferred.

3. Heard learned counsel for the parties and gone through the record. Following broader points need consideration:-

(a). Whether while procuring Propylene Glycol against invoice dated 16.09.2019 and using it in manufacture of its drugs formulations including COLDBEST-PC Syrup, the petitioner complied with standard norms and specifications or not.

(b). Whether various show cause notices, stop manufacture/sale orders, issued to the petitioner from time to time and the order suspending the drugs manufacturing licences of the petitioner are sustainable in law and in the facts and circumstances of the case.

4. Contentions and Discussion for both the above points:-

COLDBEST-PC Syrup:-

4(i). Purchase of raw material PG: Petitioner has placed on record invoice dated 16.09.2019, issued to it by M/s Thakur Enterprises, Ambala Cantt. for purchase of PG under Batch Nos.2085, 2123 and 2116. Petitioner contends that M/s Thakur Enterprises had claimed to be a licensed wholesale dealer of fine chemicals etc. and had furtherclaimed that the PG being supplied to the petitioner was manufactured by M/s Manali Petrochemicals Limited at Chennai. It is also submitted that Certificates of Analysis from Manali Petrochemicals was provided to the petitioner alongwith invoice certifying that the batches so purchased by the petitioner, inter alia, complied with IP specifications.

On behalf of the respondents, it has been submitted that during investigations, it emerged that M/s Thakur Enterprises did not possess valid drugs licence required to stock or exhibit for sale or distribution of PG. Therefore, petitioner-firm in violation of the Act & Rules purchased PG from an unlicensed firm.

No licence of M/s Thakur Enterprises is on record of the case. Even as per the petitioner, it had purchased PG only on the basis of claims made by M/s Thakur Enterprises without reasonably verifying such claims. Matter is stated to be under investigation.

4(ii). Use of Propylene Glycol (PG):-

4(ii)(a). PG so purchased by the petitioner from a firm, which allegedly did not possess required licence, was used for its drug formulations. According to the petitioner, this raw material procured from M/s Thakur Enterprises was thereafter sent by it (petitioner) for analysis to M/s Shree Sai Test House Private limited, New Delhi. The test result of this laboratory on 20.09.2019 declared the raw material to be of standard quality.

This aspect has been countered on behalf of the State by submitting that petitioner-firm had not maintained the stock register for excipients as per Schedule U and that the petitioner had failed to produce any documented letter/receipt etc. for sending sample of raw material PG to the lab in question. Therefore, this report cannot be reliedupon at this stage. The matter is subject of investigation inFIR No.21/2020.

4(ii)(b). Statedly after receipt of analysis report of PGfrom the lab at New Delhi, the COLDBEST-PC Syrup was manufactured by the petitioner. Batch No.DL5201 was readied in September, 2019, consisting of 5575 bottles weighing 360 litres, consuming about 94.5 kg of PG. According to the petitioner, post production, its Quality Control Department analyzed the finished product and issued Certificate of Analysis of all the manufactured batches of COLDBEST-PC Syrup including Batch No.DL5201. All the batches were found to be complying with the standard norms and specifications. It has also been urged by the petitioner that Government Analyst, Udhampur, J&K reported on 23.01.2020 that COLDBEST- PC Syrup manufactured by the petitioner under Batch No.DL5201 was of standard quality.

This has been countered by the State by submitting that petitioner-firm had no facility for conducting the test for presence of DEG in its finished drug formulations and had actually not conducted the test for presence of DEG in the drug. The analysis report of petitioner's Quality Control Department indicating compliance of norms relating to Ethylene Glycol and DEG were therefore misleading. It has also been emphasized that in report dated 23.01.2020, the J&K Lab had also not tested the sample for presence of DEG. Reliance upon thesereports by the petitioner is, therefore, misplaced.

4(iii). Sale of COLDBEST-PC Syrup:-

Out of 5575 bottles of COLDBEST-PC Syrup manufactured under Batch No.DL5201, 3447 bottles were consumed in eight States. It appears that some infant mortalities in the State of Jammu & Kashmir were linked with COLDBEST-PC Syrup Batch No.DL5201 manufactured by the petitioner. A team of Doctors from PGI Chandigarh visited Jammu & Kashmir to look into the probable cause of deaths and perhaps made the authorities there to understand that in the COLDBEST-PC Syrup manufactured by the petitioner under Batch No.DL5201, adulterant Diethylene Glycol was found. This fact was brought to the notice of the respondent-Department by their J&K counterparts vide letter dated 15.02.2020, inter alia, requesting for conducting inspection of the unit for ascertaining the aspect of Diethylene Glycol impurity in the drug formulation as well as for recall of the product in question irrespective of its batch, in larger public interest.

4(iv). Action by State Drug Controlling Authorities:- 4(iv)(a). Taking cognizance of the contents of above referred letter of 15.02.2020 to the effect that PGI, Chandigarh has reported presence of DEG in COLDBEST- PC Syrup manufactured by the petitioner under Batch No.DL5201, the Competent Authority of respondent- Department on 15.02.2020 itself, in exercise of the powers conferred under Rule 85(2) of the Rules, issued a show cause notice to the petitioner as to why action be not taken against it for manufacturing COLDBEST-PC Syrupcontaining Diethylene Glycol and as to why its licence should not be cancelled/ suspended for violating various provisions of Drugs and Cosmetics Act and rules made thereunder. Simultaneously, respondents directed the petitioner to stop manufacturing/sale of COLDBEST-PC Syrup as well as all the drugs having similar formulations/ compositions. Petitioner was also directed to completely recall the said drugs from the market and to ensure its complete withdrawal even upto the consumer level.

4(iv)(b). On 17.02.2020, the respondents issued notice to the petitioner to produce the record mentioned therein. Petitioner in writing expressed its inability to immediately produce the record. Whereafter on 17.02.2020 itself, another show cause notice was issued to it in exercise of the powers under Rule 85(2) of the Rules by the respondents as to why action be not taken against it for not producing the documents immediately required by the investigating team. Additionally, petitioner was directed to altogether stop manufacturing/sale under its Drug Manufacturing Licences till further orders. Petitioner on 20/22.02.2020 produced some records and on 24.02.2020 submitted its combined reply to the show cause notice dated 15.02.2020 and to show cause notice dated 17.02.2020. The investigation team comprising of six officers also submitted its interim report on 17.02.2020 with 20 observations. Apparently, not satisfied with the reply previously submitted by the petitioner and noticing the observations of the interim report, the respondents issued another show cause notice to the petitioner on 25.02.2020 as to why action be not taken against it for various violations/discrepancies observed in the spot/ interim report including following specific observations at Sr. Nos.5, 6, 7, 9, 10, 18 and 20:-

> *"5. During scrutinization of invoice it was observed that M/s Thakur Enterprises 180, LalKurti Bazar, Ambala Cantt-133001 has mentioned 3 batches:-a. Propylen Glycol, B.No.2085, Mfg Date June 2019, Exp date: May 2024, b. Propylen Glycol, B.No.2123, Mfg Date July 2019, Exp Date: June 2024, c. Propylen Glycol, B.No.2116, Mfg Date July 2019, Exp date: June 2024. But the number of Drums has not mentioned.*
>
> *6. The firm in AR no.Issuing register has mentioned AR No.1268/19-20 only against invoice no.557 dated 16-09-2019 which was further observed fabricated during investigation for entry of AR No.1268(i)/19-20 for batch no.2123 and 1268 (ii)/19-*

20 for batch no.2116.

7. Again in next entry the firm has mentioned s.no.1268A for Serratiopeptidase, B.no.AF45190267, Mfg Date: 08/19, Exp Date: 07/24, Manufactured by: M/s Anthum which was given AR. No.1268 A/19-20.

9. The firm does not have any facility to perform the test for Diethyleneglycol but the firm is mentioned the same in COA generated by the firm.

10. The firm has also produce the test report from Shree Sai Test House Pvt. Ltd., New Delhi, but the firm has failed to produce the evidence of sent sample like Postal detail etc. but stated that samples are collected by representative of testing firm.

18. The firm has failed to produce utilization data of Xanthane Gum, Propyl Paraben Sodium, Sodium Benzoate etc.

20. The firm has also failed to produce the BMR of other batches in which of a. Propylen Glycol, B.No.2085, Mfg Date June 2019, Exp date: May 2024, b. Propylen Glycol, B. No.2123, Mfg Date July 2019, Exp date: June 2024, c. Propylen Glycol, B. No.2116, Mfg Date July 2019, Exp date: June 2024 from M/s Manali Petrochemicals Limited, Chennai. In continuation of which the State Licensing Authority has issued Stop manufacturing order vide no.HFW-H(Drugs)58/08/Camp-I dated 17-02-2020."

Petitioner was also directed to adhere to the Stop Manufacturing Order issued on 17.02.2020 and was further directed to give point-wise reply to all the 20 point observations of the interim report. Petitioner replied to this notice on 28.02.2020 giving its response to 20 observationsof the interim report.

4(iv)(c). On 02.03.2020, the Government Analyst, RDTL, Chandigarh, submitted its analysis reports of three samples of drug COLDBEST-PC Syrup Batch No.DL5201 drawnfrom the State of Haryana and Jammu & Kashmir. These analysis reports declared the samples of COLDBEST-PC Syrup produced by the petitioner under Batch No.DL5201 as not of standard quality and adulterant Diethylene Glycol, a poisonous chemical, was detected in these samples. Immediately thereafter, on the basis of the analysis reports of Government Analyst, RDTL, Chandigarh in respect of samples of COLDBEST-PC Syrup Batch No.DL5201 found to be adulterated with Diethylene Glycol and finding the replies of the petitioner to the earlier noticesunsatisfactory, the respondents issued office order dated 02.03.2020, suspending the Drugs Manufacturing Licences of the petitioner-firm in public interest till further orders.

4(iv)(d). Five samples of COLDBEST-PC Syrup of different batches including one under Batch No.DL5201 and one sample of PG were collected by the respondents on 15.02.2020 from the premises of the petitioner. Out of the five samples of COLDBEST-PC Syrup, the one under Batch No.DL5201, i.e. NHN-19/94, though was found by RDTL, Chandigarh of standard quality vide

its report dated 05.03.2020, yet absence of adulterant DEG in it could not be ruled out as the sample, being of insufficient quantity, could not be tested for DEG. The other samples of COLDBEST-PC Syrup belonging to other batches were declared as of standard quality and tested negative forpresence of DEG.

On 26.02.2020, one sample of COLDBEST-PC Syrup Batch No.DL5201, NHN/19/103 collected in accordance with provision of the Act & Rules from the petitioner's premises from the stock recalled from the market, was sent for test to RDTL, Chandigarh on 27.02.2020. RDTL Chandigarh on 09.03.2020, requested the respondents for providing additional sample to complete the analysis. Since physical stock of drug in question was not available in the premises of the petitioner, therefore, permission was sought by the respondents from learned Chief Judicial Magistrate (CJM), District Sirmour at Nahan for drawing additional quantity of drug from the seized drugs. Permission was accorded by the learned Court vide order dated 11.03.2020. Additional sample so drawn was submitted to RDTL, Chandigarh on 12.03.2020. In continuation to earlier sample drawn on 26.02.2020, RDTL Chandigarh submitted its analysis report on 20.03.2020 declaring the entire sample (NHN/19/103) as not of standard quality and adulterated with DEG.

Whereafter, respondents on 20.03.2020, issued another show cause notice to the petitioner for sale of sub-standard and adulterated drug. Petitioner was also directed to comply with previously issued directions. Petitioner expressed its dissatisfaction with the analysis report. Therefore, on application of respondents, learned CJM, Sirmour on 02.05.2020 ordered for sending sealed portions of samples drawn on 26.02.2020 and 11.03.2020 to the Director, CDL, Kolkata for complete re-test. This order, however, has been stayed in Cr.R. No.146/2020 instituted in this Court by the petitioner itself.

4(iv)(e). In an appeal preferred by the petitioner under Rule 85(3) of the Drugs and Cosmetics Rules, learned Appellate Authority in its order dated 22.06.2020 considering the fact that the final investigation report in FIR No.21/2020 and final report of Director, CDL, Kolkata were yet to come, declined to interfere with the suspension order passed by the Assistant Drugs Controller-cum- Licensing Authority on 02.03.2020. Appellate Authority, however, allowed the petitioner to sell stocks of 26 samples of different drug formulations collected by Drugs Inspector, Central Drugs Standard Control Organization ('CDSCO' inshort), Baddi on 17.02.2020 from the premises of the petitioner and declared by Government Analyst, RDTL Chandigarh to be of standard quality. Additionally, petitioner's already manufactured finished products, wherePG was not used were also allowed to be sold.

5. Observations:

What emerges from above discussion is that:- **5(i)(a).** Before buying PG from M/s Thakur Enterprises, Ambala Cantt., vide invoice dated 16.09.2019,

petitioner did not even reasonably verify the authenticity of supplier's claim of being a licensed wholesale dealer of fine chemicals. According to the respondents, M/s Thakur Enterprises did not even possess a valid drug licence required for stockingor exhibiting for sale or distribution of PG.

5(i)(b). There is justification in the stand of respondents that pending further investigations, the analysis report of Shree Sai Test House Private Limited, New Delhi dated 20.09.2019, in respect to PG, allegedly purchased by thepetitioner from M/s Thakur Enterprises on 16.09.2019 and used thereafter in manufacturing various drug formulations, inter alia, COLDBEST-PC Syrup including Batch No.DL5201, declaring PG to be of standard quality and certifying that sample is compliant of DEG cannot be relied upon as the petitioner has failed to produce documented evidence of having sent the sample to the laboratory at New Delhi.

5(ii). In none of the Analysis Reports placed on record of the case, COLDBEST-PC Syrup manufactured by the petitioner under Batch No.DL5201 was declared of standard quality without presence of adulterant DEG.

5(ii)(a). The Certificate of Analysis dated 23.09.2019 ofQuality Control Department of the petitioner in respect to finished product COLDBEST-PC Syrup certified this product to be of standard quality and compliant of Ethylene Glycol and Diethylene Glycol norms. However, admittedly the petitioner-firm does not possess the testing facility for checking its drugs formulations for presence of adulterant DEG. Therefore, analysis reports of petitioner's Quality Control Department with respect to COLDBEST-PC Syrup cannot be relied upon. Same goes for test reports of petitioner's Quality Control Department with respect to analysis of sample of PG. It cannot be said to have been tested for presence of poisonous adulterant DEG in absence of such testing facility available with the petitioner.

5(ii)(b). Three test reports of RDTL, Chandigarh dated 02.03.2020 in respect of samples of COLDBEST-PC Syrup, Batch No.DL5201, drawn from the State of Haryana and Jammu & Kashmir, had declared the drug as not of standard quality after detecting poisonous chemical DEG therein. According to the respondents, Government Analyst Drug Testing Laboratory, Tamil Nadu, has also provided them their analysis report declaring COLDBEST-PC Syrup Batch No.DL5201 as not of standard quality and found to be adulterated with DEG.

5(ii)(c). The test report of RDTL, Chandigarh dated 05.03.2020 with respect to sample of COLDBEST-PC Syrup, Batch No.DL5201 (NHN-19/94), drawn on 15.02.2020 from the premises of petitioner though declared the drug as of standard quality, but due to insufficient quantity, the sample could not be tested for presence of DEG. The analysis report dated 23.01.2020 of

Government Analyst, Udhampur also had not tested the sample of COLDBEST-PC Syrup Batch No.DL5201 for DEG.

5(ii)(d). The test report of RDTL, Chandigarh dated 20.03.2020 regarding sample of COLDBEST-PC Syrup, Batch No.DL5201, collected on 26.02.2020 with additional quantity collected under order dated 11.03.2020 passed by learned CJM, Sirmour, confirmed the sample as not of standard quantity as poisonous adulterant DEG was detected in the sample. Petitioner has contested the result. Therefore, on an application moved by the Drugs Inspector, Nahan under Section 25(4) of the Act, learned CJM, Sirmour at Nahan, on 02.05.2020, ordered for dispatching sealed sample portions of COLDBEST-PC Syrup, Batch No.DL5201, collected on 26.02.2020 and 11.03.2020(Sample No.NHN/19/103) to the Director, Central DrugsLaboratory (CDL), Kolkata. This order has been stayed on 06.05.2020 in Criminal Revision No.146/2020, instituted by the petitioner. Therefore, the sample could not be sent toCDL, Kolkata for complete re-test.

6(i). Though many of above referred aspects are as yet stated to be pending for further investigation, but, prima facie, at this stage, it can certainly be observed that PG purchased by the petitioner from M/s Thakur Enterprises vide invoice dated 16.09.2019 and thereafter used in different drug formulations including COLDBEST- PC Syrup irrespective of batch numbers cannot be said to be of standard quality as at present neither there is any proof of the same having been purchased from a duly licensed dealer/stockist nor there is any proof of the same having been tested for presence of commonly tested adulterant DEG before being put to use by the petitioner in its different drug formulations. A specific drug COLDBEST- PC Syrup under Batch No.DL5201, manufactured by the petitioner allegedly using this PG, has been tested positive for poisonous chemical and adulterant DEG in samples drawn from the States of Haryana, Jammu & Kashmir and Himachal Pradesh. Though some of the analysis reports have been disputed by the petitioner and further investigation is still going on, however, at this stage, *prima facie*, it can be observed that COLDBEST-PC Syrup, Batch No.DL5201, cannot be said to be of standard quality.

Considering above aspects, action of the respondents in issuing show cause notice to the petitioner on 15.02.2020 and ordering it initially to stop manufacturing/sale of COLDBEST-PC Syrup/similar drugs formulations and directing it to recall the drug from the market was justified considering public health and safety.

6(ii). Over a period of time, after receipt of various analysis reports, spot/interim report submitted by the investigating agency, further action of the respondents in issuing separate show cause notices to the petitioner and ordering it to stop manufacture/sale of all drug formulations under its Drugs Manufacturing Licences and thereafter suspending till further

orders its Drugs Manufacturing Licences, however, cannot be justified. In issuing such notices, the respondents have exercised power under Rule 85(2) of the Rules, which reads as under:-

> *"85. Cancellation and suspension of licenses- (1).....*
>
> *(2) The Licensing Authority may for such licenses granted or renewed by him, after giving the licensee an opportunity to show cause why such an order should not be passed, by an order in writing stating the reasons therefor, cancel a license issued under this Part OR suspend it for such period as he thinks fit either wholly or in respect of any of the drugs to which it relates [OR direct the licensee to stop manufacture, sale or distribution of the said drugs and [thereupon order the destruction of drugs and] the stocks thereof in the presence of an Inspector], if in his opinion, the licensee has failed to comply with any of the conditions of the license or with any provisions of the Act or rules made thereunder."*

The power conferred under the above extracted rule can be exercised only in accordance with law. Reason were required to be given while directing the petitioner to completely stop manufacture/sale of all its licensed drugs formulations as well as in suspending its Drugs Manufacturing Licences. Petitioner had submitted replies to various show cause notices issued to it by the respondents. However, a perusal of repeatedly issued show cause notices nowhere reflects due consideration of replies submitted by the petitioner. Hon'ble Apex Court in ***Kranti Associates Private Limited and another Versus Masood Ahmed Khan and others, (2010) 9 SCC 496***, vide para 47, heldas under:-

> *"47. Summarising the above discussion, this Court holds:*
>
> *(a). In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b). A quasi-judicial authority must record reasons in support of its conclusions.*
>
> *(c). Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d). Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
>
> *(e). Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.*
>
> *(f). Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
>
> *(g). Reasons facilitate the process of judicial review by superior Courts.*
>
> *(h). The ongoing judicial trend in all countries committed to*

rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision-making justifying the principle that reason is the soul of justice.

(i). Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j). Insistence on reason is a requirement for both judicial accountability and transparency.

(k). If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l). Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m). It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.

(n). Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

> *"adequate and intelligent reasons must be given for judicial decisions".*

(o). In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

In ***Civil Appeal No.9417 of 2019,*** titled ***M/S Daffodills Pharmaceuticals Ltd. & Anr. Versus State of U.P. & Anr.***, decided on December 13, 2019, the Hon'ble Supreme Court observed that if there is one constant lodestar that lights the judicial horizon in this country, it is this: that no one can be inflicted with an adverse order, without being afforded a minimum opportunity of hearing, and prior intimation of such a move. This principle is too well entrenched in the legal ethos of this country to be ignored.

In the facts and circumstances of the case discussed above and as borne out from the record and as is evident from the show cause notices/orders dated 15.02.2020, 17.02.2020, 25.02.2020, 02.03.2020 and

20.03.2020, the allegation against the petitioner primarily pertained to use of specific PG and presence of adulterant DEG in COLDBEST-PC Syrup therefore, the Stop Manufacture/Sale Order could have been restricted to those drug formulations where PG purchased by the petitioner against invoice dated 16.09.2019 was used or atbest in respect of those drugs which involved use of PG. In a blanket manner, without setting forth the reasons required to be enumerated under Rule 85(2) of the Rules, neither the manufacture/sale of other drug formulations could be ordered to be stopped where PG was not used nor in the facts and circumstances of the case, petitioner's Drugs Manufacturing Licences could be suspended altogether by the respondents in exercise of powers under Rule 85(2) of the Rules. Even though there may be cases where a single violation/contravention of the licence may be so grave so as to justify cancellation/suspension of entire licence after due application of mind by the Competent Authority. But the record of this case does not reflect application of mind by the respondents in ordering suspension of Drugs Manufacturing Licences of the petitioner, forcing it to completely shut down its unit. The power to cancel/suspend a licence has to be exercised with sound discretion in the given facts and circumstances of the case as well as keeping in mind larger public interest, but not mechanically, hastily or arbitrarily.

The only discernible reasons for issuance of the impugned notices/orders relate to the PG procured and used by the petitioner in above described manner and detection of adulterant DEG in one batch of COLDBEST-PC Syrup, i.e. No.DL5201, manufactured by the petitioner. Even though the samples of COLDBEST-PC Syrup manufactured by the petitioner under other batches were not found to be adulterated with DEG, yet considering larger public interest, public health and safety, the action of the respondents in ordering the petitioner to stop manufacture/sale of COLDBEST-PC Syrup as a whole irrespective of its batches cannot be faulted. However, apparently no reasons have been put forth by the respondents to stop manufacture/sale of all drugs by the petitioner under show cause notice-cum-stop manufacturing/sale order dated 17.02.2020 and thereafter to pass order dated 02.03.2020 for suspending its Drugs Licences altogether till further orders. The replies submitted by the petitioner to the show cause notices were discarded mechanically. Therefore, show cause notice dated 17.02.2020 and its reiteration in the notice dated25.02.2020 to the extent they order the petitioner to stop manufacture/sale of its all drug formulations and order dated 02.03.2020 suspending drug manufacturing licences of the petitioner and its reiteration in communication dated20.03.2020 cannot be sustained.

7. Conclusion:-

For the forgoing discussions and observations, we hold and direct that:-

7(i). No interference with show cause notice/stop manufacturing/stop sale order dated 15.02.2020, directing the petitioner to recall as well as to stop manufacture/sale of COLDBEST-PC Syrup is called for.

7(ii). Show Cause Notice-cum-Stop Manufacturing/Sale Order dated 17.02.2020 as well as Show Cause Notice-cum-Stop Manufacturing/Sale Order dated 25.02.2020 and communication dated 20.03.2020 to the extent they direct the petitioner to altogether stop manufacture/sale under its drugs manufacturing licences are quashed and set aside. Respondents/Competent Authority is directed to examine the entire matter afresh after considering the replies to the notices submitted by the petitioner and thereafter pass appropriate order in accordance with law within a period of four weeks from today. It shall be open for the parties to take recourse to appropriate remedy in accordance with law in case they still feel aggrieved by the order so passed.

7(iii). Office order dated 02.03.2020, suspending drugs manufacturing licences of the petitioner, is quashed and set aside. However, till the time the competent authority takes fresh decision in terms of direction No.7(ii) above**:-**

(a) the petitioner shall not manufacture/sell any of its licensed drugs, which involve use of Propylene Glycol and

(b) petitioner is permitted to continue manufacture/ sale of all other drugs under its drugs manufacturing licenses, where Propylene Glycol is not used, subject to all applicable provisions of applicable Statutes and Rules made thereunder as well as subject to verification in accordance with law by the Competent Authority of respondent department.

7(iv). The order dated 22.06.2020 passed by the learned Appellate Authority-cum-Additional Chief Secretary (Health) is upheld only to the extent it permitted the petitioner to sell already lying stocksin which PG had not been used as well as to sell stocks of 26 samples of drug formulations declaredby RDTL, Chandigarh as of standard quality.

With these observations, the writ petition is disposed of alongwith pending miscellaneous application(s), if any.

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

Giridhar .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No. 251 of 2020
Decided on: 5.8.2020

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)-** Sections 20, 29 & 37- Recovery of commercial quantity of 'charas' from 'TS', which was allegedly to be sold by him to 'GS'- 'TS' also revealing that 'GS' a drug peddler had deposited money in account of bail petitioner showing his involvement in case- Regular bail- Gant of – Held, 'GS' already stands released on bail by Court- Contraband never came to be recovered from petitioner- Relatively small amount was deposited in account of petitioner in instalments by 'GS' - Deposited amount would not fetch quantity of recovered stuff in market- Mere financial transactions would not be sufficient to implicate petitioner in the case- Rigors of Section 37 of Act are not attracted qua petitioner and he cannot be kept in jail for indefinite period- Petition allowed- Bail granted subject to conditions. (Para 2, 3 & 5 to 7)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49;
Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218;
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496

Whether approved for reporting? [18] Yes.

For the Petitioner	**:**	M/s Yashveer Singh Rathore and Ajit Sharma, Advocates.
For the Respondent	**:**	Mr. Sanjeev Sood, Additional Advocate General and Mr. Gaurav Sharma, Deputy Advocate General, for the State.

Sandeep Sharma, Judge (oral):

Through Video Conferencing.

By way of present petition filed under Section 439 of Cr.PC, prayer has been made on behalf of the bail petitioner namely Giridhar, who is behind bars since 21.12.2019, for grant of regular bail in connection with FIR No. 239/19, dated 26.10.2019 under Sections 20 and 29 of ND&PS Act (in short "the Act") registered at P.S. Bhuntar, District Kullu, H.P.

2. Perusal of status report having been filed by the respondent-State reveals that on 25.10.2019, police party present at TCP Bajora, stopped a VOLVO bus for checking. Since occupant of seat No. 18 namely Tahal Singh got perplexed after having seen the police, police conducted his search in the presence of independent witnesses and allegedly, recovered 1.2 Kg of Charas. Since no plausible explanation came to be rendered on record by the above named occupant, police after completion of necessary codal formalities, lodged aforesaid FIR against the bail petitioner on 26.10.2019. During investigation, above named person Tahal Singh informed the police that he purchased the contraband in question from person namely Ramesh Chand for a total consideration of Rs. 80,000/-. Above named person also disclosed to the police that contraband allegedly recovered from him was to be sold to one Gary Bhai alias Ghardeep Singh Dutta, R/o Ropar, Punjab. During investigation, Tahal Singh disclosed to the police that Gary Bhai alias Ghardeep Singh transferred money in the account of the present bail petitioner. On the basis of aforesaid information shared by the Tahal Singh police carried out further investigation and found that some money was transferred in the bank account of the present bail petitioner by Gary Bhai alias Ghardeep Singh. In the aforesaid background,

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

police called upon the present bail petitioner to join the investigation. On 19.12.2019, police arrested the bail petitioner and since then, he is behind the bars.

3. Precisely, case of the Investigating Agency against the present petitioner is that contraband allegedly recovered from the conscious possession of Tahal Singh was to be sold to Gary Bhai alias Ghardeep Singh , who in turn had deposited some amount in the bank account of the present bail petitioner. During investigation, police found that sum of Rs. 24,450/- was sent by Gary Bhai alias Ghardeep Singh to the bank account of the present bail petitioner on various dates. Though present bail petitioner claimed before the Investigating Agency that since he runs the business of tour and travels, Gary Bhai alias Ghardeep Singh transferred some amount for the purpose of booking of hotel etc., but such plea of him was not accepted by the police because petitioner failed to place on record any documentary evidence suggestive of the fact that he has business of tour and travels.

4. Mr. Sanjeev Sood, learned Additional Advocate General, while fairly admitting factum with regard to filing of challan before the trial court contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency and as such, his prayer for grant for bail deserves to be rejected. Mr. Sood, while making this court to peruse status report contends that it stands duly established on record that bail petitioner was fully involved in the sale and purchase of Narcotics and as such, it cannot be said that he has been falsely implicated. While referring to the bank transactions, Mr. Sood contends that no plausible explanation ever came to be rendered on record by the bail petitioner qua the amount allegedly received by him from Gary Bhai, to whom, huge quantity of contraband was to be delivered by the present bail petitioner. Lastly, Mr. Sood contends that since bail petitioner has indulged in serious crime having adverse impact on the society, it would not be in the interest of justice to enlarge the bail petitioner on bail at this stage.

5. Having heard learned counsel for the parties and perused material available on record, this Court finds that on the date of the alleged incident, 1.2 Kg of Charas came to be recovered from the conscious possession of the co-accused namely Tahal Singh. No doubt, investigation conducted by the Investigating Agency reveals that above named Tahal Singh disclosed to the police that Charas allegedly recovered from his possession was to be delivered to Gary Bhai, but definitely, there is no direct allegation, if any, of sale and purchase of alleged contraband against the present bail petitioner. Above named Tahal Singh has stated to the police that Gary Bhai transferred some amount in the bank account of present bail petitioner, but if the statement given by Gary Bhai to the police is perused, he has nowhere stated that amount allegedly transferred by him in the bank account of the present bail petitioner was in lieu of the contraband agreed to be sold to him by Tahal Singh. Gary Bhai while denying allegation of Tahal Singh specifically disclosed to the police that sum of Rs. 25,450/- deposited by him in the bank account of the petitioner was on account of advance hotel bookings since he is in the business of tour and travels. Details of transaction as mentioned in the status report reveals that total sum of Rs. 25,450/- came to be deposited in the bank account of the bail petitioner two months prior to the alleged date of incident. Otherwise also, aforesaid sum was not deposited in one day, rather same was deposited in small installments within a span of two months and as such, there appears to be some truth in the statement given by the present bail petitioner and co-accused Gary Bhai that amount allegedly transferred in the bank account of the bail petitioner was on account of hotel bookings. Leaving everything aside, Gary Bhai to whom, allegedly entire quantity of contraband was to be delivered by the main accused, Tahal Singh stands enlarged on interim bail vide order dated 30.12.2019, passed by co-ordinate Bench of this Court in Cr.MP(M) No. 2356 of 2019.

6. In the case at hand, contraband never came to be recovered from the conscious possession of the bail petitioner, rather he has been roped in the case merely on account of some money transaction. If at all it is presumed that sum allegedly transferred in bank account of the bail petitioner by Gary Bhai was for the purpose of purchase of Charas, story of prosecution cannot be believed because cost of 1.2 Kgs of Charas would not amount to Rs. 25450/- only, rather it would fetch the amount in lacs. Other than, few whatsapp messages and the statement of main accused, there is nothing on record to suggest that present bail petitioner played an active role in transport of huge quantity of contraband, allegedly recovered from the conscious possession of the co-accused Tahal Singh. Mere *Whatsapp* message/screen shot suggestive of money transaction, if any, *inter-se* bail petitioner and Gary Bhai is not sufficient to conclude complicity, if any, of the bail petitioner as far as commission of offence at this stage is concerned, rather same needs to be proved in accordance with law. No doubt, provisions of Section 37 are attracted in the present case, because of commercial quantity, but as has been noticed herein above, contraband never came to be recovered from the exclusive

and conscious possession of the present bail petitioner and as such, prayer having been made on his behalf for grant of bail cannot be rejected on this ground.

7. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having noticed aforesaid glaring aspects of the matter, there appears to be no justification to let the bail petitioner incarcerate in jail for an indefinite period, especially when Gary Bhai, to whom allegedly entire quantity of contraband was to be supplied stands already enlarged on bail. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly observed/held that one is deemed to be innocent till the time his/her guilt is not proved in accordance with law. Moreover, trial of the accused is likely to be further delayed on account of COVID-19 and as such, this Court cannot let the bail petitioner incarcerate in jail for an indefinite period during trial.

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

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
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> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such***

offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

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

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

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

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

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was

underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, bail petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 5,00,000/- each with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

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

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

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

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

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

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

Dasti on usual terms.

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

Joginder Singh ....Petitioner.

Versus

State of Himachal Pradesh ....Respondent.

CRMPM No.490 of 2020
Reserved on : 24.8.2020
Date of Decision: 25.8.2020

Code of Criminal Procedure, 1973- Section 439- Regular bail- Grant of in a case involving gang rape etc.- Held, incident happened in 1989- Petitioner declared as proclaimed offender and could be arrested only after 27 years of incident- His whereabouts were not known during the intervening period- Possibility of his absconding to have benefit of delay in trial cannot be ruled out- Apprehension that petitioner may again cause delay in trial if enlarged on bail is not baseless- Petition dismissed with direction to Trial Court to expedite trial and conclude it before the specified date. (Para 8 to 13)

Whether approved for reporting? Yes.

For the Petitioner : Mr. Rajiv Sirkeck, Advocate, through Video Conferencing.

For the respondent : Mr. Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

Vivek Singh Thakur, Judge

This petition, filed under Section 439 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.), has been preferred for enlarging the petitioner on regular bail, in case FIR No.75 of 1989, registered under Section 376(2)(G) of the Indian Penal Code, in Police Station, Manali, District Kullu, Himachal Pradesh.

2. Status report stands filed, wherein it is stated that on 9.7.1989, victim got her statement recorded under Section 154 Cr.P.C., stating therein that on 8.7.1989, she, with permission of her mother, had gone to Manali market to purchase shoes, where she went to Star Video Parlour to watch a movie, where one Vijay, resident of Manali, was sitting on adjacent chair, who

offered her to accompany him to Vashisht, which was refused by her, whereupon he started saying so many things and compelled her to come with him from Manali market to the road at Vashisht curve and thereafter he arranged a Taxi/Jeep and made her to sit in the Jeep by catching hold of her arm. Taxi was being driven by present petitioner and Ravi Prakash was sitting with him, and all of them took her to Solang Nala. Jeep was parked on the road and Vijay had taken her backside of big stones and violated her. Thereafter, when she was about to move, three other persons Sunil, Bittu and Neenu had come in another Taxi, who also committed sexual intercourse with her and because of fear she could not say anything and thereafter Tikkam Ram and one another person, namely Nanak Mahant, had also come there and she, considering them local persons, accompanied them and Vijay, Sunil and Bittu had gone in their Taxi towards Manali and Tikkam Ram, Raghu Mahant and petitioner Joginder Singh alias Munna, Ravi, Beenu, etc. took her towards Manali in Jeep and after parking the Jeep, she was taken in the dark area, away from the road and all of them had committed sexual intercourse with her and Tikkam Ram remained with her in the last but he had also left the spot, leaving her alone, and thereafter with great difficulty she reached home and disclosed the entire incident to her mother, whereafter, on the next day, she had come to the Police Station alongwith her parents to lodge FIR.

3. As per status report, on completion of investigation, challan was presented in the Court against Vijay Kumar, Bittu, Ravi Prakash, Chuni Lal and Raghubir Mahant, whereas Joginder Singh alias Munna (petitioner) and Neenu were declared proclaimed offenders. Ultimately, in Criminal Appeal No.264 of 2009, titled as State of Himachal Pradesh v. Raghubir Singh, this High Court, vide Judgment dated 2.3.2017, had convicted all five accused, with further direction to the police to file a challan against Joginder Singh alias Munna and Neenu, after searching them. Thereafter on 28.6.2017, at about 10 a.m., petitioner was arrested at Manali and was got identified from victim as a person who had committed rape with her on 8.7.1989. During investigation, petitioner had identified the spot of commission of offence.

4. Lastly, it is stated that the petitioner had committed the offence in the year 1989, whereafter he was absconding and now three witnesses have been examined and ten witnesses remain to be examined and next date of hearing in the trial Court is 28.8.2020 for further orders.

5. Learned Deputy Advocate General, under instructions, has also submitted that all remaining ten witnesses are official witnesses.

6. Learned counsel for the petitioner has submitted that statements of victim and her mother have been recorded as PW-1 and PW-2, and in her statement as PW-1, victim, in examination-in-chief, has stated that she could not say whether the accused person in the Court was same Munna alias Joginder Singh and in cross-examination also she has stated that it was correct that she was not sure that the accused person in the Cour/t was same Joginder. It is also submitted by learned coun sel for the petitioner that petitioner had not absconded but was driving a Taxi regularly between Kalka-Kullu-Manali and during the intervening period he has been married at Kalka and is now father of two young daughters, and his 21 years old elder daughter, at the time of his arrest in the year 2017, was studying in the 1st Year, but after his arrest she had dropped her studies and 19 years younger daughter is pursuing her studies in 3rd year of Computer Course, and that his family was residing at Kalka, which has now, during July-August, 2020, shifted to Parwanoo. Learned counsel for the petitioner has further submitted that being a responsible person, having a family stationed in Himachal Pradesh, there is no possibility of the petitioner's absconding, therefore, in the aforesaid circumstances, he is entitled for bail.

7. Controverting the plea of petitioner, learned Deputy Advocate General has pointed out that victim, in her examination-in-chief, after saying that she could not say whether the accused person in the Court was same Munna alias Joginder, had again stated that accused was the same person and in cross-examination also her admission has been further qualified by her in her statement, which has been recorded by the trial Court, as she has stated that with the passage of time she was unable to recollect and recognize the accused person in the Court. He has further submitted that there is no denial on the part of the victim that petitioner was not the same person and this issue is yet to be determined by the trial Court on its merit, after recording entire evidence as there may be other material to corroborate the fact that petitioner is the same accused who had committed offence in the year 1989.

8. Petitioner was declared proclaimed offender in the year 1990 and he has been arrested on 28.6.2017. Whereabouts of the petitioner, during the intervening period, are not known, but the fact remains that for about 27 years he was out of reach of police. It is claimed by the petitioner that during this period he was running a Taxi between Kalka- Kullu -Manali. Then again, this is a matter of serious concern that despite being in the same area, the petitioner was able to avoid his arrest and manage the affairs in such a manner that for 27 years he could not be prosecuted and for that reason the witnesses, who were examined during the trial long ago, are not able to depose, with certainty. There is possibility that petitioner had been absconding only to have benefit of delay in trial, as after long period, for capacity and capability to retain, remember, recollect and narrate the facts and instances, there is always variation or confusion in the statements of witnesses.

9. Petitioner had also approached the Additional Sessions Judge, Kullu, by filing an application for bail, which was dismissed on 13.1.2020.

10. In the facts and circumstances of the case, I find that apprehension of the trial Court that petitioner, may again cause delay in conclusion of trial against him, in case he is enlarged on bail, is not baseless.

11. So far as merit or defect in the statement of victim is concerned, the same is to be assessed by the Trial Court by considering entire evidence produced and to be produced before it.

12. In aforesaid facts and circumstances, I find that it would be in the interest of justice that trial, pertaining to an incident of 1989, undergoing in the trial Court in 2020, on account of absconding of the petitioner, is concluded at the earliest and for that purpose, to secure the presence of petitioner, it would not be appropriate to enlarge him on bail.

13. Therefore, in view of above, present petition is dismissed, with direction to the parties to ensure their effective representation before the trial Court on 28.8.2020, the date already fixed by the Court and dates subsequent thereto to be fixed by the trial Court, enabling the trial Court to record the evidence at the earliest and in view of Notification dated 7.8.2020 issued by the High Court, the trial Court is also directed, by taking all safety measures, to fix date(s) for recording the evidence and to complete the evidence in trial as early as possible, so as to conclude the trial expeditiously. Prosecution is also directed to ensure presence of the witnesses on the dates fixed by the trial Court, as remaining all witnesses are official witnesses. Parties are also directed to avoid unnecessary adjournments but to cooperate and assist the Court to record the evidence and conclude the trial at the earliest, preferably by 30th October, 2020.

14. Any fact recorded herein-above and observations made by this Court are limited to the purpose of deciding the present petition and the same, in any eventuality, shall not be construed to have been made/observed on merits and thus, shall not have any effect on merits of case, which is to be decided by trial Court on its own merits on the basis of material before it.

15. Petition stands disposed of.

Registry is directed to transmit a copy of this judgment to the trial Court, through E-mail. Registrar (Judicial) of this Court to ensure compliance.

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

Lalit Kumar .....Petitioner

Versus

State of Himachal Pradesh and Ors. .....Respondents

CWP No. 495 of 2020
Decided on: 18.8.2020

Constitution of India, 1950- Articles 14 & 226- Office Memorandum dated 31.07.2012 granting additional increment to all Class-IV employees on completion of 20 years of service in same category- Whether grant of increments can be delayed?- Held, petitioner completed 20 years of service in Class-IV category on 21.07.2018- No justification for granting increment to him w.e.f. 01.04.2019- He ought to have been given aforesaid benefit from date when he completed 20 years of service- No discrimination can be done between petitioner and other

similarly situated employees who were given additional increment from date of completion of 20 years of service- Petition allowed. (Para 5 & 6)

Whether approved for reporting? [19] Yes.

For the Petitioner	**:**	Mr. J.K. Sharma, Advocate.
For the Respondents	**:**	Mr. Ashok Sharma, Advocate General with Mr. Sudhir Bhatnagar, Additional Advocate General.

Sandeep Sharma, Judge (oral):

Vide office memorandum dated 31.7.2012 (Annexure P-1) issued by the Finance department of the Government of Himachal Pradesh, all class-IV employees working in the various departments of Government have been held entitled to one additional increment on completion of 20 years of regular service on 1.8.2012. Subsequent to issuance of aforesaid communication, Government vide office memorandum dated 15.12.2012, further clarified that benefit of additional increment on completion of 20 years of regular continuous service shall be admissible to all class-IV employees irrespective of the fact that some of them have been promoted within class-IV categories. Vide aforesaid memorandum Government further clarified that such benefit would be restricted only to those class-IV categories, which remain as such in the pay scales of class-IV notified vide Finance department Fin-(PR) B(7)-1/98-II dated 3.5.2011, Fin(PR)B (A) -1/2009 dated 26.8.2009 and Fin (PR) B (7)-64/2010 dated 27.9.2012 (Annexures R-3, R-4 and R-5, respectively). Petitioner, who was initially appointed as Peon in the Forest Department w.e.f. 22.7.1998 was subsequently promoted as Jamadar in the month of July, 2007.

2. After having completed twenty years of service, petitioner preferred various representations to respondent No.3, praying therein for grant of additional increment in terms of office memorandum dated 31.7.2012, but his prayer was not acceded to on the ground that he had crossed maximum class-IV scale i.e. Rs. 10,680/- as the basic pay of the petitioner on 1.7.2018 was Rs.10,970/- plus grade pay. However, careful perusal of communication dated 7.1.2019 (Annexure R-8) suggests that pursuant to aforesaid representation filed by the petitioner, Principal Chief Conservator of Forests, Himachal Pradesh, vide communication dated 7.1.2019 (Annexure R-8) requested the Additional Chief Secretary (Forests) Government of Himachal Pradesh to permit and allow one additional increment on completion of 20 years service to all class-IV employees on the analogy of class-IV employees working in Himachal Pradesh Secretariat as well as Himachal Pradesh High Court. In response to aforesaid communication, Additional Chief Secretary (Forests) to the Government of Himachal Pradesh vide letter dated 28.3.2019 Annexure R-9, conveyed that matter was taken up with the Finance Department, which advised to do the needful as per Finance Department notification No. Fin (C) B (7)-3/2012 dated 28.2.2019 (Annexure R-10). In the notification referred herein above, Government clarified that class-IV employees of State Government in the pay band of Rs. 5910-20200/- + grade pay of Rs. 1900/-, who have completed 20 years of regular service shall be eligible to get additional increment in the pay and accordingly, vide office order dated 8.5.2019 (Annexure R-11), additional increment came to be allowed to the petitioner w.e.f. 1.4.2019.

3. Though additional increment on completion of 20 years of service in class-IV post stands granted to the petitioner, but his grouse is that since he had completed 20 years of service as Class-IV employee on 21.7.2018, additional increment ought to have been allowed to him w.e.f. 21.7.2018 instead of 1.4.2019. Petitioner has also placed on record office order dated 28.8.2018, issued by the Deputy Secretary (SA) to the Government of Himachal Pradesh (Annexure P-7) to demonstrate that persons namely M/s Prahlad Gautam, Phagnu Ram, kamlesh Gautam and Partap Singh (Peons), who had crossed maximum class-IV scale i.e. Rs. 10,680/- were granted one additional increment after completion of 20 years of service w.e.f. date they completed 20 years of regular service as Class-IV employees.

4. Perusal of Annexure P-4 reveals that matter was reconsidered by the Finance Department and it was decided that benefit of one additional increment may be given to all similarly placed class-IV employees in relaxation of provisions contained in the office memorandum No. Fin(C) B (7)3/2012 dated 15.12.2012. However, this Court is of the view that

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once in terms of aforesaid clarification, petitioner along with other similarly situate persons was also held entitled for grant of one additional increment on completion of 20 years service in Class-IV post, it is not understood that how such benefit could be allowed to him w.e.f. 1.4.2019, especially when he had completed 20 years of service as Class-IV employee on 21.7.2018. Apart from above, it is not in dispute that similarly situate employees in Himachal Pradesh Secretariat were also granted one additional increment w.e.f. the date they completed 20 years of service as Class-IV employees and as such, learned counsel for the petitioner is right in contending that petitioner has been discriminated in as much as he has been allowed benefit of one additional increment w.e.f. 1.4.2019.

5. Leaving everything aside, this Court is of the view that when as per own decision of the Government, additional increment is to be given to class-IV employee on his having completed 20 years of regular service in Class-IV post, there is no justification, if any, for granting such benefit w.e.f. 1.4.2019, rather, same is required or ought to have been granted w.e.f. the date when petitioner or other similarly situate persons completed 20 years of service as Class-IV employee i.e. 21.7.2018. Once in terms of subsequent clarification issued by the Finance Department as contained in official noting of Annexure P-4, department decided to grant additional increment to all similarly situate class-IV employees, petitioner as well as other similarly situate persons, who have complete 20 years of service ought to have been granted such benefit from the date they completed 20 years of service. While granting aforesaid benefit, no discrimination, if any, could have been made by the Government inter-se employees working in the HP Secretariat as well as employees of other departments as far as date of allowing additional increment is concerned. Since it stands duly proved on record that pursuant to clarification issued by the Government of Himachal Pradesh, some of employees as have been named in earlier part of the judgment, were granted one additional increment w.e.f. the date they completed 20 years of regular service, action of the respondents in granting benefit of additional increment to the petitioner w.e.f. 1.4.2019, cannot be held to be sustainable and as such, needs to be rectified in accordance with law.

6. Consequently, in view of the above, this Court finds merit in the present petition and accordingly same is allowed and respondents are directed to grant benefit of additional increment to the petitioner w.e.f. 21.7.2018, when he had completed twenty years of service as class-Iv employee, within a period of six weeks from today with up-to-date statutory interest. Present petition stands disposed of, along with pending application(s), if any.

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

1. CWP No. 1107 of 2019

The Solan District Co-operative (Marketing & Consumer) Federation Ltd. .....Petitioner.

Versus

Ram Lal
....Respondent.

2. CWP No. 2754 of 2019

Ram Lal .....Petitioner.

Versus

The Solan District Co-operative (Marketing & Consumer) Federation Ltd and Anr.

....Respondents

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CWP Nos. 1107 and 2754 of 2019
Reserved on 20.7.2020
Date of Decision: 31 .7.2020

Himachal Pradesh Co-operative Societies Act, 1968- Section 72 (2)- Settlement of dispute by way of arbitration- Dispute as to service conditions of workman- Held, dispute as to conditions of service of workman employed by the Society is not a dispute touching the business of the Society- Such a dispute is not arbitrable before Registrar. (Para 8)

Industrial Disputes Act, 1947- Section 10- Reference to Labour Court- Adjudication of- Held, while answering reference, Tribunal has to confine its inquiry to question referred- It cannot travel beyond the question or terms of reference. (Para 15)

Industrial Disputes Act, 1947- Section 11 A- Consequential relief of back wages- Grant of- Held, in case of wrongful termination of service, though reinstatement with continuity of service and back wages is the normal rule yet it is subject to rider that Adjudicatory Authority or Court must take into consideration the length of service of workman, nature of misconduct if any proved against him, financial condition of employer and similar other factors including whether workman was gainfully employed during period of termination. (Para 20)

Cases referred:

Morinda Coop. Sugar Mills Ltd v. Morinda Coop Mills Workers Union, (2006) 6 SCC 80;
Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain (1969 (1) SCR 887;
Delhi Cloth and General Mills Co. Ltd. vs. The Workmen and Others AIR 1967 SC 469;
Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324;

Whether approved for reporting[20]? Yes.

For the petitioner(s): Mr. Sameer Thakur, Advocate, for the petitioner in CWP No. 1107 of 2019 and for respondent No. 1 in CWP No. 2754 of 2019.

For the respondent(s): Mr. Rohit Sharma and Mr. Anuj Gupta, Advocates, for the respondent in CWP No. 1107 of 2019 and for the petitioner in CWP No. 2754 of 2019.

Sandeep Sharma, J. *(Oral)*

Since both the above captioned petitions filed under Articles 226 and 227 of the Constitution of India, lay challenge to award dated 6.4.2019 (Annexure P-11), passed by the Industrial Tribunal-cum-Labour Court, Shimla, Camp at Solan, in Ref. No. 42 of 2009, same are being taken up together for hearing and final disposal.

2. For having bird's eye view, certain undisputed facts, which may be relevant for adjudication of the petitions at hand are that the petitioner-employee namely Ram Lal was appointed as Helper in August, 1989 and was subsequently, promoted to the post of Salesman on 29.11.1991 by the respondent-Federation. On 27.1.2005 petitioner was charge-sheeted on account of alleged mis-appropriation of funds. Though, petitioner filed reply to the charge-sheet denying all the charges, but on 31.3.2015, services of the petitioner were terminated. Petitioner-employee challenged the aforesaid termination order passed by the respondent-Federation before the Deputy Registrar, Cooperative Societies, who vide order dated 3.5.2005, stayed the termination order, whereafter petitioner- employee submitted his joining report on 6.5.2005, but fact remains that he was not allowed to join the duties. It further emerges from the pleadings adduced on record by the respective parties that eventually on 11.8.2005, order of termination dated 31.3.2005, passed by the respondent-Federation was quashed and set-aside by the Deputy Registrar, Cooperative Societies and respondent-Federation was directed to reinstate the petitioner and initiate fresh inquiry against the petitioner while affording due opportunity of being heard to him. Despite there being order setting aside termination order passed by the Deputy Registrar, respondent-Federation did not allow the petitioner to resume his services, rather preferred a review/revision under Section 94 of the HP State Cooperative Societies Act, 1968 before the Deputy Registrar, Cooperative Societies, Eastern Division, Shimla. The Deputy Registrar vide order dated 30.11.2006, dismissed the review/revision filed by respondent-Federation and ordered that the respondent-Federation shall act upon the order of Deputy Registrar Cooperative Societies in its letter and spirit to facilitate conduction of

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

proper Inquiry on each article of charge against the petitioner. Pursuant to aforesaid order passed by the Deputy Registrar, respondent-Federation instead of initiating fresh enquiry issued memorandum intimating the petitioner-employee therein that Board of Directors has tentatively decided to impose the punishment of dismissal from service on petitioner w.e.f. 31.3.2005. Along with aforesaid memorandum, respondent-Federation also supplied copy of inquiry report dated 15.3.2005 submitted by the inquiring Authority and called upon the petitioner employee to file representation, if any, against the proposed punishment. Vide communication dated 21.4.2007 (Annexure P-6), the petitioner-employee filed detailed reply specifically stating therein that since inquiry report dated 15.3.2005 has been already set-aside by the appellate Court, no punishment can be inflicted upon him on the basis of such report, however, fact remains that respondent-Federation ignoring the aforesaid reply passed order dated 16.5.2007 (Annexure P-7) dismissing the petitioner from service w.e.f. 16.5.2007.

3. Being aggrieved with the aforesaid order passed by the respondent-Federation, petitioner-employee approached the Additional Registrar (Administration) Cooperative Societies, Himachal Pradesh, by way of petition under Section 72 of the HP Cooperative Societies Act, 1968. Learned counsel for the respondent-Federation raised question with regard to maintainability of the petition under Section 72 of the Act, accordingly, on 6.11.2007, learned counsel for the petitioner prayed before the court below that petition having been filed by the petitioner-employee under Section 72 of the Act may be treated as an appeal under Rule 23 of the Service Rules of Federation. However, perusal of order dated 2.1.2008, passed by the Additional Registrar (Administration) Cooperative Societies reveals that petition having been filed by the petitioner under Section 72 of the Act, which was sought to be treated as appeal under Rule 23 of Service Rules of Federation was dismissed being not maintainable.

4. Being aggrieved with aforesaid order passed by the respondent-Federation, petitioner filed revision petition under Section 94 of the Act, before the Joint Secretary (Cooperation) to the Government of Himachal Pradesh, exercising power of State Government under HP Cooperative Societies Act, 1968. On 6.11.2008, Joint Secretary Cooperation after having heard learned counsel for the parties and perused averments contained in review/revision petition permitted the petitioner employee to withdraw the petition reserving liberty to him to approach the appropriate forum for appropriate remedy.

5. After passing of aforesaid order, petitioner-employee raised a demand before the appropriate Government under the Industrial Disputes Act. Since conciliation proceedings failed, appropriate Government made following reference under Section 10 of the Industrial Disputes Act, 1947, to the Industrial Tribunal cum Labour Court:

> "Whether termination of the services of Shri Ram Lal S/o Shri Mathu Ram Salesman w.e.f. 16.5.2007 by the Manager, The Solan District Co-operative Marketing and Consumer Federation Ltd. Saproon District Solan, HP without holding any enquiry and without complying with the orders dated 11.8.2005 passed by the Deputy Registrar, Co-operative Societies, Eastern Division, Shimla, H.P. is legal and justified? If not, what back-wages, seniority, service benefits and relief Shri Ram Lal S/o Shri Mathu Ram, Salesman is entitled to?"

6. Vide award dated 21.9.2011, the Tribunal decided the reference in favour of the petitioner and held him entitled for reinstatement alongwith seniority and continuity in service. Aforesaid award was laid challenge by the respondent-Federation in the High Court by way of CWP No. 11482 of 2011, titled *The Solan District Co-operative (Marketing & Consumer) Federation Ltd v. Ram Lal and ors*. Vide judgment dated 16.5.2012, this High Court while allowing the petition filed by respondent-Federation remanded the reference back to the Tribunal with direction to implead the Solan District Co-operative (Marketing & Consumer) Federation Ltd as party respondent and decide the matter afresh. Respondent-Federation being aggrieved with the aforesaid award filed LPA No. 337 of 2012 before the Division Bench of this Court, but said appeal was dismissed vide judgment dated 7.8.2018. In the aforesaid background, terms of reference, as reproduced herein above, came to be adjudicated afresh by the labour Court below vide award dated 6.4.2019 (Annexure P-1), whereby Tribunal though set-aside the termination of the petitioner w.e.f. 16.5.2007 and directed the respondent-Federation to re-instate the petitioner forthwith alongwith seniority and continuity in service, but held the petitioner-employee not entitled to any back wages. In the aforesaid background, both petitioner-employee and respondent-Federation have approached this Court by way of two separate CWPs, laying therein challenge to aforesaid impugned award. Petitioner-employee is

aggrieved on account of nonpayment of back wages, whereas respondent-Federation has approached this Court against reinstatement order passed by the Tribunal below.

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

8. Close scrutiny of material available on record reveals that petitioner employee at the first instance laid challenge to his termination order before the Deputy Registrar (Cooperative Societies), by way of an appeal under Section 72 of the HP Cooperative Societies Act, 1968, on the ground that he has been condemn unheard. Aforesaid authority after having carefully scanned the record arrived at a conclusion that inquiry officer in his report neither submitted the detailed finding on each article of charge nor disciplinary authority supplied the copy of the inquiry report to the delinquent official. Perusal of order dated 11.8.2005, passed by the aforesaid authority i.e. Deputy Registrar (Cooperative Societies) reveals that termination order dated 31.3.2005, passed by the respondent-Federation was quashed and set-aside with direction to the respondent-Federation to conduct fresh inquiry on each article of charge. Aforesaid order though was sought to be reviewed by the respondent-Federation by way of review petition, but perusal of order dated 31.11.2006, passed by the Deputy Registrar, clearly reveals that review petition was dismissed and respondent Federation was directed to complete the enquiry afresh within a period of three months after affording an opportunity of being heard to the petitioner-employee. However, after passing of aforesaid order, respondent Federation instead of constituting fresh inquiry issued memo dated 19.4.2017, intimating therein decision of the Board of Directors to impose punishment of dismissal from service on petitioner. Vide aforesaid memo, respondent Federation called upon the petitioner to file reply to the proposed penalty, but at no point of time, fresh inquiry ever came to be constituted in terms of directions issued by the Deputy Registrar in its order dated 11.8.2005. Aforesaid order was laid challenge by way of appeal before the Additional Registrar (Administration) Cooperative Societies by the petitioner-employee, but same came to be opposed on the ground of jurisdiction by the respondent-Federation. In those proceedings, respondent-Federation claimed that as per judgment rendered by the Hon'ble Supreme Court in case titled **Morinda Coop. Sugar Mills Ltd v. Morinda Coop Mills Workers Union,** (2006) 6 SCC 80, service matters of the employee do not lie under the provisions of Arbitration as the conditions of service of the workman employed by the society cannot be held to be a dispute touching the business of the society. In light of the aforesaid objection raised by the respondent-Federation, appeal filed by the petitioner-employee came to be dismissed being not maintainable under Section 72 of the Act. Secretary (Cooperation) Govt. of HP., having taken note of the specific bar contained under Rule 23 of Service Rules of Consumer Federation Ltd., Saproon District Solan, permitted the petitioner-employee to withdraw the review/revision petition having been filed by him against the order dated 2.1.2008, passed by the Additional Registrar (Administration).

9. Since appeal filed by the petitioner under Section 72 read with Rule 23 of the bye-laws of the society, laying therein challenge to his termination order passed by the respondent-Federation, was not held maintainable and he was permitted to withdraw the same with liberty to file appropriate proceedings before appropriate court of law, this Court finds no force in the submission made by the Mr. Sameer Thakur, learned counsel representing the respondent-Federation that petitioner is/was subsequently estopped from raising dispute under the Industrial Disputes Act, 1947. Since the petitioner was permitted to withdraw the appeal filed by him under Section 72 read with Rule 23 of the bye-laws of the Society by the Joint Secretary (Cooperation) to the Government of Himachal Pradesh, with liberty to file appropriate proceedings before appropriate court of law, subsequent dispute raised by him under the Industrial Disputes Act, 1947, cannot be said to be barred by the principle of *resjudicata*.

10. Though for the reasons stated herein above, this Court is of the definite view that in view of the liberty reserved to the petitioner to file appropriate proceedings before appropriate court of law, he was well within his rights to raise dispute under the Industrial Disputes Act, but even otherwise also, principle of *resjudicata* as enshrined under Section 11 of the Civil Procedure Code, cannot be made applicable in the present case because after passing of order dated 16.5.2007, whereby service of the petitioner was ordered to be terminated w.e.f. 16.5.2007, no findings, if any, ever came to be rendered on record on merits qua the legality and validity of the aforesaid order by any of the authority prescribed under the HP Cooperative Societies Act, rather appeal having been filed by the petitioner-employee, laying therein challenge to his termination order came to be dismissed on the ground of maintainability. Leaving everything aside, aforesaid order passed by the Joint Commissioner (Cooperation), permitting the petitioner-employee to avail appropriate remedy in appropriate forum, never came to be laid challenge by the respondent-Federation.

11. It is not in dispute that after failure of conciliation proceedings, appropriate authority framed terms of reference under Section 10 of the Industrial Disputes Act and sent the same to the Industrial Tribunal for adjudication. Respondent Federation subjected itself to the jurisdiction of labour Court cum Industrial Tribunal and contested the claim of the petitioner. Since the industrial Tribunal failed to adjudicate the objections raised by the respondent-Federation, supported by written submissions filed on record, CWP bearing No. 11482 of 2011 having been filed by the respondent-Federation, laying therein challenge to award dated 21.9.2011, came to be allowed. Vide judgment dated 16.5.2012, this Court remanded the case back to the Tribunal with direction to decide the case afresh.

12. Being aggrieved with aforesaid order passed by the Single Bench of this Court, respondent filed LPA, which was also dismissed. Careful perusal of averments contained in aforesaid CWP, record whereof has been summoned by this Court, reveals that in those proceedings, specific objection with regard to jurisdiction of Conciliation Officer/Industrial Tribunal cum Labour Court was raised. In those proceedings, respondent-Federation claimed that only course available for assailing the validity of order dated 2.1.2008 passed by the Deputy Registrar was by way of seeking expeditious remedy under Article 226 of the Constitution of India. Besides above, respondent-Federation also claimed before this Court in those proceedings that once petitioner opted to file proceedings under various provisions of HP Cooperative Societies Act and having legitimately lost in those proceedings, could not have resorted to the provisions contained in the Industrial Disputes Act. However, careful perusal of judgment dated 16.5.2012, passed by the Single Judge of this Court in CWP No. 11482 of 2011 clearly reveals that such aforesaid pleas raised on behalf of the respondent was not accepted by the court, rather court having taken note of the fact that all the objections raised by the respondent-Federation have not been adjudicated by the Tribunal remanded the case back. Since ground with regard to jurisdiction of the Industrial Tribunal was negated by the learned Single Judge, matter was taken to appeal by way of LPA as referred above, but same was also dismissed and as such, respondent-Federation now at this stage cannot be allowed to raise these questions again, which otherwise have attained finality.

13. Though in view of the aforesaid detailed discussion, this Court is of the definite view that petitioner employee was well within his right to raise industrial dispute in terms of provisions contained under the Disputes Act after having availed remedies available to him, but even otherwise, Hon'ble Apex Court in ***Morinda Coop Sugar Mills Ltd's*** *supra,* has held that dispute relating to the change in service conditions of a workman is not covered in the definition of a dispute regarding the business of the society and therefore, consequent to the withdrawal of proceedings before the Registrar and upon being granted liberty to approach appropriate forum, the petitioner employee had option to approach the labour court. Relevant paras of the judgment supra are as follows:

> 9.This Court in O.N. Bhatnagar v. Smt. Rukibai Narsindas and Others (AIR 1982 SC 1097) observed inter alia as follows:
>
> > "In the present case the society is a tenant co-partnership type housing society formed with the object of providing residential accommodation to its co-partner tenant members. Now, the nature of business which a society carries on has necessarily to be ascertained from the object for which the society is constituted, and it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of the society formed with the object of providing residential accommodation to its members, which normally is its business, to ensure that the flats are in occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in an unauthorized occupation, as it is the concern of the member, who lets it out to another under an agreement of leave and licence and wants to secure possession of the premises for his own use after the termination of the licence. It must, therefore, follow that a claim by the society together with such member for ejectment of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence, is a

> dispute falling with the purview of Section 91(1) of the Act." (Underlined for emphasis)

10.In Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain (1969 (1) SCR 887) it was held as follows :

> "Five kinds of disputes are mentioned in sub- section:
>
> First, disputes touching the constitution of a society: secondly, disputes touching election of the office bearers of a society: thirdly, disputes touching the conduct of general meeting of a society: fourthly, disputes touching the management of a society: and fifthly disputes touching the business of a society. It is clear that the word " business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorized to enter into under the Act and the Rules and its bye-laws."

11. In Co-operative Central Bank Ltd. and others etc. v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad and others etc. [1969 (2) SCC 43] it was held that alteration of the conditions of the service of the workman would not be covered by the expression "touching the business of the society". It was held inter alia as follows :

> "7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred to decision to the Registrar under Section 61 of the Act. The dispute related to alterations of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society: but the meaning given to the expression "touching the business of the society". In our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be sad to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society." (Underlined for emphasis)

14. Moreover, by now, it is well settled that labour Court cannot travel beyond the terms of reference. In the case at hand, Tribunal was specifically called upon to determine "*whether termination of service of the petitioner w.e.f. 16.5.2007 by the Manager, Solan District Federation without holding any inquiry and without complying with the order dated 11.8.2005, passed by the Deputy Registrar Cooperative Societies, is legal and justified"* and as such, it had no scope, whatsoever to go into the question of entitlement and competence, if any, of the petitioner to raise the industrial dispute under the Industrial Disputes Act after having availed remedy, if any, available to him under HP Cooperative Societies Act.

15. Hon'ble Apex Court in case titled ***Oshiar Prasad and Ors v. Employers in Relation to Management of Sudamdih Coal Washery of M/s Bharat coking coal limited, Dhanbad, Jharkhand***, (2015) 4 SCC 71, has held that Tribunal while answering reference has to confine its inquiry to the question referred and has no jurisdiction to travel beyond the question or/and the terms of the reference. Relevent paras of the aforesaid judgment are reproduced herein below:-

> 18. One of the questions which fell for consideration by this Court in Delhi Cloth and General Mills Co. Ltd. vs. The Workmen and Others (AIR 1967 SC 469) was that what are the powers of the appropriate Government while making a reference and the scope and jurisdiction of Industrial Tribunal under Section 10 of the Act.
>
> 19. Justice Mitter, speaking for the Bench, held as under:
>
> > "(8) .....Under S. 10(1)(d) of the Act, it is open to the appropriate Government when it is of opinion that any industrial dispute exists to make an order in writing referring "the dispute or any matter appearing to be connected with, or relevant to the dispute,.....to a Tribunal for adjudication" under s. 10(4)
> >
> > > "10. (4) where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto."
> >
> > (9) From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary : "happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated :"
> >
> > "Something incidental to a dispute" must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct to it....."
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> 20. The same issue came up for consideration before three Judge Bench in a case reported in Pottery Mazdoor Panchayat vs. Perfect Pottery Co. Ltd. and Another, (1979) 3 SCC 762. Justice Y.V. Chandrachud - the learned Chief Justice speaking for the Court laid down the following proposition of law:
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> > "10. Two questions were argued before the High Court: Firstly, whether the tribunals had jurisdiction to question the propriety or justification of the closure and secondly, whether they had jurisdiction to go into the question of retrenchment compensation. The High Court has held on the first question that the jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters incidental thereto and that the Tribunal cannot go beyond the terms

> of the reference made to it. On the second question the High Court has accepted the respondent's contention that the question of retrenchment compensation has to be decided under Section 33-C(2) of the Central Act.
>
> 11. Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of the business was proper and justified. In other words, by the references, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references [pic]being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management."

21. The abovesaid principle of law has been consistently reiterated in M/s Firestone Tyre & Rubber Co. of India (P) Ltd. vs. The Workmen Empoloyed, represented by Firestone Tyre employees' Union AIR 1981 SC 1626, National Engineering Industries Ltd. vs. State of Rajasthan & Ors., (2000) 1 SCC 371, Mukand Ltd. vs. Mukand Staff & Officers' Association, (2004) 10 SCC 460 and State Bank of Bikaner & Jaipur vs. Om Prakash Sharma, (2006) 5 SCC 123.

22. It is thus clear that the appropriate Government is empowered to make a reference under Section 10 of the Act only when "Industrial dispute exists" or "is apprehended between the parties". Similarly, it is also clear that the Tribunal while answering the reference has to confine its inquiry to the question(s) referred and has no jurisdiction to travel beyond the question(s) or/and the terms of the reference while answering the reference. A fortiori, no inquiry can be made on those questions, which are not specifically referred to the Tribunal while answering the reference.

23. Coming now to the facts of this case, it is an admitted case that the services of the appellants and those at whose instance the reference was made were terminated long back prior to making of the reference. These workers were, therefore, not in the services of either Contractor or/and BCCL on the date of making the reference in question. Therefore, there was no industrial dispute that "existed" or "apprehended" in relation to appellants' absorption in the services of the BCCL on the date of making the reference.

24. Indeed a dispute regarding the appellants' absorption was capable of being referred to in reference for adjudication, had the appellants been in the services of Contractor or/and BCCL. But as said above, since the appellants' services were discontinued or/and retrenched (whether rightly or wrongly) long back, the question of their absorption or regularization in the services of BCCL, as claimed by them, did not arise and nor this issue could have been gone into on its merits for the reason that it was not legally possible to give any direction to absorb/regularize the appellants so long as they were not in the employment.

25. It is a settled principle of law that absorption and regularization in the service can be claimed or/and granted only when the contract of employment subsists and is in force inter se employee

> and employer. Once it comes to an end either by efflux of time or as per the terms of the Contract of employment or by its termination by the employer, then in such event, the relationship of employee and employer comes to an end and no longer subsists except for the limited purpose to examine the legality and correctness of its termination.
>
> 26. In our considered opinion, the only industrial dispute, which existed for being referred to the Industrial Tribunal for adjudication was in relation to termination of appellants' employment and - whether it was legal or not? It is an admitted fact that it was not referred to the Tribunal and, therefore, it attained finality against the appellants.
>
> 27. In our considered opinion, therefore, the reference, even if made to examine the issue of absorption of the appellants in the services of BCCL, the same was misconceived."
>
> ***Also see judgment dated 20.5.2009 passed by this Court in CWP No. 9659 of 2011***

16. Since the Industrial Tribunal could not have gone beyond the terms of reference as has been taken note herein above, Mr. Rohit Sharma, learned counsel for the petitioner-employee is right in contending that there was no occasion for the Tribunal to go into the question "whether termination of the petitioner on account of disciplinary proceedings, can be held to be 'retrenchment' as defined under Section 2(OO) of the Act or not". Mr. Sameer Thakur, vehemently argued that since termination of the petitioner-employee was an outcome of disciplinary proceedings initiated against him, such termination of service would not amount to retrenchment as defined under Section 2 (OO) of the Industrial Disputes Act and as such, there was no necessarily to comply with provisions of Rule 25 (F) of the Act, but since aforesaid question/proposition was never referred to the Tribunal for adjudication, it rightly not ventured to answer the aforesaid question raised by the respondent Federation. By way of terms of reference, Tribunal was under obligation to answer "whether termination of the petitioner employee w.e.f. 16.5.2007, by the Manager, District Consumer Federation Ltd. Saproon District Solan, H.P., without holding enquiry and without complying with order dated 11.5.2005 passed by the Deputy Registrar Cooperative Societies is legal and justified." Careful perusal of terms of reference made by the appropriate Government under Section 10 of the Act, nowhere suggests that Industrial Tribunal had an occasion or scope to go into the question "whether termination of the petitioner would amount to retrenchment in terms of Section 2(OO) of the Act or not."

17. As far as the question with regard to grant of back wages to the petitioner in the instant case is concerned, this Court is of the view that once Tribunal found the petitioner employee entitled for reinstatement alongwith seniority and continuity in service, it ought to have held the petitioner entitled for back wages. Needless to say, before holding the petitioner entitled for reinstatement, Tribunal arrived at a definite conclusion that no fair and reasonable inquiry was conducted by the respondent-Federation while holding the petitioner-employee guilty of misappropriation of funds of the society. FIR was also lodged against the petitioner and it is not in dispute that the petitioner stands absolved in two criminal cases initiated against him Ex.P23 and Ext.P24. Interestingly, one person namely Om Prakash, who was also charge-sheeted for the same mis-conduct was allowed to continue in service, whereas petitioner despite having repeated orders passed by the Deputy Registrar Cooperative Societies in his favour was not allowed to join. Despite there being specific direction issued by the Deputy Registrar Cooperative Societies to hold fresh inquiry, no enquiry worth the name was conducted, rather respondent Federation on the basis of same inquiry report, which was virtually set-aside by the Deputy Registrar while passing order dated 2.1.2008, imposed penalty of dismissal upon the petitioner. Though Tribunal below in the totality of material available before it proceeded to hold that respondent acted in gross violation of the statutory provisions and principle of natural justice while imposing the punishment of dismissal, but yet failed to award back wages while ordering reinstatement of the petitioner. Petitioner was out of job for no fault of him, rather he despite having specific orders in his favour passed by the Deputy Registrar was not allowed to join his duties by the respondent-Federation and as such, Tribunal held him entitled for reinstatement with continuity and seniority in service. While answering issue No.2, Tribunal below has fallen in grave error, for no specific reason has been assigned while denying back wages to the petitioner. There is no material worth the name available on record suggestive of the fact that respondent-Federation was able to demonstrate on record any adversity or hindrance in the grant of aforesaid relief. Once Tribunal while answering reference arrived at

the conclusion that action of the respondent-Federation in terminating the service of the petitioner is bad and dehors the rules, natural consequence was to order for reengagement/reinstatement of the petitioner from date of termination alongwith back wages. Otherwise also Section 11 A of the Industrial Disputes Act empowers the Industrial Tribunal to award consequential relief, if any. Section 11-A of the Act is reproduced as under:-

> "Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, ...16... Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its awards, set aside the order of discharge of dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge of dismissal as the circumstances of the case may require." "Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter".

18. The Hon'ble Apex Court in case titled ***Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324*** has held that reinstatement entitles an employee to claim full back wages and denial of back wages would amount to indirectly punishing the employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that the employee was gainfully employed during the intervening period.

19. Hon'ble Apex Court in case bearing Civil Appeal No. 6188 of 2019, titled ***Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors,*** *decided on 21.8.2019***,** has also held as under:-

> "9. Several judgments of this Court have laid down the principles pertaining to the grant of back wages. In Hindustan Tin Works, a three-judge Bench of this Court adjudicated on the criterion for grant of back-wages where a termination has been held to be illegal. The appellant in that case was a private limited company with an industrial unit. The Labour Court held that the retrenchment of employees by the appellant was not bona fide and awarded full back wages to the employees, which was challenged before the Supreme Court. This Court made the following observations:
>
> "9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer.
>
> Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying.

If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness.

That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages..."

(Emphasis supplied)

The Court further clarified that while the payment of full back wages would be the normal rule, there can be a departure from it where necessary circumstances have been established:

"11. In the very nature of things there cannot be a straightjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner.

The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (see Susannah Sharp v. Wakefield [(1891) AC 173, 179])." Taking note of the financial problems of the appellant company, the Court granted compensation to the extent of 75% of back wages. The principle laid down in Hindustan Tin Works has been followed by other decisions of this Court.4

10. In Surendra Kumar Verma v. Central Government Industrial Tribunal-cum- Labour Court5, the termination of the services of the appellants was held to be in contravention of Section 25-F of the Industrial Disputes Act by the Labour Court, but the appellants were denied the payment of back wages. In appeal, a three-judge bench of this Court observed:

"6... Plain common-sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders.

The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may

deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

11. In Deepali Surwase, the appellant had been employed as a teacher in a primary school run by a trust. The services of the appellant had been terminated by the management of the school pursuant to an ex-parte inquiry proceeding. The School Tribunal quashed the termination of the appellant"s services and issued a direction for the grant of full back wages. In appeal, the High Court affirmed the view of the Tribunal that the termination was illegal, but set aside the direction for grant of back wages. In appeal, a two-judge Bench of this Court laid down the following principles:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money...The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages.

If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emolument."

(Emphasis supplied)

The Court laid down the following principles to govern the payment of back wages:

"38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular

fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same.

The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L & S) 53] ."

12. In the present case the first inquiry resulted in a report which came to the conclusion that the charge of misconduct was not substantiated. Upon finding that the convening of a fresh inquiry without recording reasons was contrary to law, the High Court would have ordinarily granted liberty to the Municipal Council to take a fresh decision after due notice to the appellant. Such a course of action was, however, rendered impracticable by supervening events. The writ petition instituted by the appellant before the High Court in 1996 remained pending for nearly eighteen

> years. The appellant had been removed from service on 29 June 1996. Considering the lapse of time, reopening the proceedings would not be expedient in the interest of justice particularly when the appellant had, in the meantime, attained the age of superannuation in 2005. Relegating the appellant to a protracted course of action by restoring the proceedings before the disciplinary authority would also not be fair and proper after a lapse of nearly fourteen years since his retirement.
>
> 13. Having due regard to the principles which have been enunciated in Deepali Surwase by this Court, the High Court was not, in our view, justified in denying the back-wages to the appellant altogether. Bearing in mind the circumstances which have been noted above, a lumpsum compensation should be directed to be paid."

20. In the aforesaid judgment, it has been clearly held that in the cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule, but such rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court must take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found/proved against the employee/workman, the financial condition of the employer and similar other factors. An employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. In the case at hand, there is nothing on record suggestive of the fact that respondent-Federation was able to prove that the petitioner-employee was gainfully employed and was getting same and similar emoluments during the period of termination and as such, Tribunal below ought to have awarded back wages while holding the petitioner entitled for reinstatement alongwith continuity and seniority in service.

21. Consequently, in view of the detailed discussion made herein above as well as law relied upon, CWP No. 1107 of 2019 having been filed by the respondent-Federation is dismissed being devoid of any merits, whereas CWP No. 2754 of 2019 having been filed by the petitioner-employee is allowed and petitioner-employee is held entitled to back wages from the date of his termination from service. Pending application(s), if any, also stand disposed of accordingly.

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

Dharam Dutt Sehgal .....Petitioner

Versus

State of Himachal Pradesh and Ors. .....Respondents

CWPOA No. 4998 of 2019
Decided on: 18.8.2020

Constitution of India, 1950- Articles 14 & 226- Recovery of salary paid in excess- Challenged thereto by way of writ- Held, petitioner never misrepresented the department with a view to have financial benefits- Principal of the School himself erroneously allowed the pay scale on basis of directions given in judgment of High Court- No undertaking was taken at the time of grant of pay scale that payment in excess if any would be required to be refunded by him- Petitioner is a class-III employee- Recovery notice is bad in eyes of law and set aside. (Para 7 to 10)

Cases referred:

State of Punjab vs. Rafiq Masih, (2015)14 Supreme Court Cases 334;

Whether approved for reporting? [21] Yes.

For the Petitioner	**:**	Mr. Rajinder Dogra and Mr. Rajesh Verma, Advocates.
For the Respondents	**:**	Mr. Ashok Sharma, Advocate General, with Mr. Sudhir Bhatnagar, Additional Advocate General.

Sandeep Sharma, Judge (oral):

Through Video Conferencing

Petitioner though was initially appointed as a Music Teacher (C&V) under the Para Teacher Policy on 5.6.2004 on fixed honorarium of Rs. 4,000/- p.m., which later on came to be enhanced from time to time, but his services were subsequently regularized on 3.1.2015 as Music Teacher in terms of the policy decision taken by the respondent to regularize the services of all teachers appointed under the Para Teacher Policy, 2003 (Annexure A-3). Prior to his regularization, petitioner till 31.12.2006 was in receipt of honorarium to the tune of Rs. 4000/-, which was subsequently enhanced to sum of Rs. 7500/-p.m. After 31.3.2010, honorarium was further enhanced to Rs. 13,500 per month as is evident from the communication dated 29.3.2010 (Annexure P-5). After regularization of the petitioner as Music Teacher, respondent department initiated recovery proceedings against the petitioner on account of excess payment allegedly made to him w.e.f. 1.1.2006 to 31.12.2014.

2. Perusal of communication dated 24.3.2015 issued by the Principal, Government Girls Senior Secondary School, Nahan as well as recovery schedule annexed therewith reveals that sum of Rs. 3,46,830/- was paid to the petitioner in excess and as such, vide aforesaid communication, Principal of the aforesaid school intimated the petitioner with regard to recovery proposed to be effected from his salary. Vide aforesaid communication, Principal apprised the petitioner that recovery of the aforesaid amount will be effected from his salary in fifty installments @ Rs.7,000/- p.m. In the aforesaid background, being aggrieved with issuance of aforesaid recovery notice, petitioner approached the Erstwhile HP State Administrative Tribunal by way of OA bearing No. 317 of 2015, praying therein for following main relief:-

> ***"(i) That the impugned recovery notice Annexure A-4 may kindly be quashed and set aside and the respondents may be directed to pay the unpaid amount of honorarium amounting to Rs. 1, 27, 500/- alongwith interest @ 12% per annum from due date till realization."***

After abolition of the Tribunal, matter now stands transferred to this Court for adjudication.

2. Having heard learned counsel for the parties and perused material available on record, this Court finds that there is no dispute *inter-se* parties that petitioner was initially appointed as Music Teacher (C&V) under the Para Teacher Policy on the fixed honorarium of Rs. 4,000/-, which subsequently came to be enhanced from time to time. Similarly, it is also not in dispute that the petitioner till his regularization on 3.1.2015 continued to work uninterruptedly without any complaint.

3. Respondents with a view to refute the claim as put forth by the petitioner in the petition at hand have stated that as per notification dated 23.3.1989, Music Teacher was to be given scale of Rs. 1200-2100, which was further revised to Rs. 4020-6200 w.e.f. 1.1.1996 and Rs. 5910-20,200/- (pay band) + Rs. 2400 (grade pay) and as such, petitioner was entitled to salary of Rs. 5910+2400 instead of Rs. 10300 + 3200, hence payment made in excess is recoverable from the petitioner. While admitting that petitioner was appointed as Music Teacher under Para Teacher Policy on fixed honorarium of Rs. 4000/- P.M., which was further enhanced from time to time, respondents have further submitted that in compliance to directions/judgment dated 7.11.2012, issued by this Court in ***CWP No. 4954 of 2012, Madan Lal and Ors. v. State of HP***, whereby direction was issued to give similar pay to the Para Teachers as was being paid to the contract teachers w.e.f. 1.4.2007, Principal of the concerned School erroneously allowed the scale, which was applicable to other sub categories of C&V category and as such, amount paid in excess of due and admissible pay scale has been sought to be recovered.

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

4. However, having perused record, this Court finds that aforesaid plea having been taken by the respondent is not tenable, rather same is contrary to the record. Office order dated 29.3.2010 (Annexure P-5) issued by the Director of Higher Education, Himachal Pradesh itself suggests that petitioner from the date of his initial engagement till his regularization was being paid fixed honorarium and grant of pay scale, if any, pursuant to direction dated 7.11.2012, issued by this Court in CWP No. 494 of 2012, before regularization of the petitioner, was not on his representation, rather such benefit came to be accorded to him pursuant to aforesaid direction issued by this Court in CWP No. 4954 of 2012. Respondents have themselves admitted that Principal of the concerned school allowed the scale, which was applicable to other sub-categories of C&V category to the applicant. Though this Court having taken note of the admission of the respondents that Principal of the concerned school allowed the scale in question to the petitioner, needs not go into the question whether petitioner was entitled to pay scale of Rs. 10300 + 3200/- or not, but even otherwise perusal of Annexure A-1 i.e. policy regarding Hiring/Engagement of Para Teachers (Lecturer School Cadre), Para Teacher (TGTs) and Para Teachers (C&V) reveals that petitioner falls under the purview of C&V category of teachers, not under the sub-category of any teachers as has been stated by the respondents in their reply. No material worth credence has been made available on record suggestive of the fact that appointment of the petitioner was not made under C&V (Classical and vernacular) teachers and as such, he is entitled to pay scale/pay band of Rs. 10300+3200 and thereafter corresponding enhanced grade pay i.e. Rs.10300+4400/-

5. Leaving everything aside, no material has been adduced on record by the respondents to demonstrate that till his regularization, petitioner was not in receipt of fixed amount of honorarium, which was enhanced from Rs. 7500 to 13500 w.e.f. 31.12.2014. Petitioner in his petition has claimed that under Para Teacher Policy, C&V teachers were being paid honorarium to the tune of Rs. 4000/- per month till 31.12.2006 and thereafter, same was enhanced to Rs. 7500 till 31.3.2020., which was further enhanced to Rs. 13500/- pm till 31.12.2014, but respondents did not pay any enhanced amount to him and as such, he is also entitled to sum of Rs. 1,27,500 w.e.f. 1.1.2006. to 3.3.2010 on account of less honorarium paid to him qua the aforesaid period., but since aforesaid claim of the petitioner is hopelessly time barred, this Court is not inclined to look into the aforesaid aspect of the matter in the instant proceedings.

6. However, having taken note of the fact that at no point of time, petitioner with a view to have financial benefit misrepresented to the department, order of recovery issued by the respondent after regularization of the petitioner for the amount allegedly paid in excess is not sustainable in the eye of law. Though there is no material available on record suggestive of the fact that before regularization, petitioner was being given regular pay-scale as has been claimed by the respondents in their reply, but even otherwise as per own admission of the respondents, Principal of the concerned School himself erroneously allowed the scale, which was otherwise applicable to the other category of C&V categories. Since there is/was no fault, if any, of the petitioner as far as grant of pay scale of Rs. 10300 +3200/- is concerned, he cannot be compelled to repay the amount after his regularization. Recovery schedule drawn by the Principal suggests that though w.e.f. 1.1.2006 to 31.3.2010, petitioner was entitled to have honorarium of Rs. 4,000/- p.m., but he was paid Rs. 5,000 w.e.f. 1.4.2010 to 31.12.2014. Similarly, petitioner was entitled to have honorarium of Rs. 1410-2460-1500-2640, but he was paid Rs. 10300+3200 i.e. 13500/- but such calculation rendered on record by the Principal of the concerned School is contrary to the record because as per record, petitioner was initially kept on fixed honorarium of Rs. 4,000/-, which was enhanced to sum of Rs. 7500 w.e.f. 31.12.2006 till 31.3.2010. After 31.3.2010, aforesaid sum of Rs. 7500 was further enhanced to Rs. 13500 till 31.12.2014.

7. The Hon'ble Apex Court in case titled ***State of Punjab vs. Rafiq Masih***, ***(2015)14 Supreme Court Cases 334***, has categorically held that recovery from the retired employees or employees, who are due to retire is impermissible, especially when there was no misrepresentation, if any, on the part of the person concerned at the time of claiming benefit in his/her favour. In the case at hand, as has been taken note herein above, at no point of time, petitioner represented or mis-represented for the grant of pay scale of Rs. 10300+3200, rather such benefit was extended to him by the Principal of school concerned in terms of directions contained in judgment dated 7.11.2012, passed by this Court in ***Madan Lal's case*** *supra*.

8. Hon'ble Apex Court in subsequent judgment dated 29.7.2016 passed in case titled ***High Court of Punjab and Haryana and another versus Jagdev Singh,*** has further clarified that principle enunciated in Rafiq Masih's Case that recovery from the retired employees or employees, who are due to retire is impermissible cannot be made applicable to the situation where the officer to whom payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be

refunded. In the aforesaid judgment Hon'ble Apex Court has held that if the officer has furnished an undertaking while opting for the revised pay scale, he/she is bound by the undertaking given by him/her. At this stage, it would be relevant to reproduce paras No. 9 to 11 of the aforesaid judgment, which read as under:-

> "9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.
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> 10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc1. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:
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> > "(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
> >
> > (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
> >
> > (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
> >
> > (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
> >
> > (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." (emphasis supplied).
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> 11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking".

9. Careful perusal of aforesaid judgment rendered by the Hon'ble Apex Court clearly suggests that principle laid down by the Hon'ble Apex Court in ***Rafiq Masih's case*** supra that recovery from employee belonging to Class-II and Class-IV service (or Group C and Group D service) would be impermissible in law, still holds good. In the subsequent judgment rendered by the Hon'ble Apex Court in ***High Court of Punjab and Haryana v. Jagdev Singh's*** case (supra), it has been only clarified that recovery from those retired employees or who are due to retire within one year, of the order of recovery shall be permissible who had given undertaking at the time of taking benefit that any payment if found in excess would be liable to adjusted. In the present case, it is not in dispute that petitioner, who is a Class-III employee had not given any undertaking at the time of grant of pay scale of Rs. 10300 +3200/- in his favour that any payment, if found to be in excess would be required to be refunded and as such, recovery notice Annexure A-4 is not sustainable.

10. Consequently, in view of the detailed discussion made herein above as well as law relied upon, present petition is allowed and recovery notice dated 24.3.2015, (Annexure A-4) is set-aside. Amount, if any, received in terms of Annexure A-4 may be refunded forthwith. Accordingly, present petition is disposed of so also pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

1. CWP No. 138 of 2020

Robin Kumar and another ...Petitioners.

Versus

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

2. CWPOA No. 3601 of 2019

Anshul Thakur and others ...Petitioners

Versus

H.P. State Electricity Board Ltd. And others

..Respondents.

3. CWPOA No. 3633 of 2019

Pankesh ...Petitioner

Versus

H.P.State Electricity Board Ltd. And another

...Respondents.

4. CWPOA No. 6534 of 2019

Vijay Kumar and another ....Petitioners

Versus

H.P.State Electricity Board Ltd. And another

...Respondents.

5. CWPOA No. 6252 of 2020

Ramesh Chand ...Petitioner

Versus

H.P.Staff Selection Commission ...Respondent

CWP No. 138 of 2020 and other connected matters.
Reserved on: 06.08.2020
Decided on:14th August, 2020

Constitution of India, 1950- Articles 14, 16 & 226- Selection to public office- Eligibility criteria- Role of Court and scope of its interference in exercise of writ jurisdiction- Held, employer is best suited to decide requirements, a candidate must possess- He may prescribe additional or desirable qualifications including grant of preference- Court cannot lay down conditions of eligibility nor delve into issue with regard to desirable qualifications being on par with essential eligibility by an interpretative rewriting of advertisement. (Para 12)

Constitution of India, 1950- Articles 14 & 16 – Selection to post of Junior Engineer- Diploma Course in Engineering vis-à-vis Degree in Engineering- Inter-se distinction- Held, diploma in engineering is aimed to equip the candidates who can cater to practical requirements of engineering with emphasis on practical works- Graduates in engineering are taught with syllabus which provides theoretical training in field of engineering with low emphasis on its practical part- These two courses cater to different situations - Degree in engineering cannot be viewed as higher qualification vis-à-vis diploma in that field. (Para 16 & 17)

Junior Engineer (Electrical)/ Junior Engineer (IT) Class-III (Non-gazetted) Recruitment and Promotion Rules, 2006 (Rules)- Rules 7 & 10- Rules providing for diploma course in the requisite subject as one of eligibility conditions- Whether candidates holding degree in that subject are also eligible?- Held, normal rule is that candidate with higher qualification is deemed to be fulfilling the lower qualification prescribed for the post but such higher qualification has to be in the same channel- Degree in engineering is not higher qualification in the channel of diploma course in required subject. (Para 40)

Cases referred:

Maharashtra Public Service Commission, through its Secretary vs. Sandeep Shriram Warade and others 2019 (6) SCC 362;
Jyoti K.K. and others vs. Kerala Public Service Commission and others (2010) 15 SCC 596;
State of Punjab and others vs. Anita and others (2015) 2 SCC 170;
Zahoor Ahmad Rather and others vs. Sheikh Imtiyaz Ahmad and others (2019) 2 SCC 404;
Deepak Singh and others vs. State of U.P. and others 2019 (7) ADJ 453;
State of Punjab and others vs. Anita and others (2015)2 SCC 170;
Parvaiz Ahmad Parry vs. State of Jammu and Kashmir and others (2015) 17 SCC 709;
Zonal Manager, Bank of India, Zonal Office, Kochi and others vs. Aarya K. Babu and another (2019) 8 SCC 587;
Himachal Pradesh Staff Selection Commission and others vs. Pawan Thakur 2019 (3) Shim. L.C. 1676;
State of Punjab vs. Anita [(2015) 2 SCC 170;
Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad [(2019) 2 SCC 404;
Jyoti K.K. vs. Kerala Public Service Commission {(2010) 15 SCC 596;
State of Punjab vs. Anita {(2015) 2 SCC 170;
Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad {(2019) 2 SCC 404;
Ajith K. and others vs. Aneesh K. S. and others JT 2019 (9) SC 74;
State of Uttarakhand and others vs. Deep Chandra Tewari and another (2013) 15 SCC 557;

Whether approved for reporting? [22] Yes

For the Petitioner(s): Mr. K.D. Shreedhar, Sr. Advocate, with Mr. Kush Sharma and Ms. Tanvi Chauhan, Advocate, for the petitioners in CWP No. 138 of 2020.

Mr. Nimish Gupta, Advocate, for the petitioner(s) in CWPOA Nos. 3601 and 3633 of 2019.

Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate, for the petitioner,in CWPOA No. 6534 of 2019.

Mr. Bhuvnesh Sharma, Advocate, for the petitioner in CWPOA No. 6252 of 2020.

For the Respondents: Mr. R.P. Singh and Ms. Seema Sharma, Deputy Advocate Generals, for respondent No.1/State.

Mr. Ashok Sharma, Senior Advocate with Mr. Tara Singh Chauhan, Advocate, for respondent No.2-HPSEBL.

Mr. Sanjeev Kumar, Advocate, for respondent No.3 in CWP No.138/2020, CWPOA No. 6534 of 2019 and CWPOA No. 6252 of 2020.

Mr. Angrez Kapoor, Advocate, for respondent No.2 in CWPOA No. 3601 of 2019 and CWPOA No. 3633 of 2019.

Mr. Rakesh Kumar Sharma, Advocate, for respondents No.3 to 7 in CWPOA No. 3601 of 2019.

Justice Tarlok Singh Chauhan, J.

Whether a degree in Electrical Engineering/Electrical & Electronics Engineering is technically higher qualification than a diploma in the aforesaid subject and, if so, are the degree holders eligible for the appointment to the post of Junior Engineer (Electrical), is the core issue that arises for consideration in these petitions.

2. CWP No. 138 of 2020, CWPOA No. 3601 of 2019 and CWPOA No. 3633 of 2019 have been filed by the degree-holder petitioners (for short 'degree-holder petitioners) claiming the right of consideration, whereas CWPOA No. 6534 of 2019 and CWPOA No. 6252 of 2020 have been filed by the diploma-holder petitioners (for short diploma-holder petitioners) opposing the claim of the degree-holders.

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

3. On 27.06.2018, the Himachal Pradesh Staff Selection Commission on the requisition sent by the Himachal Pradesh State Electricity Board Ltd., advertised 222 posts of Junior Engineer (Electrical). The petitioners applied for the post and after qualifying the written examination were called for verification of the documents but the final result was not declared, hence these petitions.

4. It is urged on behalf of the degree holder petitioners that even though the qualification possessed by them is not stipulated in the rules or in the advertisement as the only minimum qualification has been prescribed, however being possessed of technical qualification higher than the prescribed qualification, they have every right to be considered for appointment.

5. On the other hand, the diploma holder petitioners opposed the consideration of the candidature of the degree holder petitioners on the ground that the qualifications possessed by these petitioners is neither higher nor can be considered in teeth of the recruitment rules as also on the basis of the advertisement issued by the Himachal Pradesh Staff Selection Commission.

6. The Employer i.e. Himachal Pradesh State Electricity Board Ltd. (for short 'HPSEBL') has adopted a very guarded stand as is evident from para 13 of the reply which reads as under:

"13. That the para No.13 of the petition pertaining to record is admitted and contrary to record is denied specifically. It is further submitted with utmost respect that as per the provisions of R&P regulations the minimum essential qualification provided for making recruitment to the post of Junior Engineer (Elect.) is "matriculation with Diploma in Electrical/ Electronics/Electronics and Communication/ Computer Science from the recognized Institution/ Board/University duly recognized by the Central or State Government". Accordingly the replying respondent has requested respondent No.3 being the recruiting agency for conducting the process of selection in accordance with law taking into account the aforesaid provisions of the R&P Regulations and to sponsor the name of eligible successful candidates for considering their appointment to the post of Junior Engineer (Elect.) and respondent No.3 has to initiate the selection process strictly in accordance with the provisions of the R&P Regulations, which have also been incorporated in the advertisement issued for that purpose and the petitioners are fully aware of this essential requirements and which has been notified in the advertisement as is published by respondent No.3 and respondent No.3 could not travel beyond the provisions of the R&P as framed and notified by the replying respondent as such the petition of the petitioners is premature and same is liable to be dismissed."

7. Similar averments have been made in para-5 of the preliminary submissions.

8. The respondent-Staff Selection Commission, which has issued the advertisement and has conducted the selection takes exception to the consideration of the graduate degree holder petitioners as being not eligible and it is because of such exception that the selection has not been taken to its logical end.

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

10. Rules 7 & 10 of the Junior Engineer (Electrical)/Junior Engineer (IT) Class-III (NonGazette) Recruitment and Promotion Rules, 2006 lays down the minimum educational and other qualification required for direct recruits J.Es and the same is as under:

7. Amended Provision
Essential: Minimum matriculation with diploma in Electrical Engineering/ Electrical & Electronics Engineering from a recognized Institution/ Board/University duly recognized by the Central/State Government for JE (Elect) post. Minimum matriculation with diploma in Computer Science Engineering or Electronic & Communication Engineering of Information Technology or equivalent from recognized Institute/ University for JE (IT) post. **<u>Desirable:</u>** Knowledge of customs, manners and dialects of Himachal Pradesh & suitability

for appointment in peculiar conditions prevailing in the State.

Amended Provision:

72% posts including 50 posts of Junior Engineer (IT) by direct recruitment on regular or on contract basis, through the H.P. Subordinate Services Selection Board or a recruiting agency, including the department recruitment committee as constituted by the Board, from time to time.

(ii) 28% by promotion."

11. Advertisement issued by respondent No.3, set out the minimum qualification as under:

***"Junior Engineer Electrical (post code 663)**: Minimum matriculation with diploma in Electrical Engineering/Electrical & Electronics Engineering from a recognized Institution/Board/ University duly recognized by the Central/State Government".*

12. It is more than settled that essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The Court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders to proceed in accordance with law. In no case can the Court in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same. (Refer: **Maharashtra Public Service Commission, through its Secretary** vs. **Sandeep Shriram Warade and others 2019 (6) SCC 362**).

13. Learned counsel for the degree holder petitioners vehemently argued that the rule in question only prescribes for minimum qualification and would, therefore, not debar the consideration and eligibility of the candidates, who have higher technical qualification. Strong reliance in support of such submission has been placed on the judgment rendered by the Hon'ble Supreme Court in **Jyoti K.K. and others vs. Kerala Public Service Commission and others (2010) 15 SCC 596.**

14. On the other hand, the Board as also the diploma holder petitioners would argue that the judgment rendered in **Jyoti K.K.'s** case (supra) is not at all applicable to the present facts in view of the clarification issued by the Hon'ble Supreme Court in subsequent decisions, more particularly, in **State of Punjab and others** vs. **Anita and others (2015) 2 SCC 170** and **Zahoor Ahmad Rather and others** vs**. Sheikh Imtiyaz Ahmad and others (2019) 2 SCC 404.**

15. In order to appreciate the rival contentions, the first question that arises for consideration is whether the decree in the field in question can be held to be higher qualification when compared to the diploma in the field.

16. A diploma in engineering essentially is designed to impart practical aspect of the engineering and the mere perusal of the syllabus reveals that the Diploma in Engineering is aimed to equip the candidates, who can cater to the practical requirement of engineering with emphasis on the practical works. In short, it aims to train persons for execution of the works and handling of equipments, etc. whereas the graduates in Engineering are taught with syllabus which provides theoretical training in the field of Engineering with low emphasis on the practical part of the engineering.

17. In India, Diploma Course in Engineering, is offered to the students and is a short duration course with the focus on training a person in a particular field. The curriculum includes basic theoretical knowledge and extensive practical knowledge and the diploma can be conferred by various institutes who may or may not be affiliated to the University Grant Commission (hereinafter referred to 'UGC') or All India Council for Technical Education (hereinafter referred to 'AICTE'). The same can be offered even to students after passing their Class-X Examination, in contrast, the Bachelor in Technical Education is offered to students

after their completion of Class-XII Examination. A 'degree' can be granted only by the Institutes affiliated to UGC or AICTE. The duration of the course is longer (at present 4 years) and the emphasis in the curriculum is on academics. Thus, in India, focus and the aim of the two streams of education is entirely different with stress on extensive practical knowledge in the case of diploma holders and major emphasis on academic in the case of degree holders. Thus, the Diploma in Engineering and Degree in Engineering cater to different situations and, in view thereof, a degree in the field, in question, cannot be viewed as a higher qualification when compared to a diploma in that field.

18. In taking this view, we are supported by the judgment of the Full Bench of the Allahabad High Court in **Deepak Singh and others vs. State of U.P. and others 2019 (7) ADJ 453.**

19. No doubt, the Hon'ble Supreme Court in **Jyoti K.K.** case (supra) held the degree to be higher qualification than a diploma, but the said judgment was based upon the interpretation of rules before it, under which the essential technical qualifications prescribed by the Rules for recruitment to the post of Sub Engineers (Electrical) in the Kerala State Electricity Board were (i) a Diploma in Electrical Engineering of a recognized Institution obtained after a three years course of study, or (ii) a Certificate in Electrical Engineering from any one of the recognized technical schools with five years of service in the Kerala State Electricity Board.

20. The Kerala Public Service Commission rejected the applications of candidates who possessed a B. Tech. or B. Degree in Electrical Engineering. But, the Hon'ble Supreme Court took note of Rule 10 (a) (ii) of Part I of Kerala State and Subordinate Services Rules, 1956, which clearly stipulated that the qualifications recognized by Executive Orders or Standing Orders of the Government as equivalent to a qualification stipulated in the special Rules as well as those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be considered as fulfillment of the eligibility criteria. Interestingly Rule 10 (a) (ii), though contained in the General Rules for State and Subordinate Services, also contained a *non-obstante* Clause. Rule 10 (a) (ii) of the Kerala State and Subordinate Services Rules, extracted by the Hon'ble Supreme Court in ***Jyoti K.K*** reads as follows:

"10.(a)(ii) *Notwithstanding anything contained in these rules or in the Special Rules, the qualifications recognised by executive orders or standing orders of government as equivalent to a qualification specified for a post in the Special Rules and such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post."*

21. It is relevant to note that the prescription contained in Rule 10 (a) (ii) of the General Rules, was notwithstanding anything contained even in the Special Rules.

22. The Hon'ble Supreme Court also observed in para-9 of its decision in ***Jyoti K K*** that the Special Rules did not contain any clause for exclusion of candidates who possessed higher qualifications. Therefore, the Hon'ble Supreme Court allowed the case of the Degree Holders in Engineering. While this is not the fact situation obtaining in the present case.

23. The aforesaid decision was considered in **State of Punjab and others vs. Anita and others (2015)2 SCC 170**, wherein applications were invited for JBT/ETT qualified teachers. Under the rules, the prescribed qualification for a JBT teacher included a Matric with a two years' course in JBT training and knowledge of Punjabi and Hindi of the Matriculation standard or its equivalent. In this background, the Hon'ble Supreme Court held that none of the respondents held the prescribed qualification and an MA, MSc or MCom could not be treated as a "higher qualification".

24. At this stage, we may take note of the judgment rendered by the Hon'ble Supreme Court in ***Parvaiz Ahmad Parry*** vs. ***State of Jammu and Kashmir and others (2015) 17 SCC 709*** wherein the eligibility conditions/criteria in the advertisement was BSc (Forestry) or equivalent from any university recognized by ICAR. Whereas the appellant therein was possessing BSc degree with Forestry as one of the major subjects and also MSc (Forestry) and it was in this background that the Hon'ble Supreme Court concluded that the appellant possessed the prescribed qualification and hence rejection of his application by treating him as ineligible was not proper.

25. In **Zahoor Ahmad** case (supra), the question before the Hon'ble Supreme Court pertained to the appointment of Technician III. The qualification prescribed was Matriculation with ITI in Electrical Trade. Some of the diploma holders appellants in Electrical Engineering and diploma in Electronics and Communication had applied. It was noted that in some District Centres their interviews were conducted. The Selection Board held a meeting that only ITI is

relevant for the trade in question and rest of the candidates were not eligible. It is in such background that the Hon'ble Supreme Court concluded and observed as under:

"26. *We are in respectful agreement with the interpretation which has been placed on the judgment in Jyoti KK in the subsequent decision in Anita (supra). The decision in Jyoti KK turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily pre-supposes the acquisition of another, albeit lower, qualification. The prescription of qualifications for a post is a matter of recruitment policy. The state as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the state, as the recruiting authority, to determine. The decision in Jyoti KK turned on a specific statutory rule under which the holding of a higher qualification could pre- suppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench of the High Court was justified in reversing the judgment of the learned Single Judge and in coming to the 10 id at page 177 conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision of the Division Bench."*

26. In **Zonal Manager, Bank of India, Zonal Office, Kochi and others** vs. **Aarya K. Babu and another (2019) 8 SCC 587,** the Hon'ble Supreme Court was dealing with a case pertaining to the post of Agricultural Field Officer (Scale-1). The qualifications prescribed were of graduate possessing degree in Agro-Forestry. Some of the candidates had secured a four year degree in Forestry. The High Court had held such candidates were eligible. However, the matter was taken up before the Hon'ble Supreme Court. One of the questions raised was whether the High Court was justified in undertaking the exercise of providing equivalence to another qualification so as to declare it to be equivalent to the qualification prescribed in the recruitment notification ignoring the fact that the employer who makes the recruitment had not considered such degree as equivalent. It was in this background that the Hon'ble Supreme Court observed that any such approach would amount to denial of opportunity to those who possess such qualification but had not applied. It is apt to reproduce the relevant observations as contained in para-12 of the judgment, which reads as under:

"12. Though we have taken note of the said contention we are unable to accept the same. We are of such opinion in view of the wellestablished position that it is not for the Court to read into or assume and thereby include certain qualifications which have not been included in the Notification by the employer. Further the rules as referred to by the learned counsel for the respondents is pointed out to be a rule for promotion of officers. That apart, even if the qualification prescribed in the advertisement was contrary to the qualification provided under the recruitment rules, it would have been open for the candidate concerned to challenge the Notification alleging denial of opportunity. On the other hand, having taken note of the specific qualification prescribed in the Notification it would not be open for a candidate to assume that the qualification possessed by such candidate is equivalent and thereby seek consideration for appointment nor will it even be open for the employer to change the requirements midstream during the ongoing selection process or accept any qualification other than the one notified since it would amount to denial of opportunity to those who possess the qualification but had not applied as it was not notified."

27. Similar issues have time and again come up before this Court. In **Himachal Pradesh Staff Selection Commission and others** vs. **Pawan Thakur 2019 (3) Shim. L.C. 1676,** the facts of the case were set-out in paras 3 to 9 and same are as under:

"3. By a Notification dated 16.5.2016, the Staff Selection Commission invited applications for appointment to various posts, in various departments of the Government. One of the posts included in the Notification for recruitment was the post of Surveyors, to be appointed on contract basis, in the Department of Industries and in the Department of Irrigation and Public Health. The post code allotted to the said post in the Department of Irrigation and Public Health was 527. The post code allotted to the said post in the Department of Industries was 488.

4. The essential qualifications prescribed in the Notification for recruitment to the post of surveyors in the Department of Irrigation and Public Health were (i) a pass in 10+2 examination from a recognized Board/University; and (ii) a certificate in the trade of Survey Work or its equivalent from a recognized I.T.I or from an Institute duly recognized by the Central/HP Government. The essential qualifications prescribed for recruitment to the post of surveyors in the Department of Industries were (i) Matric Examination or its equivalent from a recognized Board of School Education/ Institution duly recognized by the Central /H.P. Government and (ii) two years

Certificate Course in the trade of Survey Work from a recognized I.T.I/Institution duly recognized by the Central/H.P. Government.

5. The post of Surveyor is in Class-III and is a Non-Gazetted State Cadre post. The Rules relating to recruitment and Promotion to the said post, in the department of Irrigation and Public Health, titled as "Himachal Pradesh Department of Irrigation and Public Health Surveyor Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2013"issued by the Governor in exercise of the powers conferred by proviso to Article 309 of the Constitution, also prescribe the very same qualifications as indicated in the Notification for recruitment, namely (i) a pass in 10+2 examination from a recognized Board/University; and (ii) a Certificate in the trade of Survey Work or its equivalent from a recognized I.T.I or from an Institute duly recognized by the Central/H.P. Government.

6. Similarly, the prescription in the notification, with regard to post of Surveyor in the department of Industries was also in tune with the Recruitment and Promotion Rules for the post of Surveyors in the Department of Industries.

7. In response to the said Notification for recruitment, a lot of candidates, including those who were either Diploma Holders or Degree Holders in the discipline of Civil Engineering, also applied. The diploma/degree holders applied on the basis that they were holding a higher qualification in the same discipline and that therefore, there could be no bar.

8. On 25.9.2016, a written screening test was conducted and even the Diploma Holders and Degree Holders in Civil Engineering were allowed to participate in the written screening test. The results of this screening test were declared on 20.1.2017, and the short-listed candidates were invited for interview from 6.3.2017 to 9.3.2017.

9. But in the meantime, the applications of candidates holding a Diploma or Degree in Civil Engineering were rejected. Challenging the orders of rejection, a set of candidates filed Original Applications in O.A. Nos. 787, 801, 802, 823, 836, 942 and 1329 of 2017 on the file of the Tribunal."

28. The Tribunal allowed all the petitions mainly on the basis of the judgment rendered by the Hon'ble Supreme Court in **Jyoti K.K.** case (supra) and when the matter was assailed before a Co-ordinate Bench of this Court, **Jyoti K.K.** case (supra) was not only taken into consideration but the distinction brought about by the Hon'ble Supreme Court in **Anita** and **Zahoor Ahmad** case (supra) was also meticulously set out and it was observed as under:

*"13. As we have stated earlier, the main ground on which the Tribunal allowed the Original Applications of the respondents herein, was the ratio purportedly laid down by the apex Court in **Jyoti K.K.** But in **Jyoti K.K.** the essential technical qualifications prescribed by the Rules for recruitment to the post of Sub-Engineers (Electrical) in the Kerala State Electricity Board were (i) a Diploma in Electrical Engineering of a recognized Institution obtained after a 3 years course of study, or (ii) a Certificate in Electrical Engineering from any one of the recognized technical schools with five years of service in the Kerala State Electricity Board. The Kerala Public Service Commission rejected the applications of candidates who possessed a B. Tech. or B. Degree in Electrical Engineering. But, the Supreme Court took note of Rule 10 (a) (ii) of Part I of Kerala State and Subordinate Services Rules, 1956, which clearly stipulated that the qualifications recognized by Executive Orders or Standing Orders of the Government as equivalent to a qualification stipulated in the special Rules as well as those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be considered as fulfillment of the eligibility criteria. Interestingly Rule 10 (a) (ii), though contained in the General Rules for State and Subordinate Services, also contained a non-obstante Clause. Rule 10 (a) (ii) of the Kerala State and Subordinate Services Rules, extracted by the Supreme Court in **Jyoti K.K** reads as follows:*

***"10.(a)(ii)** Notwithstanding anything contained in these rules or in the Special Rules, the qualifications recognised by executive orders or standing orders of government as equivalent to a qualification specified for a post in the Special Rules and such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post."*

14. It is relevant to note that the prescription contained in Rule 10 (a) (ii) of the General Rules, was notwithstanding anything contained even in the Special Rules.

*15. The Supreme Court also observed in para-9 of its decision in **Jyoti KK** that the Special Rules did not contain any clause for exclusion of candidates who possessed higher*

qualifications. Therefore, the Supreme Court allowed the case of the Degree Holders in Engineering.

*16. It is exactly for the above stated reasons that in a subsequent decision in **State of Punjab vs. Anita [(2015) 2 SCC 170]** the Supreme Court distinguished the decision in **Jyoti K.K.** The distinction made in **Anita**, was relied upon by the Supreme Court in a more recent decision in **Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad [(2019) 2 SCC 404].** In fact in paragraph 25 of the report in **Zahoor Ahmad,** the Supreme Court made it clear that the hypothesis formulated in **Jyoti K.K.** as though the possession of a higher qualification would presuppose the acquisition of a lower qualification, cannot be accepted in the absence of a statutory stipulation like the one contained in Rule 10(a) (ii) of the Kerala State and Subordinate Services Rules. Again in para 26 of the report in **Zahoor Ahmad,** the Supreme Court reiterated that the decision in **Jyoti K.K.** turned on the provisions of Rule 10(a) (ii) of General Rules and that in the absence of such a Rule, it is not possible to draw an inference that a higher qualification presupposes the acquisition of a lower qualification. The Supreme Court cautioned in **Zahoor Ahmad** that the prescription of qualifications for a post, is a matter of recruitment policy and that the State as the employer, is entitled to prescribe the qualifications as a condition of eligibility. The Court cautioned that it is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications.*

*17. Emphasis was laid by the Supreme Court in **Zahoor Ahmad** that the equivalence of qualification is not a matter which can be determined in exercise of the power of judicial review. One of the important observations made by the Supreme Court in para 27 of the report in **Zahoor Ahmad** is that the State, as a public employer, may well take into account social perspectives that require the creation of job opportunities across the societal structure. This observation assumes significance in the light of the fact that there are different layers of un-employed youth, with some dropping out of Schools, some abandoning studies after acquiring a Certificate Course, some pursuing a Diploma and a few pursing a Degree. If the State thinks that different job opportunities had to be created across the board, for all these sections of unemployed youth, the same cannot be found fault with. Therefore, the only ground on which the Tribunal allowed the Original Applications of the respondents herein, on the basis of ratio in **Jyoti K.K** cannot be upheld. It is true that the judgment of the Tribunal was rendered on 17.5.2018 and the decision in **Zahoor Ahmad** came on 5.12.2018. But **Jyoti K.K.** was not distinguished for the first time in **Zahoor Ahmad.** It had already been distinguished in **Anita** which the Tribunal did not take note of."*

(underlying supplied by us).

29. It would be noticed that the issue in question is no longer *res integra* and stands decided against the decree holder petitioners in view of the judgment rendered in **Pawan Thakur** case (supra), but we would complete this discussion by referring to certain other judgments of this Court as also the judgments of the Hon'ble Supreme Court.

30. In CWP No. 161 of 2019 titled **Bhupinder Sharma vs. State of H.P. and others and connected matters,** decided on 29.08.2019 the post sought to be filled up was that of Junior Office Assistants for which the essential qualification as prescribed by the Recruitment and Promotion Rules was as under:

(i) 10+2 from a recognized Board of School Education/University.

(ii) One year diploma in Computer Science/Computer Application/Information Technology from a recognized University/Institution.

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi.

Or

(i) 10+2 from a recognized Board of School Education/ University.

(ii) 'O' or 'A' level Diploma from National Institute of Electronics & Information Technology (NIELIT).

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi.

OR

(i) 10+2 from a recognized Board of School Education/University.

(ii) Diploma in Information Technology (IT) from a recognized ITI/Institution.

(iii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi."

31. Various petitions came to be filed before this Court. One set of such petitions was filed by the candidates who aggrieved by the strict adherence to the Recruitment and Promotion Rules.

32. Apart from the other contentions, one of the contentions put-forth by the petitioners therein was "*That persons who possess a higher qualification in the same discipline cannot be rejected, especially after they have participated in the process of selection and also secured higher marks than the other candidates".*

33. Dealing with such contentions, a Co-ordinate Bench of this Court observed as under:

"36. The third contention of the learned Senior Counsel for the petitioner is that the petitioner has a higher qualification in the same discipline than what is prescribed and that he has also secured a higher rank in the written examination, proving himself to be more meritorious. Therefore, it is his contention that a more meritorious candidate cannot be thrown out, paving the way for less meritorious.

37. Though the aforesaid contention is very attractive, we do not think that the same is acceptable on a deeper scrutiny. The argument that the possession of a higher qualification would presuppose the possession of lower qualification, originally accepted by the Supreme Court in ***Jyoti K.K. vs. Kerala Public Service Commission {(2010) 15 SCC 596},*** *had already been distinguished in* ***State of Punjab vs. Anita {(2015) 2 SCC 170}.*** *This distinction was quoted with approval in a subsequent decision in* ***Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad {(2019) 2 SCC 404}.*** *Therefore, the petitioner cannot advance his cause on the basis of a purported higher qualification. Insofar as the argument revolving around merit is concerned, it is to be pointed out that the assessment of merit should be confined only to those who satisfy the eligibility criteria prescribed by the Rules. Persons who fall outside the purview of the Rules cannot take advantage of the result of the written examination. Therefore, the third contention also deserves to be rejected.*

46. As a result, persons holding diplomas, of durations of one year, two years or three years have now become eligible as per the amended Rules. A person holding a BA degree with Mathematics and a Masters' degree in Computer Application cannot take advantage of the said amendment. The amendment does not include within its purview, degree holders and the post graduate holders. Therefore, the last contention also deserves to be dismissed.

51. Whether we like it or not, ours is a society which is full of inequalities. Some are less fortunate and end up only with a Diploma. Some are better placed to acquire degrees and Post Graduate Degrees. If the State has different avenues of employment for different sections of people, the same cannot be undone by the Courts by juxtaposing higher qualifications into lower qualifications. Therefore, the challenge to the impugned judgment of the Tribunal is merit-less. Hence CWP No. 161 of 2019 is liable to be dismissed. All applications for intervention are dismissed, as the interveners have no common cause either with the writ petitioner or with the 5th respondent herein. The theme of their song is not in tune either with that of the writ petitioner or with that of the 5th respondent herein, who was the applicant before the Tribunal. Hence CWP No. 161 of 2019 as well as the intervention applications filed therein is dismissed."

34. In CWP No. 1155 of 2020 titled **Avinash Koundal** vs. **Himachal Pradesh Staff Selection Commission and another** and connected matter, decided on 16.07.2020, this Bench was dealing with a case where the candidature of the petitioners for direct recruitment to the posts of Technical Superintendents (Production/Store/Marketing/MIS/P&I) on contract basis had been rejected on the ground that they do not possess the minimum educational qualifications prescribed in the advertisement, which in turn, was based upon the service Rules for the posts. The minimum essential qualification as reproduced in the advertisement was that the "*candidates should possess full time 04 years degree in Dairy Technology/Dairy Husbandry from the Recognized University."* The petitioners had obtained a degree in Food Science and Technology and claimed that the same was higher qualification as compared to degree in Dairy Technology/ Dairy Husbandry.

35. This Court after placing reliance on the judgments rendered by the Hon'ble Supreme Court in **Sandeep Shriram Varde's** case (supra) and **Zahoor Ahmad Rather's** case (supra) and the judgment rendered by this Court in **Bhupender Sharma's** case (supra), dismissed the writ petition by observing as under:

*"**3**. We have heard learned counsel for the parties and gone through the material available on record. Admittedly, the petitioners do not possess the minimum essential*

qualification of four years degree in Dairy Technology/Dairy Husbandry from a recognized University as stipulated in the advertisement and as prescribed under the Service Rules for the posts in question.

3(i). *Learned counsel for the petitioners contends that:-* ***firstly,*** *no University in the respondent-State is imparting four years degree in Dairy Technology/Dairy Husbandry, therefore, insistence in the advertisement as well as under the service Rules for the posts in question upon possessing this degree, is not justified.*

The aforesaid contention has no force. The mere fact that four years degree in Dairy Technology/Dairy Husbandry is not imparted in the respondent-State, will not preclude the employer to insist upon possession of this degree as an essential qualification for the post. It is not the case of the petitioners that the degree sought for the posts in terms of the advertisement as well as under the service Rules, is not being imparted in any of the Indian Universities. The service Rules for the posts in question prescribing four years degree in Dairy Technology/Dairy Husbandry as an essential qualification for recruitment, have not been challenged by the petitioners.

3(ii). ***Second,*** *contention raised on behalf of the petitioners is that degree in Food Science and Technology possessed/obtained by the petitioners is a higher qualification as compared to degree in Dairy Technology/Dairy Husbandry required by the respondents. Therefore, their candidature should not have been rejected. In making this submission, learned counsel relied upon Appendix 'B' to the service Rules framed pursuant to bye-laws No.26 of the Himachal Pradesh State Cooperative Milk Producers Federation Limited, detailing required 'minimum qualifications and experience for filling up various posts by direct recruitment'. Sr. Nos.1, 2, 3 & 5 of the aforesaid Appendix 'B', pertain to the posts of Managing Director, General Manager, Senior Manager (Plants) and Manager (Production), respectively. For these Managerial posts, a candidate, inter-alia, possessing a degree in Dairy Technology/Dairy Husbandry or a degree in Food Technology, is eligible to participate in the selection process by way of direct recruitment.*

A perusal of qualifications required for posts at Sr. Nos.1, 2, 3 & 5 of Appendix 'B', makes it evident that degree in Dairy Technology/Dairy Husbandry and Food Technology have been identified as separate degrees by the respondents. Degree in Food Technology is not considered as a higher qualification to the degree in Dairy Technology/Dairy Husbandry. For direct recruitment to the posts of Managing Director, General Manager, Senior Manager (Plants) and Manager (Production), which are all essentially managerial posts, the candidates, inter alia, possessing degree in Dairy Technology/Dairy Husbandry or a degree in Food Technology, will be eligible to participate in the selection process. However, this fact alone will not advance the contention of the petitioners that degree in Food Technology is to be considered at higher pedestal to the degree in Dairy Technology/Dairy Husbandry. Hon'ble Apex Court in ***(2019) 6 SCC 362,*** *titled* ***Maharashtra Public Service Commission*** *versus* ***Sandeep Shriram Warade and others and connected matters,*** *has held that:- it is otherwise the prerogative of the employer to prescribe qualifications required for a post. The Court is neither equipped nor can lay down eligibility conditions required for a post nor can delve into these issues by re-writing the Advertisement/Rules. The relevant paras from the judgment are extracted herein-in-below:-*

"9.*The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being at par with the essential eligibility by an interpretive rewriting of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same.*

10 to 13. xxx xxx xxx

14. *The view taken by the Tribunal finds approval in Deptt. Of Health & Family Welfare v. Anita Puri, observing as follows:*

"7. Admittedly, in the advertisement which was published calling for applications from the candidates for the posts of Dental Officer it was clearly stipulated that the minimum qualification for the post is B.D.S. It was also stipulated that preference should be given for higher dental qualification. There is also no dispute that M.D.S. is a higher qualification than the minimum qualification required for the post and Respondent 1 was having that degree. The question then arises is whether a person holding a M.D.S. qualification is entitled to be selected and appointed as of right by virtue of the aforesaid advertisement conferring preference for higher qualification? The answer to the aforesaid question must be in the negative. When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed……. In this view of the matter, the High Court in our considered opinion was wholly in error in holding that a M.D.S. qualified person like Respondent 1 was entitled to be selected and appointed when the Government indicated in the advertisement that higher qualification person would get some preference. The said conclusion of the High Court, therefore, is wholly unsustainable and must be reversed."

3(iii). Third, *contention put-forth on behalf of the petitioners, is that degree in Food Technology obtained by them from Chaudhary Sarwan Kumar Agriculture University, Palampur, is equivalent to the four years degree in Dairy Technology/Dairy Husbandry required by the respondents under the advertisement, therefore, their candidatures could not have been rejected for not possessing the degree in Dairy Technology/Dairy Husbandry. A co-ordinate Bench of this Court in* ***CWP No.161 of 2019,*** *titled* ***Bhupender Sharma*** *versus* ***State of HP and others and connected matters,*** *decided on 29.08.2019, while adjudicating a similar issue, after considering plethora of judgments including judgment rendered by Hon'ble Apex Court, cited in* ***(2019) 2 SCC 404,*** *titled* ***Zahoor Ahmad Rather and others*** *vs.* ***Sheikh Imtiyaz Ahmad and others and connected matter,*** *has observed thus:*

"37. *Though the aforesaid contention is very attractive, we do not think that the same is acceptable on a deeper scrutiny. The argument that the possession of a higher qualification would presuppose the possession of lower qualification, originally accepted by the Supreme Court in Jyoti K.K. vs Kerala Public Service Commission {(2010) 15 SCC 596}, had already been distinguished in State of Punjab vs. Anita {(2015) 2 SCC 170}. This distinction was quoted with approval in a subsequent decision in Zahoor Ahmad Rather vs. Sheikh Imtiyaz Ahmad {(2019) 2 SCC 404}. Therefore, the petitioner cannot advance his cause on the basis of a purported higher qualification. Insofar as the argument revolving around merit is concerned, it is to be pointed out that the assessment of merit should be confined only to those who satisfy the eligibility criteria prescribed by the Rules. Persons who fall outside the purview of the Rules cannot take advantage of the result of the written examination. Therefore, the third contention also deserves to be rejected.*

38 to 46. *xxx xxx xxx xxx*

47. *Relying upon the decision of the Supreme Court in Mohd. Riazul Usman Gani vs. District & Sessions Judge {(2000) 2 SCC 606}, it is contended by the learned Senior Counsel for the petitioner that the possession of a higher qualification cannot be a bar for the consideration of a candidate for selection to a post requiring a lower qualification.*

48*. It is true that the Supreme Court held in that case that the possession of a higher qualification cannot become a disadvantage to a candidate. But the Supreme Court made it clear in the fourth last paragraph of the same judgment that they were saying what they said, on the facts of the case on hand and that the same should not be understood as laying down a rule of universal application. Hence the said decision is of no assistance to the petitioner.*

49. *The reliance placed by the learned Senior Counsel for the petitioner in Parvaiz Ahmad Parry vs. State of Jammu and Kashmir {(2015) 17 SCC 709}, is also misplaced. That was a case where the Rules stipulated the qualification of a BSc in Forestry or equivalent from any University recognized by the Indian Council of Agricultural Research. The appellant before the Supreme Court had acquired a degree in another subject with Forestry as one of the ancillaries and he had also acquired a MSc degree in Forestry. Therefore, the said decision turned on the special facts of the case. Hence it is distinguishable.*

50. *Today the declaration of law that holds the field is the one in Zahoor Ahmad Rather. It was made clear in the said case that it is not the role of the Courts to find out the equivalence. In fact the Court implored in Zahoor Ahmad Rather that the State, as the employer, may legitimately bear*

in mind several factors including the nature of the job, the aptitudes required for efficient discharge of duties, functionality of qualification and the content of the course of studies. The State as a public employer, it was pointed out in the said decision, may well take into account social perspectives that require creation of job opportunities across the societal structure."

In ***Maharashtra Public Service Commission's*** *case (supra), it has been held by Hon'ble Apex Court that questions of equivalence will fall outside domain of judicial review. Even otherwise, no material has been placed by the petitioners to show that degrees possessed by them in Food Technology from Chaudhary Sarwan Kumar Agriculture University, Palampur, is equivalent to the degree in Dairy Technology/Dairy Husbandry. The advertisement issued by the respondents requiring four years degree in Dairy Technology/Diary Husbandry for the Post Code No.719, is in turn based upon the service Rules for the posts in question. The word 'equivalent' is not mentioned either in the Advertisement or in the service Rules.*

3(iv). *We may also take note of the fact that the petitioners had participated in the selection process fully aware of the terms and conditions mentioned therein. After rejection of their candidature on the basis of eligibility condition, mentioned in the advertisement, which in turn is based upon provisions of service Rules, it is not open for them to contend that the degree in Food Technology obtained by them from Chaudhary Sarwan Kumar Agriculture University, Palampur, should be treated at par/equivalent or at higher pedestal to the degree in Dairy Technology/Dairy Husbandry.* ***[Refer (2017) 4 SCC 357,*** *titled* ***Ashok Kumar and another*** *vs.* ***State of Bihar).*** *It has also been pointed out by the respondents in their reply that the advertisement in question, issued for filling in, inter-alia, aforesaid 11 posts in question under Post Code 719, stands concluded as no candidate was found eligible."*

36. Discussion on the subject would be incomplete in case we do not refer to the latest judgment of the Hon'ble Supreme Court in **Ajith K. and others vs. Aneesh K. S. and others JT 2019 (9) SC 74**, wherein the question posed was whether candidates possessing higher qualifications than the prescribed qualification can be considered for the post advertised. The prescribed qualification for the post of Junior Health Inspector Grade-II was SIDC, yet the candidates possessing the qualification of Diploma in Health Inspectors Course (for short DHIC) was also short-listed. The State justified this decision on the basis of a three-member Committee report which concluded that DHIC was a higher qualification. When the issue came up before the Tribunal, it was observed that though diploma course was superior, but to qualify under Rule 10 (a) (ii), it was to be shown that the course pre-supposed the completion of the certificate course (SIDC) which was prescribed. The Hon'ble Supreme Court held that none of the conditions stipulated in Rule 10 (a) (ii) was met. As per the first condition, qualification should have been recognized by executive orders or standing orders of the government as equivalent to qualification specified for the post. As per second condition, there should have been determination by Service Commission of equivalence of the qualifications, in accordance with Rule 13 (b) (I). This was not done in advance and an exercise was undertaken only during pendency of the proceedings. As per the last condition, qualification should have been pre-supposed the acquisition of a lower qualification prescribed for the post. Report of the three-member Committee contained no finding that the acquisition of DHIC pre-supposed the completion of SIDC (certificate course). Reference to diploma as an additional qualification or that diploma was acceptable in Health Department was extraneous consideration and the judgment in ***Jyoti K.K.*** case (supra) was distinguished, whereas the judgment rendered in ***Zahoor Ahmad Rather*** case (supra) was relied upon as would be evident from the observations as contained in paras 13 to 16 of the judgment which read as under:-

"13. *The decision in Jyoti K K concerned a situation where KPSC invited applications for selection for the post of Sub-Engineers (Electrical) in the Kerala State Electricity Board7. The technical qualifications prescribed were as follows:*

2. Technical qualifications—

(a) Diploma in Electrical Engineering of a recognised institution after 3 years' course of study,
OR

(b) a certificate in Electrical Engineering from any one of the recognised technical schools shown below with five years' service under the Kerala State Electricity Board, [Not fully extracted as not relevant] OR

(c) MGTE/KGTE in electrical light and power (higher) with five years' experience as IInd Grade Overseer (Electrical) under the Board.

The appellants were B.Tech degree holders or Bachelor's degree holders in electrical engineering. KPSC held that they were not eligible for selection. The candidates contended that they were persons possessing higher qualifications and hence could not be excluded. This Court interpreted the provisions in Rule 10(a)(i) and held:

7. It is no doubt true, as stated by the High Court that when a qualification has been set out under the relevant Rules, the same cannot be in any manner whittled down and a different qualification cannot be adopted. The High Court is also justified in stating that the higher qualification must clearly indicate or presuppose the acquisition of the lower qualification prescribed for that post in order to attract that part of the Rule to the effect that such of those higher qualifications which presuppose the acquisition of the lower qualifications prescribed for the post shall also be sufficient for the post. If a person has acquired higher qualifications in the same Faculty, such qualifications can certainly be stated to presuppose the acquisition of the lower qualifications prescribed for the post. In this case it may not be necessary to seek far.

8. Under the relevant Rules, for the post of Assistant Engineer, degree in Electrical Engineering of Kerala University or other equivalent qualification recognised or equivalent thereto has been prescribed. For a higher post when a direct recruitment has to be held, the qualification that has to be obtained, obviously gives an indication that such qualification is definitely higher qualification than what is prescribed for the lower post, namely, the post of Sub-Engineer. In that view of the matter the qualification of degree in Electrical Engineering presupposes the acquisition of the lower qualification of diploma in that subject prescribed for the post, shall be considered to be sufficient for that post.

14. The above extract indicates that the qualification for the promotional post of assistant engineer was a degree in engineering. Consequently, the acquisition of the degree was held to pre-suppose the acquisition of the 'lower qualification' of the diploma prescribed for the post of sub-engineer. This constitutes a distinguishing factor and hence the decision in Jyoti K K does not apply to the present facts. The decision in Jyoti K K was subsequently distinguished in State of Punjab v Anita, as noted by this Court in a more recent decision in Zahoor Ahmad Rather v Sheikh Imtiyaz Ahmad. (See also in this context, the decision of the two judge Bench in P M Latha v State of Kerala.)

15 The Principal Secretary to the State Government (EU) in a communication dated 7 July 2017 to KPSC stated:

"Though, diploma in Health Inspector course having a duration of 2 years is not included in the qualifications required as per the notification for Junior Health Inspector, Grade II in Municipal Common Service, the PSC has included those candidates having qualifications in diploma in Health Inspectors Course shortlist of the said post by taking the same as an additional qualification to the rest of qualifications...

Since in the circumstances that the report submitted by the Director of Health Department after conducting comparison study of syllabus of both the course, the diploma in Health Inspectors course is a higher qualification above the qualification prescribed under the concerned special rule and that diploma in Health Inspector course is accepted as a qualification to the post of Junior Health Inspector in the Health Department, the diploma in Health Inspectors Course can be accepted and reckoned as a higher qualification compared to the qualification prescribed to the post of Junior Health Inspector Grade II in Municipal Common Service. (Emphasis supplied)

16 The reference to the diploma being an additional qualification is extraneous to Rule 10(a)(ii). The reference to a diploma being acceptable in the Health Department is again an extraneous consideration. Ex facie, it is evident that in coming to the conclusion extracted above, there was no application of mind to the requirements contained in Rule 10(a)(ii). There was no determination of equivalence by any executive order or standing order of the State Government. Nor was there any finding that a DHIC pre-supposes the acquisition of the lower qualification. KPSC has not carried out any exercise as required by the provisions of the rule."

37. We may also at this stage take a note of the judgment of the Full Bench of the Allahabad High Court in **Deepak Singh** case (supra) wherein on account of the conflict of various judgments, the matter was referred to the Full Bench. Six questions were referred by the learned Single Judge to the Larger Bench and after elaborate discussion and reasoning the same were answered as under:

"(1) A Diploma in Engineering and Degree in Engineering are two distinct qualifications and a degree in the field in question cannot be viewed as a higher qualification when compared to Diploma in that field.

(2). The decision in the case of Alok Kumar Mishra (supra) and Kartikey (supra) laid down the correct position in law holding that the degree holder is excluded from the zone of consideration for appointment as a Junior Engineer with regard to the Diploma in question.

(3). The degree holder is held to be ineligible to participate in the selection process of Junior Engineer in the light of the Advertisement issued.

(4) The exclusion of the degree holders from the zone of consideration is in consonance with the tests propounded by the Supreme Court in case of State of Uttarakhand and others vs. Deep Chandra Tewari and another.

(5). The State Government, while prescribing the essential qualifications or desirable qualifications are best suited to decide the requirements for selecting a candidate for nature of work required by the State Government and the courts are precluded from laying down the conditions of eligibility. If the language in the Rules is clear judicial review cannot be used to decide what is best suited for the employer.

(6). The 'O' level Diploma granted by NIELIT is not equivalent to Post Graduate Diploma in Computer Application and there is no presumption available to hold that the PGDCA possess the necessary qualification as prescribed for 'O' level Diploma accorded by NIELIT."

38. Lastly and more importantly, we may refer to a judgment of the Hon'ble Supreme Court in **State of Uttarakhand and others vs. Deep Chandra Tewari and another (2013) 15 SCC 557** wherein the Apex Court was confronted with a case where the requirement for appointment as a Assistant Teacher was Bachelor's Degree in any of two subjects Geography, Economics, Political Science and History from any University established by law in India whereas the respondents had the qualification of B.Ed. with specialization in vocational education. It was argued before the Hon'ble Supreme Court that there is no marked difference between B.Ed. degree and the B.Ed. degree with specialisation in vocational education. The Hon'ble Supreme Court held as under:

"We notice, however, for the post in question i.e Assistant Teacher (General), the qualification is simply Bachelor's degree in any of two subjects, Geography, Economics, Political Science and History from any university established by law in India, or LT Diploma from any training institution/degree college. If B.Ed. with specialisation in vocational education was the required qualification, then it would have been specifically mentioned in the notification, which has not been done. Consequently, we have to take it that the B.Ed. degree mentioned in the advertisement is B.Ed. degree simpliciter and not B.Ed. with specialisation in vocational education. The post to be filled up i.e Assistant Teacher (General) nowhere indicates that for the purpose of appointment to the said post, specialisation in vocational education is a necessary requirement."

39. Although a question raised before the Hon'ble Supreme Court was with regard to the difference in between B.Ed. with specialisation in vocational course and B.Ed. in specified subjects, the Hon'ble Supreme Court recorded the general principle as under:

"We are conscious of the principle that when particular qualifications are prescribed for a post, the candidature of a candidate possessing higher qualification cannot be rejected on that basis. No doubt, normal rule would be that candidate with higher qualification is deemed to fulfill the lower qualification prescribed for a post. But that higher qualification has to be in the same channel. Further, this rule will be subject to an exception. Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of the said qualification a candidate may not be suitable for the post, even if he possesses a "better" qualification but that "better" qualification has no relevance with the function attached with the post."

40. It would be noticed that the Hon'ble Supreme Court has categorically held that normal rule would be that candidate with higher qualification is deemed to be fulfilled the lower qualification prescribed for the post. But that higher qualification has to be in the same channel, which is not the position in the present case. Therefore, the guiding factor while

considering the case of higher qualification is that it must be in the same line. The degree in engineering is not in the same line as diploma in engineering and it, therefore, cannot be considered to be a higher qualification.

41. Judged in light of the aforesaid exposition of law, a Diploma in Engineering and Degree in Engineering are two distinct qualifications and a degree in the field in question cannot be viewed as a higher qualification when compared to Diploma in that field. Consequently, the degree holder petitioners cannot be permitted to urge that they possess higher qualification which would meet the requirement of specific qualifications specified in the rules or advertisement.

42. In addition to the aforesaid, it would be noticed that the respondent-Electricity Board has itself not considered the degree in Electrical Engineering/ Electrical & Electronics Engineering to be superior to the diploma and rather treated these to be two separate and distinct qualifications and that is why it vide notification dated 03.06.2020 has amended the Recruitment and Promotion Rules for the post of Junior Engineer (Electrical/Junior Engineer (IT) Class-III (Non-Gazetted) in the following manner:

Junior Engineer (Electrical):

Existing provision against Column No.7 Annexure (A) regarding Education qualification.	Amended Provision.
(1) Minimum Matriculation with Diploma in Electrical Engineering/Electrical & Electronic Engineering from a recognized Institution/ Board/ University duly recognized by the Central/State Govt. for JE (Elect.) post.	Diploma or Degree in Electrical Engineering or Electrical & Electronic Engineering from a recognized Board/Institution/ University, established by law by the State/ Central Govt. OR AMIE from Institution of Engineers (India) (only those candidates who are enrolled for AMIE with the Institute of Engineer (India) Kolkata with permanent recognition upto 31.5.2013) would be eligible.

43. In view of the aforesaid discussion, we accordingly find no merit in the petitions filed by the degree holder petitioners being CWP No. 138 of 2020, CWPOA No. 3601 of 2019 and CWPOA
No. 3633 of 2019 and the same are accordingly dismissed, whereas the petitions filed by the diploma holder petitioners i.e. CWPOA No. 6534 of 2019 and CWPOA No. 6252 of 2020 are allowed. Accordingly, the Himachal Pradesh Staff Selection Commission is directed to consider the case of only those diploma holders strictly in accordance with the rules and the advertisement which form the basis for recruitment to the post of Junior Engineer (Electrical).

44. These petitions are disposed of in the aforesaid terms, so also the pending applications if any, leaving the parties to bear their own costs.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

1. **CWP No. 346 of 2020**

Prakash Chand ...Petitioner.

Versus

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

2. **CWP No. 562 of 2020**

Suresh Kumar Sharma ...Petitioner

Versus

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

CWP No. 346 of 2020 and CWP No. 562 of 2020.
Decided on: 21st August, 2020

Constitution of India, 1950- Article 226- Transfer of a public servant on request of political executive- Validity of transfer order- Held, an elected representative can only propose transfer of an employee for genuine and cogent reasons- Administrative Department alone is competent to issue order of transfer after due application of mind- Transfer cannot be ordered simply on basis of note of a political representative. (Para 6)

Case referred:

Lok Prahari through its General Secretary vs. State of Uttar Pradesh and others (2018) 6 SCC 1;

Whether approved for reporting? Yes

For the Petitioner(s): Mr. Kul Bhushan Khajuria, Advocate, in CWP No. 346 of 2020.

Mr. Vijay Kumar Arora, Advocate, in CWP No. 562 of 2020 and for respondent No.3, in CWP No. 346 of 2020.

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Ranjan Sharma, Mr. Vikas Rathore, Mr. Vinod Thakur, Addl. A.Gs., Mr. Bhupinder Thakur and Ms. Seema Sharma, Dy. A.Gs., for the respondents/State.

Justice Tarlok Singh Chauhan, J.(Oral)

Since both these petitions involve a common order of transfer dated 13.01.2020, the petitioner Prakash Chand has assailed the same as being illegal, arbitrary and contrary to all norms, whereas the petitioner Suresh Kumar Sharma in CWP No. 562 of 2020 has sought enforcement of the order, as such, the same are taken up together for hearing and are being disposed of by a common judgment.

2. These cases reflect a sorry state of affairs where the transfer of a Government servant has been effected on the request of a former Minister, who unfortunately is no longer in the land of living.

3. It is more than settled that after demitting the office, public representatives be it the Chief Minister, Minister, M.P. or MLAs, is on a par with common citizen, even though, by virtue of office held, he/she may be entitled to some protocols. The public office held by them becomes a matter of history and, therefore, cannot form the basis of reasonable classification to categorise previous holders of public office as a special category of persons entitled to the benefit of special privileges like making recommendation for transfer.

4. In coming to such conclusion, we draw the support from the judgment of the Hon'ble Supreme Court in ***Lok Prahari through its General Secretary vs. State of Uttar Pradesh and others (2018) 6 SCC 1.***

5. The record reveals that the former Minister gave a list of five persons to be transferred. Before the recommendations could reach the administrative department, the same were placed before the Hon'ble Chief Minister, who approved the above recommendation of transfer as it is without even consulting the administrative authority.

6. It is trite that even an elected representative can only propose the transfer of an employee, that too for genuine and cogent reasons and not by usurping the authority of the administrative department, who then alone is competent to issue the orders of transfer after due application of mind. Whereas, in the instant case, as stated above, the proposal itself was bad in law as it was initiated by a person who had no authority whatsoever to do so. Therefore, any action drawn on such proposal is also bad in law.

7. Since the order dated 13.01.2020 is not sustainable, consequently, the petition filed by the petitioner Prakash Chand i.e. CWP No. 346 of 2020 is allowed and that of CWP No. 562 of 2020 filed by the petitioner Suresh Kumar Sharma, is dismissed.

8. At this stage, it is represented by Mr. Vijay Kumar Arora, learned counsel for the petitioner in CWP No. 562 of 2020 that his client is having personal difficulty that is why he had sought his transfer and now that the transfer has been cancelled, he may be permitted to make a representation. The request appears to be innocuous and is allowed.

9. The petitioner in CWP No. 562 of 2020 will make a representation to the respondents/competent authority, which shall be decided within a period of four weeks from the receipt thereof.

10. Both the petitions stand disposed of in the aforesaid terms, so also the pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

1. CWP No. 1494 of 2020
Ex. Hav. Balwan Singh ...Petitioner.

Versus

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

2. CWP No. 1659 of 2020

Ex. Hav. Ajay Kumar ...Petitioner

Versus

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

3. CWP No.1660 of 2020

Ex. Hav. Fateh Singh ...Petitioner

Versus

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

CWP No. 1494 of 2020 and
CWP Nos. 1659 and 1660 of 2020.
Reserved on: 13.08.2020
Decided on: 17th August, 2020

Constitution of India, 1950- Articles 14 & 226- Retirement date- Determination of- Held, when employee has retired on last date of the month, his date of retirement has to be treated as first date of the succeeding month- Petitioners who retired/released from Army Service on 31.12.2016, would be eligible for reemployment as per norms which prescribed that there must not break in service of more than two years between date of discharge from Army and enrollment in police- They were not ineligible on 1.1.2019- Their candidature was wrongly rejected- Petition allowed. (Para 5, 6, 8, 10 & 11)

Cases referred:

S. Banerjee vs. Union of India and others 1989 Supp (2) SCC 486;
Principal Accountant General, A.P. and another vs. C. Subba Rao, 2005 Lab I.C. 1224;

Whether approved for reporting? Yes

For the Petitioner(s): Mr. Imran Khan and Mr. Ravinder Singh Jaswal, Advocates.

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Ranjan Sharma, Additional Advocate General and Ms. Svaneel Jaswal, Deputy Advocate General.

Justice Tarlok Singh Chauhan, J.

Since common question of law and facts arise for consideration in all these petitions, therefore they were taken up together for hearing and are being disposed of by a common judgment.

2. The petitioners are Ex-Servicemen and superannuated from the Indian Army on 31.12.2016 and thereafter, they got their names registered for re-employment in the respective Employment Exchanges.

3. The Superintendent of Police, Kangra at Dharamshala (respondent No.3), vide recruitment notice dated 23.06.2015, requested the Director, Sainik Welfare Board (respondent No.2) to sponsor the names of Ex-servicemen as per terms and conditions for 24 posts reserved for Ex-servicemen vide Annexure R-1.

4. The Director General of Police fixed 45 years as the age for Ex-servicemen for enrollment in Police and the break in service between the date of discharge from Army and enrollment in Police was kept as two years keeping in view the job requirement of the Police.

5. The Commandant 2nd IRBn, Sakoh, District Kangra (respondent No.5) vide letter dated 13.3.2020 informed respondent No.2 that on scrutiny of recruitment record it was found that the petitioners had been discharged from Army on 31.12.2016, whereas the cut off date of eligibility was 01.01.2019. The duration gap from their date of discharge to cut off date admissible for the post exceeds two years time limit by one day, which is contrary to the instructions of the Government.

6. Respondent No.2 vide letter dated 18.3.2020 clarified the position by stating that the petitioners, who were in active service on 31.12.2016 and were serving Soldiers, they became Ex-servicemen only on 01.01.2017. Despite this clarification, the candidatures of the petitioners have been rejected vide letter dated 14.04.2020 on the aforesaid account, constraining them to file the instant petitions.

7. We have heard learned counsel for the parties and have gone through the material placed on record.

8. It would be noticed that the petitioners had been in active service upto 31.12.2016. Once that be so, then obviously it is only on 01.01.2017 that they ceased to be in service and acquired the status of Ex-servicemen.

9. A similar question came up before the Hon'ble Supreme Court in ***S. Banerjee*** *vs.* ***Union of India and others 1989 Supp (2) SCC 486*** wherein the petitioner therein sought voluntary retirement and was so retired on 31.12.1985, he acquired the benefit of the recommendation of the Pay Commission, which came into force w.e.f. 01.01.1986. The question was whether the petitioner therein could be said to have been in service on 01.01.1986 or ceased to be in service for practical purpose on 31.12.1985 itself. Referring to the contentions, the Hon'ble Supreme Court observed as under:

> *"3. After the retirement of the petitioner, the Fourth Central Pay Commission (for short 'Pay Commission') gave its report recommending the revision of salaries and pension of the Government employees. It is not disputed that the above recommendations of the Pay Commission have been accepted by the Government and that the benefit thereof is also avail- able to the employees of this Court. Paragraph 17.3 of Chapter 17 of Part II at page 93 of the Report of the Pay Commission provides as follows:*
>
> > ***"17.3 In the case of employees retiring during the period January 1, 1986 to September 30, 1986, Government may consider treating the entire dearness allowance drawn by them up to December 31, 1985 as pay for pensionary benefits."***
>
> *4. The petitioner claimed the benefit of the recommendation of the Pay Commission as contained in the said paragraph 17.3, but it was not allowed on the ground that he did not, as he was not entitled to, draw salary for January 1, 1986 in view of the proviso to rule 5(2) of the Central Civil Service (Pension) Rules, 1972, hereinafter referred to as 'the Rules'. Rule 5(2) reads as follows:*

> ***"5(2). The day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day.***
>
> ***Provided that in the case of a Government servant who is retired prematurely or who retires voluntarily under clause (j) to (m) of Rule 56 of the Fundamental Rules or Rule 48 (or Rule 48-A) as the case may be, the date of retirement shall be treated as a non- working day."***
>
> *5. At the hearing of the writ petition, it has also been vehemently urged on behalf of the respondents that as in view of the proviso to rule 5(2) of the Rules, the date of retirement of the petitioner should be treated as a non- working day or, in other words, as the petitioner was not entitled to the salary for the day of his retirement, he was not entitled to the benefit of the recommendation of the Pay Commission as contained in paragraph. 17.3 of the report extracted above.*
>
> *6. Under paragraph 17.3, the benefits recommended will be available to employees retiring during the period, January 1, 1986 to September 30, 1986. So the employees retiring on January 1, 1986 will be entitled to the benefit under para- graph 17.3. The question that arises for our consideration is whether the petitioner has retired on January 1, 1986. We have already extracted the order of this Court dated December 6, 1985 whereby the petitioner was permitted to retire voluntarily from the service of the Registry of the Supreme Court with effect from the forenoon of January 1, 1986. It is true that in view of the proviso to rule 5(2) of the Rules, the petitioner will not be entitled to any salary for the day on which he actually retired. But, in our opinion, that has no bearing on the question as to the date of retirement. Can it be said that the petitioner retired on December 31, 1985? The answer must be in the negative. Indeed, Mr. Anti Dev Singh, learned counsel appearing on behalf of the respondents, frankly conceded that the petitioner could not be said to have retired on December 31, 1985. It is also not the case of the respondents that the petitioner had retired from the service of this Court on December 31, 1985. Then it must be held that the petitioner had retired with effect from January 1, 1986 and that is also the order of this Court dated December 6, 1985. It may be that the petitioner had retired with effect from the forenoon of January 1, 1986 as per the said order of this Court, that is to say, as soon as January 1, 1986 had commenced the petitioner retired. But, nevertheless, it has to be said that the petitioner had retired on January 1, 1986 and not on December 31, 1985. In the circumstances, the petitioner comes within the purview of paragraph 17.3 of the recommendations of the Pay Commission."*

10. After placing reliance on the judgment in **S. Banerjee** case (supra), the Full Bench of Andhra Pradesh High Court in ***Principal Accountant General, A.P. and another vs. C. Subba Rao, 2005 Lab I.C. 1224***, held that when the employee has retired on the last date of the month, his date of retirement has to be treated as first date of the succeeding month.

11. In view of the aforesaid discussion, we find merit in these petitions and the same are accordingly allowed. The impugned order dated 14.4.2020 whereby the candidatures of the petitioners have been found ineligible for the post of Constable reserved for Ex-servicemen, is quashed and set-aside and consequently, the respondents are directed to give appointment to the petitioners for the post of Constable in the Department.

12. All these writ petitions are disposed of in the aforesaid terms, so also the pending application(s), if any.

13. For compliance, list on **17.09.2020**.

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

IFCI Limited & others ...Petitioners.

Versus

M/s HIM ISPAT Ltd. & others ..Respondents.

Review Petition No.24 of 2020
Date of Decision: August 13, 2020

Code of Civil Procedure, 1908- Section 114- Review of judgment or order- Error apparent on record- What is?- Held, judgment passed after taking into consideration facts and circumstances brought on record as well as provisions of law applicable to case, cannot be said to be a judgment suffering from an error apparent on record- Even if two views are possible on a particular issue, it cannot be a ground to review a judgment. (Para 5 & 6)

Whether approved for reporting? Yes

For the Petitioners:	Mr.Subhash Sharma, Advocate, through Video Conferencing.
For the Respondents:	Mr. Sanjeev Kuthiala, Senior Advocate, with Ms.Rachna Kuthiala, Advocate, for the Official Liquidator, through Video Conferencing.
	None for other respondents.

Vivek Singh Thakur, J (oral)

This review petition has been filed against judgment dated 06.03.2020, by stating therein that petitioners reasonably found and believed that this Court while dealing with Company Application No.7 of 2018 has not interpreted the relevant provisions of law contained in Section 529A read with Section 529 of the Companies Act, 1956 (hereinafter referred to as 'the Act'), in given context of the matter and further that observations made by the Court in Paras 30 to 34 of the impugned judgment are a matter of concern as far as rights of the petitioners under Section 529A of the Act are concerned. Further that observations made in para 30 of the impugned judgment that no other property has been claimed under mortgage, appears totally contrary to the factual position otherwise reflected in Company Application No.7 of 2018. It is further averred that discussion centering around the provisions of law contained in Section 529A of the Act in paras 31 to 34 of the impugned judgment has not construed the legislative intent in right perspective. It is also averred that petitioners are admittedly the secured creditors and, thus, their rightful preferential claim cannot be ignored and denied and petitioners reasonably believe that sale proceeds lying with the Official Liquidator are from the sale of assets mortgaged by the Company in liquidation with the secured lenders and in view of aforesaid factual position, relevant provision of law contained in Section 529A was to be construed and applied by giving first charge to the petitioners and thus allowing of the full claim of workmen is contrary to the essence of law contained in Clause (c) of Section 529(1) of the Act, which would incur colossal financial losses, running to the tune of about `3 Crores, to the petitioners.

2. Lastly, it is stated that petitioners reasonably believe that they have correctly pointed out the error apparent on the face of record, whereby their preferential claims have not been appreciated by this Court.

3. The grounds taken for reviewing the impugned judgment in question, are not disclosing any new or important evidence or facts, which were not in the knowledge of the petitioners or could not be produced by them during hearing despite their best

efforts and due diligence or discovery of mistake or error apparent on the face of record or any other analogous sufficient cause.

4. It is evident from the grounds raised for reviewing the judgment that petitioners are trying to re-argue the points, which have already been decided by this Court, after considering facts and circumstances placed before it as well as provisions of Section 529 read with Section 529A of the Act, in the light of pronouncements of the Apex Court referred in the judgment. The petitioners cannot be allowed to re-agitate points in review petition, which have already been decided by this Court.

5. Even if, two views are possible on a particular issue, it cannot be a ground to review a judgment, rendered after taking into consideration pronouncements of the Apex Court and provisions of relevant law in detail. Mere fact, that having regard to the material on record another view could be taken, is not a ground for review.

6. A decision not accepting the plea of a party, but passed after taking into consideration entire facts and circumstances brought on record and considering pronouncements of the Apex Court as well as provisions of law applicable to the case, cannot be termed having apparent error on the face of record.

7. Though, I am of the considered view that there is no error in interpreting the relevant provisions of law and appreciating pronouncements of the Apex Court, however, even if, plea of petitioners is accepted that there is incorrect interpretation of law, then also, for the detailed discussion in the impugned judgment, with respect to provisions of the Act and ratio of law laid down by the Supreme Court, such error cannot be said to be self evident, but the same is to be detected by a process of reasoning and such error, if any, cannot be said to be an error apparent on the face of record, so as to attract the jurisdiction under Order 47 of Civil Procedure Code.

8. Therefore, I find no ground is made out for entertaining this review petition.

9. This petition has been filed raising doubt about calculations and finding of this Court with respect to the share of workmen in terms of Section 529A of the Act. But the workmen have not been arrayed as party in the Review Petition nor copy of the petition has been supplied to them or their learned counsel. Therefore, for want of joining necessary party in the petition also, the same is liable to be dismissed.

10. In view of above, petition is dismissed being devoid of merit alongwith pending application.

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

Dev Prakash ....Petitioner.

Vs.

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

CWPOA No. 5077 of 2019
Date of Decision: 10.08.2020

Constitution of India, 1950- Articles 14 & 226- Claim for regularization of services of petitioner as Bill Clerk (Class-III) instead of Bill Distributor- Entitlement- Held, order of initial regularization of petitioner as Bill Distributor passed in 1988 was unsuccessfully assailed by him before Administrative Tribunal- Order of Administrative Tribunal was not set aside in Civil Writ or LPA filed against judgment passed in writ petition- Order attained finality before judgment in Gauri Dutt's case Latest HLJ 2008 (HP) 366, was pronounced by High Court- Undoing of things which stood concluded in 1988 would otherwise open pandora's box- Further held, even ratio of Gauri Dutt's case is not attracted as petitioner never performed duties against two posts. (Para 5 to 9)

Whether approved for reporting? *Yes.*

For the petitioner: Mr. Bhuvnesh Sharma, Advocate.

For the respondents: M/s Somesh Raj, Shiv Pal Manhans and Dinesh Thakur, Additional Advocate Generals, with Mr. Raju Ram Rahi, Deputy Advocate General.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(i) That the Office Order dated 30.12.2014 at Annexure A-11, whereby the claim of the applicant for regularization as Bill Distributor Clerk has been rejected may kindly be quashed and set aide and the respondents may further be directed to regularize the services of the applicant as Bill Distributor Clerk instead of Bill Distributor w.e.f. the date of regularization of his services as Bill Distributor, with all consequential benefits."*

2. The case of the petitioner is that he was initially appointed as Bill Distributor-cum-Ledger Clerk in IPH Sub-Division Barsar, Tehsil Barsar, District Hamirpur, H.P. on 01.06.1979. Vide letter dated 06.09.1988 (Annexure A-1), Assistant Engineer, IPH Sub-Division, Barsar sent his case to the Executive Engineer, IPH Sub-Division, Basar with regard to his appointment as Bill Distributor-cum-Ledger Clerk. Vide Memorandum dated 05.08.1988, the petitioner was offered the post of Bill Distributor-Non Industrial Workcharged converted into regular cadre from the date of his joining. It appears that being dis-satisfied with the said order of appointment, the petitioner filed an Original Application before the erstwhile Himachal Pradesh Administrative Tribunal, which was dismissed by the learned Tribunal on 31.10.1996. The review petition also met with the same fate. Petitioner thereafter filed CWP No. 3979 of 2011 before this Court, which was dismissed by the Hon'ble Single Bench of this Court on the ground of delay. Hon'ble Division Bench of this Court in LPA No. 16 of 2013, titled as *Dev Prakash Vs. State of H.P. and another*, on 27th May, 2014, permitted the petitioner to withdraw the appeal as well as the writ petition filed by him with liberty to the petitioner to make a representation in view of the law laid down by this Court in ***Gauri Dutt and others*** *Vs.* ***State of H.P.,*** reported in ***Latest HLJ 2008 (HP) 366.*** Thereafter, a representation was made by the petitioner on 21.07.2014 (Annexure A-9), which stands rejected by the competent authority vide Office Order dated 20.12.2014 (Annexure A-11).

3. Feeling aggrieved, the petitioner has filed this writ petition.

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

5. The issue with regard to regularization of the petitioner as Bill Distributor (Class-IV employee) has attained finality, as it is the own case of the petitioner that the Original Application which was preferred by him against his order of regularization as such was dismissed by the learned Tribunal and the Review Petition was also dismissed. Though it is a matter of record that subsequent writ petition filed by the petitioner against the order passed by the learned Tribunal as well as Letters Patent Appeal were permitted to be withdrawn by the Hon'ble Division Bench of this Court, with liberty to the petitioner to file a representation in terms of the law laid down by this Court in ***Gauri Dutt's*** case, however, the order of rejection of the Original Application of the petitioner with regard to his initial order of regularization, was not set aside by this Court, meaning thereby that the order passed by the learned Tribunal has attained finality.

6. As far as the Office Order vide which representation of the petitioner was rejected is concerned, a perusal of the same demonstrates that reasons stand assigned therein by the Authority concerned as to why the case of the petitioner was not covered by the judgment of this Court in ***Gauri Dutt's*** case (*supra*). Relevant portion of the order is quoted hereinbelow:

> *"...And whereas, the Executive Engineer, IPH Division Barsar submitted the point wise reply vide his office letter No. IPH-PHSD-BSR-Court Case Dev Prakash/2014-17810 dated 24.11.2014 and stated that as per Gauri Dutt's judgment if a worker has worked on daily wages in two or more posts, then after completion of 10 years of service, he can be regularized in the lowest post/scale by combining the total service rendered in different capacities, but if he declines to join in lower post/scale in that event, he has to wait for completion of 10 years in higher scale/post. But, in the instant matter the petitioner has accepted the offer on lower post without any protest and worked as such till his retirement. He further stated that the petitioner was regularized under the policy of 1988, wherein the State Govt. decided to regularize the services of those non-industrial workers, who were on the establishment of IPH Department up to the year 1979. He has also submitted the man days Chart of the petitioner.*
>
> *And, whereas, I have considered the whole matter and perused the record. It has been observed that the petitioner's services were regularized under the policy in 1988 i.e., much much prior to the judgment and order passed by the Hon'ble Supreme Court in Mool Raj Upadhyaya's case which was further explained in 2006 by the Hon'ble High Court of Himachal Pradesh in Gauri Dutt's case. Moreover, he has not worked continuously for 10 years as Bill Distributor Clerk. Therefore, I am of the considered view that these judgments are not attracted to the present case as it had been settled prior to the pronouncement of these judgments. Thus, the settled position cannot be unsettled now. Further, as intimated by the Engineer-*

in-Chief, I & PH Department, Shimla vide his office letter No. IPH-ES-III-D/W, Court Case Vol-42/2014-5450-52 dated 13.10.2014, the case of the petitioner submitted by Chief Engineer, (C/Z) I & PH Department, Mandi vide his office letter No. IPH-CE-(CZ)-EA-IV-4/Vol-11/2006-1846-47 dated 15.5.2006 has already been rejected and is not pending in his office, therefore nothing survives in his argument for regularization of his services as Bill Clerk from 2006 i.e., the date when his case was recommended and forwarded to Engineer-in-Chief, I & PH Department Shimla by the Chief Enngineer (C/Z) I & PH Department, Mandi on 15.05.2006."

7. During the course of arguments, learned counsel for the petitioner could not demonstrate that the findings so contained in order dated 20.12.2014 were incorrect and contrary to the record. Even otherwise, as it is a matter of record that the order of initial regularization of the petitioner was unsuccessfully assailed by him before the learned Tribunal, in that view of the matter also, the findings returned by the competent authority cannot be faulted with, as it is not in dispute that the case of the petitioner had attained finality before the judgment was pronounced in ***Gauri Dutt's*** case by this Court. Therefore also, undoing what stood done in the year 1988, would otherwise also open a Pandora's box.

8. One more fact which is of relevance here is that the judgment pronounced by this Court in ***Gauri Dutt's*** case is that in case a person has performed duties against two posts, then an option has to be given to him when he completes requisite number of years for being regularized against the lower post as to whether he wants to be regularized against the lower post or wants to wait to be regularized against a higher post upon completion of requisite number of years in terms of the Policy in place. In the year 1988, the petitioner initially accepted his regularization against the post of Bill Distributor. It is thereafter that he approached the learned Tribunal assailing said order with the plea that his services ought to have been regularized as a Class-III worker and not as Class-II worker, which Original Application was dismissed by the learned Tribunal, as already mentioned hereinabove. Therefore, in these peculiar circumstances, the petitioner otherwise also cannot claim the benefit of judgment in ***Gauri Dutt's*** case (*supra*).

9. In view of the findings returned hereinabove, as there is no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

1. CWPOA No. 3141 of 2019
   Ct. Bhupinder Kumar and others ...Petitioners

   Versus

   State of H.P. and another ...Respondents
2. CWPOA No. 6428 of 2020

Ct. Sudhir Sharma and others ...Petitioners

Versus

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

CWPOA No. 3141 of 2019 alongwith
CWPOA No. 6428 of 2020
Reserved on : 21.07.2020
Date of decision:04.08. 2020

Administrative Law- Executive Instructions/ Standing Orders- Validity- Held, Executive Instructions/ Standing Orders cannot override or supersede the Rules- What is not prescribed in Rules cannot be stipulated under the Standing Orders. (Para 3)

Himachal Pradesh Police Act, 2007 (Act)- Section 143- Standing Orders- Held, Authorities stipulated in Section 143 of Act have the power to issue Standing Orders to carry out purposes of the Act- It is open to them to amend the same in accordance with law. (Para 4)

Constitution of India, 1950- Articles 14 & 226- Standing Order No. 11/2016 and amendment thereof- Holding of B-1 test online for constables for Lower School Training on different dates- Challenge thereto on ground that candidates who appeared at later stages were in advantageous position- Held, for holding online test at same time and date for all avenues/districts, server was developed but snag occurred in it and test could not be conducted on a particular date- To avoid reoccurrence, respondents consulted Information and Technology Department and other technical experts and decision to hold online test over a period of days at one centre equipped with requisite facilities was taken, after amending Standing Order 11/2016 by assigning district wise slots – Decision of respondents cannot be faulted- Further held, petition challenging an examination would not arise where candidate had appeared and participated. (Para 4)

Cases referred:

Ashok Kumar Vs. State of Bihar (2017) 4 SCC 357;
Chandra Prakash Tiwari Vs. Shakuntala Shukla (2002) 6 SCC 127;
Unionof India Vs. S. Vinodh Kumar (2007) 8 SCC 100;
Munindra Kumar Vs. Rajiv Govil (1991) 3 SCC 368;
Rashmi Mishra Vs. M.P. Public Service Commission (2006) 12 SCC 724;
Amlan Jyoti Borooah Vs. State of Assam (2009) 3 SCC 227;
Manish Kumar Shahi Vs. State of Bihar (2010) 12 SCC 576 ;
Madan Lal Vs. State of J&K (1995) 3 SCC 486;
Marripatti Nagaraja Vs. State of A.P. (2007) 11 SCC 522 ;
Dhananjay Malik Vs. State of Uttaranchal (2008) 4 SCC 171;
K.A. Nagamani Vs. Indian Airlines (2009)5 SCC 515 ;
Vijendra Kumar Verma Vs. Public Service Commission (2011) 1 SCC 150;
Ramesh Chandra Shah Vs. Anil Joshi (2013) 11 SCC 309;
State (UT of Chandigarh) Vs. Jasmine Kaur (2014) 10 SCC 521;
Pradeep Kumar Rai Vs. Dinesh Kumar Pandey (2015) 11 SCC 493;
Madras Institute of Development Studies Vs. K. Sivasubramaniyan (2016)1 SCC 454;

Whether approved for reporting? : YES

For the Petitioners: Mr. K.D. Shreedhar, Senior Advocate,

with Ms. Shreya Chauhan, Advocate , forthe petitioners in CWPOA No. 3141 of 2019.

Mr. Sanjeev Bhushan, Senior Advocate,with Mr. Rakesh Chauhan, Advocate, forthe petitioners in CWPOA No. 6428 of 2020

For the Respondents: Mr. Ashok Sharma, Advocate General, with

Mr. Ranjan Sharma, Mr. Vinod Thakur andMr. Desh Raj Thakur, Additional Advocates General, for the State.

Jyotsna Rewal Dua, J.

Being inter-connected, these writ petitions are taken up together for disposal.

2. Main prayer in both these writ petitions is for quashing of order/circular, dated 18.01.2018, whereby, on the basis of State level merit list, 234 out of 931 Constables who had qualified B-I Test (2017), were nominated by the respondents for the Lower School Course, keeping in view the availability of vacancies at that time in the rank of Head Constables.

3. CWPOA No. 3141 of 2019

3(i) During hearing of this petition, learned Senior Counsel for the petitioner, restricted his prayers, and argued, only for grant of following relief No. 4 :-

> *"IV. That the respondents may be further directed to sendall the candidates for the Lower School Course as and when the vacancies for promotion to the post of Head Constables are available."*

3(ii) All the petitioners were appointed as Constables in the Police Department. After completion of requisite service and satisfying the eligibility criteria, they appeared in B-I Test held by the respondents w.e.f. 08.08.2017 to 25.08.2017 at A.P.G. University, Shimla.

3(iii) About 3500 Constables had appeared in the test. 931 Constables, including the petitioners, qualified this test. The Departmental Promotion Committee (DPC) examined the merit list of B-I Test 2017**.** The Committee prepared the State level final merit of 931 B-I Test qualified Constables at Police Headquarter Level. Out of 931 qualified Constables, the D.P.C. nominated 234 Constables for

undergoing Lower School Course on the basis of State Level merit list. The recommendation was made on the basis of vacancies in the rank of Head Constables. The Committee further recommended that *'rest of the B-I Test pass candidates may be deputed to Lower School Course as and when vacancies in the rank of Head Constables (Executive Police) are available'*. Petitioners had also qualified the B-I Test 2017 with following merit positions:-

"

Sr. No.	*Name of Applicants*	*Merit List/Ranking*
1.	*Bhupinder Singh No. 475*	*285*
2.	*Pawan Kumar No. 457*	*886*
3.	*Balkar Singh No. 444*	*475*
4.	*Rajan Thakur No. 426*	*344*
5.	*Vineet Kumar No. 933*	*499*
6.	*Lalit Kumar No. 1293*	*577*
7.	*Amit Chauhan No. 133*	*240*
8.	*Anit Kumar No. 377*	*527*
9.	*Som Raj No. 516*	*237*
10.	*Kuldeep Kumar No. 376*	*404*
11.	*Neeraj Kumar No. 814*	*283*
12.	*Sanjeev Kumar No. 491*	*272*
13.	*Dinesh Kumar No. 531*	*341*

"

3(iv) Legal Position

3(iv)(a) B-I Test selection is made from amongst Constables for undergoing promotional course (Lower School Course) to enable their promotion to the posts of Head Constables. This test is governed by Rule 13.7 of Punjab Police Rules as made applicable to the State of Himachal Pradesh as well as by Standing orders issued by the respondents. The relevant part of unamended Rule 13.7 of Punjab Police Rule is reproduced hereunder:-

> ***"13.7. List 'B'. Selection of candidates for admission to promotion Course for Constables at the Police Training College.-*** *(1) List 'B' in Form 13.7 shall be maintained by each Superintendent of Police/Commandant, Police Battalion of Himachal Pradesh. It shall include the names of all Constables selected for admission to the Promotion Course for Constables at the Police Training College. Selection shall be made in the month of January every year generally. However, the Director General of Police shall have discretionary powers to hold these tests once, or more than once in a year in case of exigencies, keepingin view the vacancy position. The test shall be regulated by the standing orders issued by the Director General of Police. All the successful candidates shall be kept in a panel and shall be sentfor lower school course on merit basis as per available vacancies. Names shall be entered in the said list in order of their merit as determined by the Departmental Promotion Committee constituted by Director General of Police on the basis of the test. x x x x x x x x x."*

(2) All Constables

(a) Who are middle pass and have put in more than four years of service ;

(b) Who are at least matriculates and have put in more than three years of service; or

(c) Who obtain first class with credit in the Recruits Course specified in rule 19.2; will be eligible to have their names entered in the aforesaid list, if they are not above thirty years on the first day of July in the year in which the selection is made;

Provided that no Constable who has been awarded a major punishment within a period of three years preceding the first day of January of the year in which such selection is made will be eligible for admission to this list and if any Constable whose name has been brought on this list is not sent to the Police Training College in the year he will be required to compete again with the new candidates, if he is still eligible for admission to the said list under the rules.

(3) Temporary Constables brought on List 'B' shall be absorbed in the regular establishment in preference to others.

(4) No Constable who has failed to qualify in the promotion course of Constables shall be readmitted to List 'B', unless the Principal, Police Training College, for the reasons to be recorded in writing by him considers him deserving of another chance and he is still eligible. The reasons for doing so shall be communicated by him to the Superintendent of Police concerned."

3(iv)(b) Standing order was issued by the respondents on 13.09.1993, incorporating following provision with respect to B-I Test in Clause 16 :-

> *"The Constables who duly qualify B-1 test will not have to appear again in the same test. All the successful candidates will be kept in a panel and they will be sent for Lower School Course on merit basis as per available vacancies."*

3(iv)(c) Respondents-State enacted its own Act known as Himachal Pradesh Police Act, 2007. Under Section 144(4) whereof the Punjab Police Rules were to remain in force in the State of Himachal Pradesh to the extent of their being consistent with the 2007 Act. Power to frame rules, regulations and standing orders was provided in Sections 141, 142 and 143 respectively under the 2007 Act.

The provision of standing order issued on 13.09.1993 *(already extracted above)* was incorporated in Rule 13.7 by way of

Punjab Police (Himachal Pradesh Amendment) Rules, 2008. By virtue of amendment in the Rules, a Constable after qualifying the B-I test once, was not required to compete again with new candidates even if his name was not sent for Lower School Course within one year of the preparation of State Level Merit List of B-I test. He was to be sent for undergoing Lower School Course as and when vacancies in the rank of Head Constables become available. **3(iv)(d)** On 06.04.2012, respondents issued an amended standing order regarding selection under B-I Test providing that *"16: As per HPPR, List will be valid for one year only for which the test has been held."*

3(iv)(e) Observations-It would be appropriate here to take note of somewhat similar factual and legal position arising out of B-I Test conducted by the respondents in 2013 about which a Co-ordinate Bench of this Court had an occasion to deal with in LPA No. 158 of 2014, titled Suresh Kumar and others Vs. State of H.P. alongwith other connected matters. In the B-I test held by respondents in 2013, merit list of qualified candidates was prepared. Some candidates with higher merit in the list, were deputed to undergo Lower School Course. Remaining candidates figuring in the merit list of qualified Constables were not deputed for want of available vacancies in the rank of Head Constables. The State took shelter behind the Standing Order of 06.04.2012 to contend that list, so prepared, was valid only for one year for which the test was held. Therefore, even those Constables, whose names remained in the unexhausted list, were required to compete again in the next B-I test for their inclusion in List-B.

After noticing the provisions of the Act, Rules and Standing Orders, this Court held that Standing Orders could not be issued contrary to and in violation of Rule 13.7 of the Rules. Standing orders could be issued subject to Rules and Regulations and the H.P. Police Act, 2007. The executive instructions/Standing Orders cannot over-ride or supersede the Rules. Therefore, when Rules did not prescribe for a cap of one year's validity of B-I list, then the same could not be prescribed under the Standing Orders as the same would be in conflict with the Rules. Relevant concluding paras from the judgment, dated 08.01.2016 delivered in LPA No. 158 of 2014 and connected matters are reproduced hereunder:-

> *"23. Once the Constables have successfully competed B-1 test and were admittedly not sent for the Lower School Course only because of Clause 16 of the standing orders, we see no reason why they should be subjected to again undergo a test.*
>
> *24. It would be noticed that the only reason which persuaded and prevailed upon the learned writ Court to*

dismiss the writ petitions was that it treated the list B-1 as a select panel and concluded that the same was valid for one year. This was not the correct legal position as the select list is the list which is normally prepared by the Selection Committee out of the candidates, who are considered fit for appointment in order of their merit. Whereas, B-1 enlisted candidates are those successful candidates, who have qualified the B-1 test and would be required to be sent to Lower School Course. It is only after successful passing of this Course that they would be entitled to be considered for promotion as Head constables. The mere passing

of the B-1 test in itself does not result in promotion and, therefore, by any stretch of imagination can be considered to be a select panel."

The above judgment has admittedly attained finality**.**

Stand of the respondents to the restricted relief now prayed in this petition is, that petitioners having qualified B-I test (2017) shall also be sent for Lower School Course as per their order of merit, prepared in the B-I test (2017) as and when vacancies become available in the rank of Head Constables. This stand is in consonance with the observations and findings given in the judgment referred to above. However, grant of the relief prayed by the petitioners and fairly conceded by the respondents in view of the judgment dated 08.01.2016, passed in LPA No. 158 of 2014 alongwith connected matters, is dependent upon the outcome of the companion matter i.e. CWPOA No. 6428 of 2020. Therefore, it will now be appropriate to take up CWPOA No. 6428 of 2020.

4. CWPOA 6428/2020

4(i) Two differently placed categories of petitioners have filed this common petition. Petitioner nos 13-14 did not participate in the selection process for B-I test 2017 whereas petitioner nos 1-12 after remaining unsuccessful in this very test have instituted instant petition seeking quashing of entire B-I test 2017 held by the respondents as well as of circular dated 18.1.2018 whereby on the basis of their State Level Merit, 234 out of 931 constables who qualified the B-I test 2017, were sent to undergo Lower School Course. Promotions of Constables to the post of Head Constables, if any, effected on the basis of results of B-I test 2017 have also been sought to be quashed and set aside. Petitioners have prayed for re-holding of B-I test 2017 on the following grounds;-

a) B-I test 2017 was not held in all the districts on the same date and time thereby contravening the provisions of standing order(SO) dated 2.1.2017.

b) Amendment of SO dated 2.1.2017 by SO dated 1.8.2017 enablingholding of B-I test on different dates was a deliberate, irrational exercise against the spirit of the standing order.

c) Holding of B-I test 2017 on various dates gave leverage to constables, who appeared in the test on later dates.

4(ii). Facts in continuation of those described while discussing CWPOA 3141/2019 may be noticed for determining the points raised in this petition:-

4(ii)(a) While deciding LPA 158/2014 & companion matters pertaining to issues relating to B-I test 2013, a coordinate bench of this court had interpreted various provisions of HP Police Rules and Standing Orders*(which have already been discussed in para 3 above)*. Post this verdict, the respondents issued SO no. 11/2016 on 2.1.2017 under para 13-20 of HP Police Rules. Relevant extract from the SO is as under ;-

> *" Standing Order No. 11/2016*
>
> *Standing order under para 13-20 of the Police Rules regarding selection ofconstables for admission to List-B*
>
> *(1) to (5)……*
>
> **(6) Written Test**
>
> *(a) to (b)….*
> *(c) written test will be held either in the distt. or at venue(s) to be notified by HP Police HQ as per requirements and feasibility.*
>
> *(d) written test will be conducted either on computers through the online tests, software designed for the purpose or through printed question papers and answer sheets.*
> *(e) The questions for written test will be either multiple choice/objective or descriptive or a combination of both.*
> *(f) The duration of each test will be at least 2 hours (Two hours only) and together shall carry 150 marks i.e. 75 marks for each paper.*
> *(g) The minimum qualifying marks percentage for the written test will be 60% for both General and SC/ST category candidates i.e. 90 marks out of 150 marks…….*
> *(7) to (11)…..*
>
> **(12) General**
>
> *(a) The test shall be initiated on the same date and time in all the districts/venue. The date will be fixed by the Director General of Policeand the same would be widely advertised through HP Police website sothat maximum of constable become aware of B-I test…."*

In terms of above SO, B-1 test was to be held on the same date and time in all the districts/venues. Accordingly on 12.5.2017, respondents issued an advertisement for holding the test online on 16.7.2017. Test, however, was not held on 16.07.2017 and was postponed.

4(ii)(b) An amendment was carried out in SO no. 11/2016 on 1.8.2017 incorporating following provision in para 12 of SO no. 11/2016;-

> *"...Para 12: The test shall ordinarily be initiated on the same date and time in all districts/venues. However if required the test may also be held over a period of time by assigning slots district wise "*

On the strength of above extracted amendment, B-I test was held by the respondents w.e.f. 8.8.2017 to 25.8.2017 at APG University Shimla. 931 candidates/constables who qualified the test were placed in the State Level merit list, out of which, 234 constables on the basis of their merit and availability of vacancies in the cadre of Head Constables were recommended by the Departmental Promotion Committee for undergoing Lower School Course.

4(iii) Contentions

4(iii)(a) Main thrust of ld. Senior counsel for the petitioners is that conducting B-I test for a number of days was contrary to SO no. 11/2016. His contention is that *inter-se* merit of candidates cannot be determined on the basis of a test wherein they appeared on different dates. Those who appeared on later dates were in advantageous position as many overlapping questions had appeared on different dates. Though mobile phones were not allowed inside the examination hall however many candidates were seen with snapshots of some of the questions which appeared in the test. Another allegation is that for candidates of Kangra District, 2nd paper was held on 23.8.2017 but some of these candidates were allowed re-test of this paper on 24.8.2017. Most of the candidates belonging to District Kangra scored maximum marks in the 2nd paper held on 24.8.2017 since they were already aware of the questions.

4(iii)(b) On factual aspects, above contentions have been refuted by the Ld. Advocate General in the following manner;-

a) SO no. 11/2016 issued on 2.1.2017 laid the procedure for holding B-I test. The test was to be held online at the same time and date for all the avenues/districts. Accordingly a server was developed by the respondents. The User Acceptance Testing of this software was conducted for checking its feasibility and functionality. The Department of Information and Technology audited it. Thereafter the B-I test was scheduled to be held in all the districts on 16.7.2017. However the server developed technical snags resultantly the test could not be held on 16.7.2017 and had to be postponed.

b) Considering that complications in the server could re-occur, more so if all the 3500 appearing candidates were to log in for their online test at the same time on the same date, therefore, the technical aspects of the matter were re-examined by the respondents with software developer and the technical staff of the department. It was not found practicable at that time to hold the online

test for all 3500 candidates at different venues on the same date and time as there could be repetitions of server complications. Accordingly, it was decided to hold B-I test online at limited number of centres with required internet and institutional facilities. For this purpose, question bank of 10,000/- questions was prepared. Logic was applied in the software so that no two candidates get the same question. With this aim, the SO 11/2016 dated 2.1.2017 was amended on 1.8.2017 providing for holding the written test either on same date and time in all the districts/venues or over a period of time by assigning district wise slotsto be notified by the respondents as per requirement and feasibility.

c) 2017 was the first time that the respondents were holding B-I test online. The data was to be released directly from IT Department's server. No offline services were created to ensure integrity of the selection process. After going through the requirements and noticing the technical snags due to which the test could not be held on 16.7.2017, the B-I testwas rescheduled for the candidates of all the districts at APG GoyalUniversity Shimla w.e.f. 8.8.2017 to 25.8.2017. The centre had necessary facilities and required infrastructure for holding the test.

d) No two candidates could get same question as the software randomly picked up questions from the question bank for each candidate. No objection in this regard was received by the respondents from any candidate. Therefore the contention of overlapping of the questions raised by the petitioners were not correct.

e) The statistics available with the respondents and the district wise positions of the candidates do not support the contentions of the petitioners about the candidates appearing later in the exams scoring higher marks in comparison to those who appeared on earlier dates of the test.

f) Only those candidates whose tests could not be conducted successfully due to technical errors in the allotted systems were allowed a retest in the next shift either on the same day or the next day considering the remaining time of the shift in which errors occurred. All such errors faced by the candidates with details of their names, type of problems, follow up actions taken by the staff committees, shift etc. have also been mentioned in the proceedings. Complete transparency was maintained in the process. Provision for retest in such cases of technical snags was brought to the notice of candidates during briefings held just prior to the test. No objection against this provision, which was otherwise fair, was raised by anyone at anytime during the test at APG University. Regarding a specific instance of candidates of Kangra District quoted by the petitioners, it was submitted that on 23.8.2017, a total of 113 candidatesof Kangra District appeared in 2nd paper of online B-I test. Networkproblems occurred in the system of 66 candidates. Despite efforts made by the technical committee, the technical glitches could not be resolved within the given time. Therefore the technical

committee decided to take 2nd paper of these 66 candidates on 24.8.2017 when 64 candidates appeared and 28 qualified the 2nd paper.

Thus on the basis of above factual submissions it was urged by the respondents that amendment in SO no. 11/2016 was carried out in accordance with law, due to bonafide and genuine reasons and that B-1 test 2017 was conducted in a transparent and fair manner.

4(iv) Observations

4(iv)(a) It is admitted position that 2017 was the first time that B-I test was being held online by the respondents. Effort made by the respondent department for holding B-I test 2017 at same time and date on all venues/districts is visible from the record of the case. Scheduling of the test on 16.7.2017 at same time and date for all the districts is not in dispute. There is no reason to disbelieve the respondents that despite their best efforts, the server developed technical snags forcing them to postpone the test. It is understandable that fearing repetition of technical glitches in a test being held online for the first time where around 3500 candidates were to log in at the same time and date, the respondents would tread in cautiously and would re-examine the technical aspects of the matter in consultation with its software developer, Information and Technology Department and other technical experts. In such circumstances, decision to hold the online test over a period of days at one centre equipped with requisite facilities and for facilitating this decision carrying out required amendment in the standing order no. 11/2016, cannot be faulted. Power to issue standing orders is contained in section 143 of HP Police Act 2007, which reads as under:-

> *"...*143. Power to issue standing orders.
>
> *(1) The Director-General of Police may, subject to the rules and the regulations made under this Act, issue standing orders to carry out the purposes of this Act.*
>
> *(2) Subject to sub-section (1), the Inspector-General, the Deputy Inspector-General, the District Superintendent of Police and Commandant of a Battalion may, with the previous approval of the authority to whom they are directly subordinate and subject to the rules and regulations made under this Act, issue standing instructions within their respective jurisdiction to carry out the purposes of this Act."*

It is the standing order issued by the respondents which governs the procedure for holding the B-I test. It is open for the respondents to amend the same in accordance with law. Petitioners have not pointed out any illegality in amendment of the standing order No. 11/2016. The amendment was not in conflict with the Statute or the Rules.

4(iv)(b) It has also not been demonstrated as to how the holding of B-I test w.e.f. 8.8.2017 to 25.8.2017 caused prejudice to the petitioners. All factual assertions of the petitioners viz. advantageous position of candidates who appeared in the test on later dates, overlapping of questions, a specific instance of some

candidates of Kangra district allegedly allowed to re-take the 2nd paper, have all been convincingly, effectively refuted by the respondents with justifiable reasons and explanations. There is no apparent reason to doubt the stand of the respondents that the data was released directly from the server of Department of Information and Technology. No offline services were created in the interest of maintaining integrity. Question bank of 10,000 questions was created. Logic was applied in the system to ensure that no two candidates got the same question. Only those candidates were allowed to take the re-test whose tests could not be conducted due to technical errors which could not be removed within given time by the technical committee. Provision for holding of re-test in such circumstances was brought to the notice of all the candidates during briefing held before the test. Allegation regarding some candidates from Kangra District securing more marks in 2nd paper only on account of having appeared in the re-test was denied giving statistics.

4(iv)(c) Though the petitioners have tried to find fault with holding of B-I test at APG University over a period of days w.e.f. 8.8.2017 to 25.8.2017 as well as in respect of modalities thereof, which have been noticed and deliberated above, however the fact also remains that the petitioner no. 1-12 appeared in this very B-I test under the terms and conditions of the Standing Order dated 2.1.2017 as amended on 1.8.2017 without raising any demur or protest. Having participatedin the test, these petitioners cannot be heard to complain that the test should have been held on same time and date in different avenues/districts instead of holding at one centre over a period of days and further that the terms andconditions for holding the test were not proper.

In this regard, it would be profitable to refer to **(2019) 15 SCC 633**, titled **Union of India and others** Vs. **C. Girija and others and connected**

matters, wherein following previous judgments of Hon'ble Apex Court on the issue were noticed viz. **Ashok Kumar** Vs. **State of Bihar (2017) 4 SCC 357; Chandra Prakash Tiwari** Vs. **Shakuntala Shukla (2002) 6 SCC 127**; **Unionof India** Vs. **S. Vinodh Kumar (2007) 8 SCC 100; Munindra Kumar** Vs. **Rajiv Govil (1991) 3 SCC 368; Rashmi Mishra** Vs. **M.P. Public Service Commission (2006) 12 SCC 724; Amlan Jyoti Borooah** Vs. **State of Assam (2009) 3 SCC 227; Manish Kumar Shahi** Vs. **State of Bihar (2010) 12 SCC 576 ; Madan Lal** Vs. **State of J&K (1995) 3 SCC 486 ; Marripatti Nagaraja** Vs. **State of A.P. (2007) 11 SCC 522 ; Dhananjay Malik** Vs. **State of Uttaranchal (2008) 4 SCC 171; K.A. Nagamani** Vs. **Indian Airlines (2009) 5 SCC 515 ; Vijendra Kumar Verma** Vs. **Public Service Commission (2011) 1 SCC 150 ; Ramesh Chandra Shah** Vs. **Anil Joshi (2013) 11 SCC 309 ; State (UT of Chandigarh)** Vs. **Jasmine Kaur (2014) 10 SCC 521 ; Pradeep Kumar Rai** Vs. **Dinesh Kumar Pandey (2015) 11 SCC 493** and **Madras Institute of Development Studies** Vs. **K. Sivasubramaniyan (2016)1 SCC 454**. The broader principles which can be extracted from the above judgments, are :- (i) when a candidate appears in the examination without objection and is subsequently found to be not successful, his challenge to the selection process is precluded; (ii)

question of entertaining a petition challenging an examination would not arise where a candidate had appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was lacuna therein merely because his or hers result was not palatable; (iii) those who consciously take part in the selection process cannot thereafter turn around and question the method of selection andits outcome; conduct of such persons disentitle them from questioning the selection process; (iv) after participating in the selection process, challenge to the same after declaration of result cannot be allowed. The candidates cannot approbate and reprobate at the same time.

In view of the above well settled legal position, petitioner Nos. 1 to 12 having participated in B-I test (2017) held at one Centre over a period of days and after remaining unsuccessful in the test cannot challenge the selection process on the ground that the test was required to be held at the same time and date in different venues/districts. Respondents have even otherwise explained the reasons and justifications for amending SO No. 11/2016 enabling them to hold the test at one venue over a period of days. Amendment has not been shown to be suffering from any illegality. The allegations of some unfair methods in the selection process have been effectively and convincingly refuted by the respondents. Petitioners No. 13 and 14 were admittedly neither eligible nor participated in the B-I test (2017), therefore, they otherwise have no locus-standi to join the issues raised by petitioners No. 1 to 12. The net result of the above discussion is that all the contentions raised by the petitioners are without any force and are accordingly rejected.

Conclusion :-

5. The sum total of above discussion is that :-

5(i) CWPOA No. 3141 of 2019 is allowed in terms of relief No. 4 of its prayer clause. Respondents are directed to send qualified Constables as per their order of merit in the State Level Merit List of B-I test (2017) for undergoing Lower School Course as and when vacancies arise in the rank of Head Constables.

5(ii) CWPOA No. 6428 of 2020 is dismissed. However, considering a grievance common to all the petitioners with respect to non holding of B-I test by the respondents for years together thereby denying the eligible Constables right of consideration for promotion to the post of Head Constables *(raised by way of CMP No. 1660 of 2020 instituted by the petitioners under Order 6 Rule 17 C.P.C. seeking amendment of the petition during ongoing hearing of the case)*, we direct the respondents to examine in accordance with applicable Act, Rules and Regulations, the possibility and feasibility of holding B-I test every year and sending qualified candidates therein on the basis of their State level merit in the B-I List for Lower School Course by giving preference to the qualified candidates of previous years B-I Lists and after exhausting the B-I lists of previous years in succession i.e. without tinkering with or violating in any manner the findings and observations of this Court in the judgment, dated 08.01.2016, passed in LPA No. 158 of 2014 and connected

matters. This exercise be completed and appropriate decision, in accordance with law and in view of foregoing observations, be taken within a period of eight weeks from today.

Both the writ petitions stand disposed of in the aforesaid terms so also the pending applications, if any, including CMP No. 1660 of 2020 instituted in CWPOA No. 6428 of 2020.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. &
HON'BLE MS JUSTICE JYOTSNA REWAL DUA, J.

Dr. Aman Kumar ...Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No. 2618 of 2020
Reserved on: 21.8.2020

Decided on: 26.08.2020

Constitution of India, 1950- Articles 14, 15 & 226- Admission to MDS Course- Petitioner participating in test and thereafter challenging terms and conditions of prospectus as unconstitutional- Held, petitioner had applied and participated under terms and conditions of prospectus- After participating in counseling under terms and conditions of the prospectus, petitioner cannot be heard to complain about alleged illegality of conditions. (Para 5)

Cases referred:

Ashok Kumar Vs. State of Bihar (2017) 4 SCC 357;
Chandra Prakash Tiwari Vs. Shakuntala Shukla (2002) 6 SCC 127;
of India Vs. S. Vinodh Kumar (2007) 8 SCC 100;
Munindra Kumar Vs. Rajiv Govil (1991) 3 SCC 368;
Rashmi MishraVs. M.P. Public Service Commission (2006) 12 SCC 724;
Amlan Jyoti Borooah Vs. State of Assam (2009) 3 SCC 227;
Manish Kumar Shahi Vs.State of Bihar (2010) 12 SCC 576 ;
Madan Lal Vs. State of J&K (1995) 3SCC 486 ;
Marripatti Nagaraja Vs. State of A.P. (2007) 11 SCC 522 ;
Dhananjay Malik Vs. State of Uttaranchal (2008) 4 SCC 171;
K.A. Nagamani Vs. Indian Airlines(2009) 5 SCC 515 ;
Vijendra Kumar Verma Vs. Public Service Commission (2011) 1 SCC 150 ;
Ramesh Chandra Shah Vs. Anil Joshi (2013) 11 SCC 309 ;
State (UT of Chandigarh) Vs. Jasmine Kaur (2014) 10 SCC 521 ;
Pradeep KumarRai Vs. Dinesh Kumar Pandey (2015) 11 SCC 493;
Madras Institute of Development Studies Vs. K. Sivasubramaniyan (2016) 1 SCC 454;

Whether approved for reporting? Yes

For the petitioner : Mr. Jiya Lal Bhardwaj, Advocate with Mr.

Sanjay Bhardwaj, Advocate.

For the respondents : Mr. Ajay Vaidya, Senior Additional Advocate General for respondentsNo.1 to 3/State.

Mr. Neel Kamal Sharma, Advocate, for respondent No.4.

Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rakesh Chauhan, Advocate, for respondent No.5.

Jyotsna Rewal Dua *(J)*

Petitioner is an aspirant to Master of Dental Surgery (MDS) Course. He qualified NEET-MDS-2020 test held on 20.12.2019 and within the period prescribed under the prospectus issued thereafter by the respondents, applied for admission to MDS Course academic session 2020-

23. Petitioner, who belongs to Scheduled Castes category and applied as such, for admission only in Himachal Pradesh Government Dental College, Shimla (hereinafter in short as HPGDC), remained unsuccessful in firstround of counselling. He could not secure MDS seat even in second round ofcounselling, hence, feeling aggrieved instant petition has been preferred.

2. We have heard learned counsel for the parties and gone through the material available on record.

3 **Two short grounds** on which this writ petition has been preferred are:-

3(a) MDS seat falling against roster point No.14 during second round of counselling had to be filled up from a candidate belonging to Scheduled Caste category. The seat, however, has been wrongly alloted to respondent No.5 (Dr. Nidhi Chandel) belonging to General Category.

3(b) Clause 5.6 of the prospectus is unconstitutional.

4. **Facts and discussion:-**

4(i) Prospectus for MDS course 2020-2023, prescribed 40 point roster to be followed in distribution of MDS seats amongst candidates belonging to different categories. Clause 3.3(b)(i) of the prospectus reads as under:-

> "(i) 40 point reservation roster shall be applied in respect to distribution of seats among Gen., SC & ST categories in continuation to the last roster point exhausted in the previous academic year in the following manner:-

Sr.No	*Name of the category*	*40 point roster (vertically)*
1	*SC (15%)*	*1,8,14,22,28 and 36*
2	*ST (7.5%)*	*4,17 and 31*
3	*Person with disability 5%*	*20 and 40*

> Note: 40 point roster exhausted up-to point 14 in the last year session 2019-20, hence now will start from point 15."

Since 40 point roster stood already exhausted up-to pointNo.14 in the session 2019-2020, therefore, counselling for the academic session 2020-2023 had to start from roster point No.15.

4(ii) It is not in dispute that counselling in the first round actually started from roster point No.15. During first round of counselling, 76 MDS degree seats, out of total available 86 seats were allotted, in order of merit and choice of candidates as per roster point earmarked for the category concerned. Starting from roster point No.15, 40 point roster was therefore exhausted for 76 seats at roster point No.10.

4(iii) Petitioner had submitted his application form for counselling to MDS course for academic session 2020-2023 with only one option i.e. HPGDC, Shimla. He had specifically refused to opt for any other dental college in the State. Petitioner could not make it in the first round of counselling.

4(iv) After first round of counselling two seats belonging to un-reserved category remained vacant in HPGDC, Shimla, due to non-joining/surrendering of seats. One more seat was reverted from All India Quota to State Quota in HPGDC, Shimla. Ten seats out of total available 86 seats were not allocated to any one in the first round of counselling. Additionally, against 76 seats allocated in the first round of counselling, 34 candidates did not join

within the prescribed period. Thus, second round of counselling was held for 11 seats [86-76=10 unallocated in 1st round +1 revered from All India Quota]. Additionally 34 seats were also available as resultant vacancies allocated in the first round, therefore, total number of MDS degree seats available in the second round of counselling was 34 + 11=45.

4(v) On 34 resultant vacancies of first round, roster points had already been applied. In this regard Clause 5.6 of the prospectus provided as under:-

> *"5.6 Seat falling vacant in 1st round of counseling will be filled from same category by virtue of vacant seat during 2nd round of counseling and subsequent counseling."*

Fresh roster points therefore, were not to be applied to 34 vacancies on which roster had already been applied in the first round. Rosterhad to be applied only on 11 seats, which were not allocated at all in the firstround. According to the respondents, 45 seats were filled up strictly in accordance with the provisions of prospectus in order of merit and choice, asper 40 point roster already applied on 34 seats of round one and also on 11 seats for which the roster was to be applied afresh. During second round of counselling, against 34 resultant vacancies of first round, candidates were selected from amongst the respective categories only strictly as per provisions of Clause 5.6 of the prospectus *(already extracted above)*.

4(vi) The respondents No.1 to 3 alongwith their reply have appended tabulations depicting application of roster in filling MDS seats. Table-1 of Annexure R-2 pertaining to seat allocation in first round of counselling shows:-

(a) Allocation of 76 MDS seats.

(b) 40 point roster was started from roster point No.15 at Serial Nos.1 and exhausted at roster point No.10 at Serial No.76..

(c) 34 candidates out of 76 allocated seats, did not join.

Petitioner has no grievance to the filling up of seats/allocation of seats/application of roster etc. in the first round of counselling.

Table-2 of Annexure R-2, depicts seat allocation of first and second round combined. Roster point No.14 in the second round of counselling (regarding wrong allocation of which, grievance has been raised in the writ petition) was meant for Scheduled Caste category candidate in Private Dental College. However, since no eligible candidate including the petitioner was available (petitioner having not opted for Private Dental Colleges and opted only for HPDGC, Shimla), therefore, earmarked seat of Scheduled Caste category against running roster point No.14 during second round of counselling was filled up from amongst General Category candidate in accordance with following provision of Clause 3.3 of the prospectus:-

> *"3.3 in case, the eligible candidates to the extent of reservation in any category are not available or un-filled, the vacant seats shall be filled up by making them available in the category as givenbelow:*
>
> *(a) The vacant/unfilled seats of SC category shall be filledup amongst the eligible ST category candidates.*
> *(b) The vacant/unfilled seats of ST category shall be filledup amongst the eligible SC category candidates.*
> *(c) In case, the eligible candidate are not available in the above two reserved category in the above manner, the vacant seats shall then be filled up from amongst the eligible unreserved candidates.*
>
> *(d) The candidature of SC/ST candidates belonging to other State (non-HP) will only be considered for general category by virtue of their general combined merit.*
> *(e) As per 40 point roster there is no specific seat (roster point) for the OBC candidate, hence the OBC candidate will be considered in General Category as per general combined merit."*

In view of above, roster point No.14 during second round of counselling was filled up from Mr. Aron Sharma, in Himachal Dental College Sunder Nagar Mandi.

5. Observations

5(a) Petitioner's allegation that respondent No.5 (Dr. Nidhi Chandel) a General Category candidate, during second round of counselling was allocated point No.14, belonging to Scheduled Caste category is not borne out from the record of the case. Respondent No.5 was already allocatedMDS seat in Conservative

Dentistry, during first round of counselling as a General Category candidate at roster point No.27.

Petitioner had given his specific option only for MDS seat asa reserved category candidate in HPGDC, Shimla. He had specifically refused allocation of MDS seat in Private Dental Colleges. Petitioner could not secure the MDS seat in 1st round of counselling. He has not evendisputed proceedings of first round of counselling.

There were 9 MDS seat in HPGDC, Shimla, out of which 7 seats were for General Category, 1 for Scheduled Caste category and 1 for Scheduled Tribe category. In the first round of counselling all these seats were allotted to respective category candidates as per 40 point roster. However, out of 7 General Category candidates, 2 seats had fallen vacantdue to surrendering/non-joining by the General Category candidates. In addition to these two seats, one more seat was added to the General Categorydue to reversion from All India Quota. Thus, in second round of counselling there were three seats available for General Category in HPGDC, Shimla. These three seats were filled from General Category candidates, as per rosterpoint of round one and as per Clause 5.6 of the prospectus as well asconsidering the merit of the candidates and the choices filled by the candidates for the second round. In this manner respondent No.5, (Dr. NidhiChandel) who was allotted MDS seat of Conservative Dentistry in first round of counselling in Bhojia Dental College Nalagarh as General Category candidate against roster point No.27 was alloted MDS seat of Periodontology in HPGDC Shimla, against roster point No.20.

Petitioner otherwise also stands at 3rd place in the Scheduled Caste category State Merit List. The first candidate Dr. Shaleen Chaudhary was alloted MDS seat of Oral Medicines in HPGDC, Shimla against roster point No.22 (Scheduled Caste). The second candidate Dr. Randeep Kumar has been admitted in Himachal Dental College Sunder Nagar, Mandi against roster point No.28 (Scheduled Caste). Thus, in HPGDC, there was only one seat meant for Scheduled Caste category, which was filled up from Dr. Shaleen Chaudhary against roster point No.22 during first round of counselling. Petitioner therefore could not be allocated MDS seat in HPGDCShimla.

From the above facts and discussion, it is clear that roster point No.14, during second round of counselling was allotted to one Dr. Aron Sharma in the HDC Sunder Nagar, District Mandi, in accordance with Clause 3.3 of the prospectus. Therefore the contention of the petitioner that this roster point No.14 was filled in HPGDC, Shimla from Dr. Nidhi Chandel belonging to General Category is incorrect. Dr. Nidhi Chandel had already been allocated seat of Conservative Dentistry, in BDC Nalagarh as aGeneral Category candidate against roster point No.27 in the first round of counselling. Due to reversion of one MDS seat from All India Quota to StateQuota, the available vacancies in HPGDC, Shimla for General Category candidates in second round of counselling rose from two to three. Accordingly, because of up-gradation opted by candidates of previously allocated seats in first round of counselling, Dr. Nidhi Chandel was alloted the MDS seat in HPGDC, Shimla.

5(b) Challenge to Clause 5.6 of the prospectus:-

The challenge of the petitioner to Clause 5.6 of the prospectus regarding filling up of vacant seats of first round of counselling from same category, during second round and subsequent counselling is misplaced. Petitioner had applied and participated under the terms and conditions of the prospectus. After participating in the counselling under the terms and conditions of the prospectus, petitioner can not be heard to complain about the alleged illegality of the conditions.

In this regard, it would be profitable to refer to **(2019) 15 SCC 633**, titled **Union of India and others Vs. C. Girija and others and connected matters**, wherein following previous judgments of Hon'ble Apex Court on the issue were noticed viz. Ashok Kumar Vs. State of Bihar (2017) 4 SCC 357; Chandra Prakash Tiwari Vs. Shakuntala Shukla (2002) 6 SCC 127; of India Vs. S. Vinodh Kumar (2007) 8 SCC 100; Munindra Kumar Vs. Rajiv Govil (1991) 3 SCC 368; Rashmi Mishra Vs. M.P. Public Service Commission (2006) 12 SCC 724; Amlan Jyoti Borooah Vs. State of Assam (2009) 3 SCC 227; Manish Kumar Shahi Vs.State of Bihar (2010) 12 SCC 576 ; Madan Lal Vs. State of J&K (1995) 3SCC 486 ; Marripatti Nagaraja Vs. State of A.P. (2007) 11 SCC 522 ; Dhananjay Malik Vs. State of Uttaranchal (2008) 4 SCC 171;K.A. Nagamani Vs. Indian

Airlines(2009) 5 SCC 515 ; Vijendra Kumar Verma Vs. Public Service Commission (2011) 1 SCC 150 ; Ramesh Chandra Shah Vs. Anil Joshi (2013) 11 SCC 309 ; State (UT of Chandigarh) Vs. Jasmine Kaur (2014) 10 SCC 521 ; Pradeep Kumar Rai Vs. Dinesh Kumar Pandey (2015) 11 SCC 493 and Madras Institute of Development Studies Vs. K. Sivasubramaniyan (2016) 1 SCC 454. Thebroader principles which can be extracted from the above judgments, are :-

(i) when a candidate appears in the examination without objection and is subsequently found to be not successful, his challenge to the selection process is precluded; (ii) question of entertaining a petition challenging an examination would not arise where a candidate had appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was lacuna therein merely because his or hers result was not palatable; (iii) those who consciously take part in the

selection process cannot thereafter turn around and question the method of selection and its outcome; conduct of such persons disentitle them from questioning the selection process; (iv)after participating in the selection process, challenge to the same after declaration of result cannot be allowed. The candidates cannot approbate and reprobate at the same time.

The principle that the prospectus is binding on all persons concerned, was laid down by Hon'ble Supreme Court in ***Punjab Engineering College Chandigarh Vs. Sanjay Gulati*** reported in ***AIR 1983 SC 580.*** The terms & conditions of the prospectus are to be strictly adhered to avoid prejudice to the candidates during admission. (refer to the judgments in ***Sonia Kayastha Vs. State of H.P.*** reported in ***1999(1) Sim.L.C 162 & AIR 1999 Punjab and Haryana 319 (F.B)*** titled ***Indu Gupta Vs. Director Sports Punjab)***.

In view of the foregoing observations, contentions of the petitioner under both the grounds raised by him, are rejected. Accordingly, we find no merit in the instant writ petition and the same is dismissed accordingly. Pending miscellaneous application(s), if any, shall also stands disposed of.

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

CMPMO No. 69 of 2018

Shokat Ali ....Petitioner.

Vs.

Gulam Sabir and another .....Respondents.

CMPMO No. 201 of 2019

Shokat Ali .....Petitioner

Vs.

Rehana Parween alias Roma .....Respondent.

CMPMO No. 202 of 2019

Shokat Ali ....Petitioner.

Vs.

Rehana Parween alias Roma .....Respondent.

CMPMO No. 69 of 2018 a/w
CMPMO Nos. 201 and 202 of 2019
Date of Decision: 14.09.2020

Code of Civil Procedure, **1908**- Order XXXIX Rules 1 & 2- Temporary injunction- Grant of- Plaintiff alleging relinquishment deeds executed by him in defendants favour as nonest and seeking temporary injunction during pendency of suit restraining them from alienating land- Held, plaintiff specifically admitting execution of relinquishment deeds in defendants favour and there are no allegations of fraud etc. – Relinquishment deeds until set aside by competent court shall presumed to be valid for all intents and purposes- Plaintiff thus has no prima facie case or balance of convenience in his favour- Nor he will suffer irreparable loss in case of refusal of temporary injunction as principle of lis pendens shall apply in case suit property is disposed of during pendency of suit- Petition dismissed. (Para 8 & 9)

Whether approved for reporting? *Yes.*

For the petitioner(s): M/s Servedaman Rathore and Ankit Aggarwal, Advocates in all the petitions.

For the respondents: Mr. Karan Singh Kanwar, Advocate in all the petitions.

Ajay Mohan Goel, Judge *(Oral):*

CMPMO No. 69 of 2018

By way of this petition filed under Article 227 of the Constitution of India, the petitioner assails order dated 30.09.2016, passed by the Court of learned Civil Judge (Junior Division), Sirmaur District at Nahan in Civil Misc. App. No. 10/6 of 2016, vide which, an application filed under Order 39, Rules 1 & 2 read with Section 151 of the Code of Civil Procedure in Civil Suit No. 09/1 of 2016, stood dismissed by the learned Court below, as well as judgment dated 08.01.2018, passed by the Court of learned District Judge, Sirmaur District at Nahan in Civil Misc. Appeal No. 35-CMA/14 of 2017, vide which, the appeal filed by the present petitioner against the order passed by the learned Trial Court, was dismissed.

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

Petitioner before this Court has filed a suit, *inter alia,* seeking declaration that certain relinquishment deeds which have been executed by him in favour of the present respondents-defendants, are *non est* in the eyes of law, as the same were executed by him on account of some matrimonial dispute between him and his wife to avoid his liability and further, the same stood executed on account of some wrong legal advise. Alongwith the suit, the petitioner-plaintiff has also filed an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure, seeking the relief of temporary injunction against the present respondents-defendants, which stood dismissed by the learned Trial Court vide order dated 30.09.2016 by holding that the petitioner-plaintiff was not entitled for any interim relief, as he was not able to substantiate any *prima facie* case & balance of convenience in his favour or the fact that in the event of denial of interim relief in his favour, he shall suffer any irreparable loss or injury.

3. In appeal, the order passed by the learned Trial Court has been upheld by the learned Appellate Court by dismissing the appeal of the present petitioner.

4. Feeling aggrieved, the petitioner has filed this petition under Article 227 of the Constitution of India.

5. I have heard learned counsel for the parties and have also gone through the orders passed by the learned Courts below.

6. The execution of relinquishment deeds by the present petitioner in favour of the respondents-defendants is not in dispute, yet he has filed a suit seeking declaration that the execution of the relinquishment deeds is bad in law. This Court refrains from making any further comment on the merits of the suit, as the same is pending trial before the learned Trial Court and any observation that may be made by this Court on the merits of the case, may affect the interests of either party.

7. Suffice it to say that in order to obtain interim relief under Order 39, Rules 1 and 2 of the Code of Civil Procedure, three ingredients which a party is to prove before the Court are: (a) prima facie case; (b) balance of convenience; and (c) irreparable loss in the event of interim relief not being granted.

8. Coming to the facts of the present case, as the petitioner is seeking declaration for setting aside certain relinquishment deeds which he himself admits to have executed in favour of the respondents-defendants, it cannot be said that there is a *prima facie* case in favour of the petitioner-plaintiff, as it is not his case that said relinquishment deeds were on account of some fraud etc. so committed upon him. Similarly, it cannot be said that balance of convenience is in favour of the petitioner-plaintiff, because once it is his own case that relinquishment deeds stood executed in favour of the defendants, then till the same are set aside by a competent Court of law, presumption is that the deeds are valid for all intents and purposes. Thirdly, the contention of the petitioner that in the event of the interim relief not being granted, he shall suffer irreparable loss or that the parties may alienate the properties during the pendency of

the suit to the prejudice of the petitioner also has no merit, for the simple reason that as the matter is *sub judice,* it is but natural that the principle of *lis pendens* shall apply.

9. Now coming to the orders passed by the learned Courts below, during the course of arguments, learned counsel for the petitioner could not demonstrate that the findings which have been returned by the learned Courts below are contrary to the record available with learned Courts below while deciding the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure and the appeal. In fact, the order passed by the learned Appellate Court in appeal clearly demonstrates that even the factum of possession of the suit land with the petitioner is in dispute, because the contents of the relinquishment deeds are to the contrary. Not only this, the observation which has been made by learned Trial Court while dismissing the application under Order 39 Rules 1 and 2 of the Code of Civil Procedure is that the stand of the respondents before it was that the suit so filed by the petitioner is otherwise also barred by limitation. In these circumstances, as the petitioner was not able to prove the ingredients necessary to gain interim relief under Order 39, Rules 1 and 2 of the Code of Civil Procedure before the learned Courts below, this Court does not deems it proper to interfere with the orders which have been passed by the learned Courts below, which are subject matter of this petition.

10. Another point which the Court has to take into consideration while deciding the petition under Article 227 of the Constitution of India is that in such like matters, this Court is not to sit as an appellate Court. In case the orders passed by the learned Courts below which stand assailed before this Court under Article 227 of the Constitution of India contain one of the views which the Courts could have probably taken on the factual matrix before the Court, then this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India may not interfere with the same. Therefore also, this Court does not finds any merit in this petition and the same is accordingly dismissed, so also pending miscellaneous applications, if any. Interim order stands vacated.

CMPMO Nos. 201 and 202 of 2019

11. In view of the order passed in CMPMO No. 69 of 2018, as no further orders are required to be passed in these petitions, the same are disposed of accordingly.

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

Krishna @ Kiran .....Petitioner.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Revision No.168 of 2020
Reserved on: 21.09.2020
Decided on: 28.09.2020

Code of Criminal Procedure, 1973 (Code)- Sections 167 (2) & 173 (8)- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Section 36A(4) – Recovery of commercial quantity of contraband- Default bail- Entitlement- Petitioner contending that investigation continued even after 180 days without permission of Court and resulted in filing of 'supplementary

chargesheet' thereafter- As complete chargesheet was not filed within stipulated period of 180 days, she is entitled for default bail- Held, chargesheet stood filed in the Court within 180 days- It is not the contention of petitioner that Chemical Analyser's report was not part of chargesheet – By way of supplementary chargesheet, voice sample was intended to be placed on record for purpose of addition of Section 201 of Indian Penal Code, 1860- Earlier chargesheet was not incomplete- Petitioner not entitled for default bail. (Para 19)

Code of Criminal Procedure, 1973 (Code)- Sections 167 (2) & 173 (8)- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Section 36A(4), proviso– Default bail- Held, proviso appended to Section 36A(4) of Act has no applicability when a chargesheet has already been filed within period of 180 days- Thereafter prosecution can always file supplementary chargesheet under Section 173(8) of the Code.

Whether approved for reporting? Yes.

For the petitioner: Mr. Kundan Kumar, Advocate.

For the respondent: M/s Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General.

(Through Video Conferencing)

Ajay Mohan Goel, Judge :

By way of this petition, the petitioner has prayed for setting aside order dated 02.03.2020, passed by the Court of learned Special Judge (II), Shimla in Bail Application No. 12-S/22 of 2020, titled as Krishna alias Kiran Vs. State of Himachal Pradesh, vide which, the bail application filed by the petitioner under Section 167(2) of the Code of Criminal Procedure has been dismissed.

2. Brief facts necessary for the adjudication of present petition are that the petitioner herein filed an application under Section 167(2) of the Code of Criminal Procedure for grant of bail before the Court of learned Special Judge (II), Shimla in FIR No. 29/2019, dated 06.02.2019, registered under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 201 of the Indian Penal Code at Police Station Sadar, Shimla. The contention of the petitioner before the learned Special Judge was that she was arrested in the said FIR on 05.07.2019 and was produced before the Court on 06.07.2019. The charge-sheet was filed within 180 days. The period of 180 days from the production of the petitioner in the Court was over on 02.01.2020. Thereafter, the case was listed on 29.01.2020 for scrutiny of documents, when the prosecution filed a supplementary charge-sheet in the case before the learned Court below, copies whereof were supplied to the petitioner. According to the petitioner, the period of investigation under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') was subject to Sub-section (4) of Section 36A of the NDPS Act. The factum of filing of supplementary charge-sheet on 29.01.2020 by the prosecution demonstrated

that the first charge-sheet was incomplete, meaning thereby that investigation in the matter continued even after the period of 180 days of incarceration of the petitioner, as provided in Section 36A of the NDPS Act and, therefore, the petitioner was entitled to be released on bail under Section 167(2) of the Code of Criminal Procedure. According to the petitioner, as investigation continued beyond the period of 180 days without permission of the learned Trial Court, as was mandatory under the provisions of Section 36A of the NDPS Act, therefore, she was entitled to be released on bail under Section 167(2) of the Code of Criminal Procedure.

3. This application stands dismissed by the learned Special Court vide order dated 02.03.2020. While dismissing the application, learned Court has held that in the case in hand, FIR was registered on 06.02.2019 and the accused was arrested on 06.07.2019. The challan, complete in all respects, was filed 03.08.2019 alongwith the report of S.F.S.L. Learned Court held that the report of the Chemical Examiner was also filed alongwith the challan, which meant that the investigation with regard to NDPS offences was complete within the prescribed period. Learned Court also held that vide supplementary challan, police had filed the report of voice sample and, thus, added Section 201 of the Indian Penal Code. By relying upon the judgment of the Hon'ble Supreme Court in Cr. Appeal N. 478-479 of 2017, titled as Vinubhai Haribhai Malaviya Vs. The State of Gujrat, decided on 16.19.2019, learned Trial Court held that the bail application of the accused was devoid of any merit and accordingly, the same was dismissed.

4. Feeling aggrieved, petitioner has filed the present petition.

5. Learned counsel for the petitioner has argued that the order passed by the learned Court below, vide which, the application of the petitioner for grant of bail under Section 167(2) of the Code of Criminal Procedure has been rejected, is not sustainable in the eyes of law, as learned Special Court has erred in not appreciating that as a complete charge-sheet was not filed by the prosecution within the period stipulated under the NDPS Act, the petitioner was entitled to be released on bail under Section 167(2) of the Code of Criminal Procedure in light of the judgment delivered in similar circumstance by the Hon'ble High Court of Punjab and Haryana at Chandigarh in Gurpal Singh and another Vs. State of Punjab, CR.R. No. 791 of 2016, decided on 23rd April, 2016. Learned counsel has argued that as NDPS Act is a Special Act, therefore, once there was a breach of the provisions contained in Section 36A of the said Act, as complete challan was not filed without the permission of learned Trial Court, then the petitioner was entitled for grant of bail under Section 167(2) of the Code of Criminal Procedure and denial of the same by the learned Special Court is a result of complete misreading of the statutory provisions as well as the law declared by the Hon'ble High Court of Punjab and Haryana. He has further argued that benefit of Section 173(8) of the Code of Code of Criminal Procedure cannot be given to the prosecution, as the field is covered by the provisions of Section 36A (4) of the NDPS Act. On these bases, he has prayed for setting aside the order dated 02.03.2020, passed by the learned Special Judge and release of petitioner under Section 167(2) of the Code of Criminal Procedure.

6. The petition has been resisted by the State on the ground that there was no infirmity with the order passed by the learned Court below rejecting the bail application filed by the petitioner under Section 167(2) of the Code of Criminal Procedure, because the challan in

terms of the provisions of Section 36A, harmoniously read with Section 173 of the Code of Criminal Procedure, stood filed by the prosecution within the stipulated period and simply because a supplementary challan was filed thereafter, the same did not confer any right upon the petitioner to claim bail under Section 167(2) of the Code of Criminal Procedure, as it is completely wrong to assume on the part of the petitioner that simply because a supplementary challan was filed later on, therefore, the initial challan was incomplete. Learned Additional Advocate General has argued that the judgment of Hon'ble Punjab and Haryana High Court is not applicable in the facts of this Case and even otherwise, the same is not binding on this Court. He has further submitted that the provisions of the NDPS Act are being completely misread and misinterpreted by the petitioner and therefore also, the petition is liable to be dismissed, because no right stands conferred upon the petitioner to be released on bail under Section 167(2) of the Code of Criminal Procedure, simply because a supplementary challan has been filed by the prosecution, for which, there was no need to seek any leave of the Court. On these points, he has prayed that the bail petition be dismissed.

7. I have heard learned counsel for the parties and have also gone through the pleadings.

8. Section 36-C of the NDPS Act reads as under:

> "**36C. Application of Code to proceedings before a Special Court.**
>
> Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."

Sub-section (4) of Section 36A and proviso thereto read as under:

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

9. A perusal of Sub-section (4) of Section 36A thus demonstrates that this statutory provision provides that "ninety days" referred to in Section 167 (2) of the Code of Criminal Procedure are to be construed as "one hundred and eighty days" as far as persons

accused of an offence punishable under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity booked under the NDPS Act are concerned.

10. At this stage, it is necessary to refer to certain provisions of Section 167 of the Code of Criminal also. Section 167(2) of the Code of Criminal Procedure, inter alia, provides that the Magistrate to whom an accused person is forwarded under this Section may, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, provided that the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the policy, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so. The provision further provides that no Magistrate shall authorise the detention of the accused person in custody under the said paragraph of Section 167(2) for a total period exceeding 90 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.

11. Now, the period of "90 days", as it finds mention in Section 167(2) of the Code of Criminal Procedure has been construed to refer to "180 days" in Sub-section (4) of Section 36A of the NDPS Act. The proviso thereto further contains that if it is not possible to complete the investigation within the period of 180 days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of 180 days.

12. Coming to the facts of this case, according to the petitioner, she was arrested on 05.07.2019 and was produced before the Court on 06.07.2019 and the charge-sheet was also filed within the period of 180 days. Her case is that as on 29.01.2020, when the matter was listed before the learned Special Judge for scrutiny of documents, as a supplementary charge-sheet was filed by the prosecution, therefore, it had to be construed that investigation was not completed within 180 days, conferring upon the petitioner the right to be released on bail under Section 167(2) of the Code of Criminal Procedure, as no permission was sought by the prosecution to investigate the matter beyond the period of 180 days.

13. The contention of the petitioner that this charge-sheet cannot be stated to be a complete charge-sheet, is based upon the judgment of Hon'ble High Court of Punjab and Haryana in *Gurpal Singh's* case (supra), wherein the Hon'ble High Court has held as under:

> ".....13. It is true that in the given case, certain documents which are formal in nature, if not accompanied with the report/charge-sheet may not change the nature of report/charge-sheet contemplated under Section 173(2) and (5) of the Code particularly when material is sufficient for the Magistrate to take cognizance of the offence as per provisions of the Code. However, in the instant case, the Chemical Analyser's report is the basis for deciding whether substance which is seized during raid is Ganja or not, which would determine whether provisions of the Narcotic Drugs and Psychotropic Substances Act are attracted or not. The Magistrate in such situation undoubtedly cannot proceed to take cognizance of the offence for want of complete charge-sheet/report and, therefore, in the present case, the charge-sheet/report which is submitted

by the Police in the Court on 04.08.2001 cannot be said to be a charge-sheet/report as contemplated under Section 173(5) of the Code.

14. There is another dimension to the issue in question. In the given set of circumstances, Police may submit a charge-sheet in the Court though incomplete, but within a stipulate period as contemplated under Section 167(2) of the Code, i.e., sixty days or ninety days, if all the relevant documents are filed in the Court as contemplated under Section 173(5) of the Code, in that event, the accused cannot seek bail in view of provisions of Section 167(2) of the Code. However, in the instant case, Chemical Analyser's report was filed in the Court beyond the period of ninety days, i.e., on 9.11.2001 and, therefore, prosecution in the present case cannot taken any advantage in this regard. It is needless to mention that if the Police fails to file charge-sheet/report contemplated under Section 173 of the Code within the stipulated period of sixty days or ninety days, a right is accrued to the accused to seek release on bail and Court in such situation are expected to dispose of such applications forthwith without granting time to prosecution to fill up the lacuna.

15. In the instant case, the Trial Court ought to have disposed of forthwith the application of the applicants whereby release was sought in view of provisions of Section 167(2) of the Code, without granting further time to the prosecution. In any case, prosecution, in the instant case, did not file all material documents within the stipulated period and, therefore, report/charge-sheet which is filed by the prosecution is not in conformity with Section 173(5) of the Code. The applicants, in my opinion, are entitled to be released on bail since prosecution failed to file charge-sheet/report within the stipulated period as contemplated under Section 167(2) of the Code."

Following the judgment of Apex Court in Satya Narain Musadi's case (supra) which has been followed by the High Court of Andhra Pradesh in Matchumari China's case (supra), and by Calcutta High Court in Raghubirsaran Jain and another Vs. State and another, 1995 Crl. L.J. 4117, I am of the considered opinion that the petitioners herein should have been released, in peculiar circumstances of this case, as indefeasible right had accrued to them under Section 167(2) Cr.P.C. on presentation of incomplete challan without the report of chemical examiner and the prosecution agency having not availed the benefit of Section 36A(4) of the NDPS Act within a period of 180 days. In a case under the NDPS Act, a right of bail under Section 167(2) Cr. P.C. of an accused can be defeated by the prosecution agency by availing the remedy under Section 36A(4) of the NDPS Act subject to the fulfillment of the statutory requirement of Section 36A(4) of the NDPS Act which is to be considered in each case on individual merits by the concerned trial Court/Special Judge. The right under Section 167(2) Cr. P.C. cannot be defeated by merely filing an incomplete challan. It is pertinent to observe here that all observations made in this judgment are in context to the offences under the NDPS Act."

14. In my considered view, the contention of the petitioner that she is entitled to be released on bail under the provisions of Section 167(2) of the Code of Criminal Procedure, because supplementary charge-sheet stood filed by the State without the leave of the Court beyond 180 days, is without any merit. It is not in dispute that the charge-sheet stood filed by the prosecution within 180 days, as it is the admitted case of the petitioner herself.

15. A perusal of the judgment passed by the High Court of Punjab and Haryana demonstrates that what weighed with the Hon'ble Court while ordering the release of the accused therein under Section 167(2) of the Code of Criminal Procedure was that the Chemical Analyser's report was not appended with the earlier charge-sheet and as per the Hon'ble Court, because it was Chemical Analyser's report, on the basis of which, it could have been deciphered as to whether the seized substance was Ganja or not, which would determine whether the provisions of the NDPS act were attracted or not, the Magistrate in such situation could not proceed to take cognizance of the offence for want of complete charge-sheet.

16. I will leave the matter as it stood decided by the Hon'ble High Court of Punjab and Haryana at this stage itself and proceed. In the case in hand, it is not the contention of the petitioner that Chemical Analyser's report was not a part of the initial charge-sheet. Further, a perusal of the order passed by the learned Court below demonstrates that by way of supplementary charge-sheet, all that was intended by the prosecution to place on record was a voice sample for the purpose of addition of Section 201 of the Indian Penal Code. That being so, by no stretch of imagination, it could be said that the earlier charge-sheet/challan filed by the prosecution was purportedly incomplete so as to enable learned Special Court to take cognizance.

17. At this stage, it is relevant to refer to the judgment of Hon'ble Supreme Court in ***Abdul Azeez P.V. and others*** Vs. ***National Investigation Agency*** JT 2014(13) SC 10, in which, Hon'ble Court in para-4 has been pleased to held as under:

> "4. Having gone through the charge-sheet, we are not persuaded to take a different view. The materials adverted to show that it was a final report on the facets investigated into by the investigating agency. Furthermore, the requisite sanctions as required under Sections 18 and 18A of the UAPA and so also under Section 7 of the Explosive Substances Act were also accorded by the concerned authorities. The charge-sheet so filed before the learned Special Court was complete in all respects so as to enable the learned Special Court to take cognizance in the matter. Merely because certain facets of the matter called for further investigation it does not deem such report anything other than a final report. In our opinion Section 167(2) of Cr. P.C. stood fully complied with and as such the petitioners are not entitled to statutory bail under Section 167(2) of Cr. P.C."

18. One another important aspect of the matter, which this Court would like to dwell upon at this stage is that the provisions of Section 36A(4) as well as proviso thereto are being indeed misread and misinterpreted by the petitioner. In my considered view, Sub-section(4) of Section 36A only makes conditions imposed under Section 167(2) of the Code of Criminal

Procedure, entitling an accused for grant of bail if the investigation is not completed within the period prescribed therein, more stringent. Not only this, the proviso further confers upon the prosecution the right to seek time from the Special Court up to one year by fulfilling the ingredients of the proviso. The proviso is attracted in the eventuality when, indeed, no charge-sheet is filed in 180 days, as contemplated under Section 36A(4) of the NDPS Act. The proviso has no applicability when a charge-sheet has already been filed within the period of 180 days. Thereafter, in case the prosecution intends to file a supplementary charge-sheet, it can always do so under Section 178(8) of the Code of Criminal Procedure, as said provisions are deemed to be applicable in offences to be tried under the NDPS Act/ proceedings to be held by the Special Court in terms of Section 36C of the NDPS Act.

19. Therefore, in view of the above discussion, as this Court does not find any merit in the present petition and further as this Court finds no infirmity in order dated 02.03.2020, passed by the Court of learned Special Judge(II), Shimla in Bail Application No. 12-S/22 of 2020, this petition is dismissed, so also pending miscellaneous applications, if any.

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

Hemant Kumar ....Petitioner.

Vs.

State of Himachal Pradesh and another ....Respondents

CWPOA No. 229 of 2019
Date of Decision: 10.09.2020

Administrative Law- Applicability of principles of natural justice- Reasoned/speaking order, what is?- Held, expression 'speaking order' does not ipso facto mean and require that order necessarily has to be lengthy one- Order, may be brief, but if spells out reasons as to why it has been passed then it is a speaking order. (Para 13)

Constitution of India, 1950- Articles 14 & 226- Extraordinary leave to pursue employment outside State- Grant of- Held, employee has only a right of being considered to be granted extraordinary leave as per Office Memorandum- Proceeding on such leave without the same being sanctioned in his favour would amount to misconduct. (Para 14)

Constitution of India, 1950- Articles 14 & 226- Order of dismissal from service- Writ petition- Scope of Court's interference- Held, against decision of Disciplinary Authority or Appellate Authority, High Court is not to act as Appellate Authority- Primarily, Court has to see whether disciplinary proceedings were conducted in a manner in consonance with prevalent service rules – *And whether petitioner was given a fair opportunity to put forth his case or not?. (Para 13)*

Whether approved for reporting?1 *Yes.*

For the petitioner: Ms. Shalini Thakur, Advocate.

For the respondents: Mr. Ajay Vaidya, Senior Additional Advocate General.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(1) A writ of certiorari may kindly be issued for quashing Annexure P-8 dated 7.8.2006, Annexure P-10 dated Oct., 2007, Annexure P-13 dated 14.8.2008 and Annexure P-15 dated 27.11.2008.*
>
> *(2) A writ of mandamus may kindly be issued to the respondents to grant Extraordinary Leave to the petitioner as prayed for by him vide Annexure P-2 dated 28.5.2007.*
>
> *(3) A writ of mandamus may kindly be issued to the respondents for reinstating the petitioner in service with all consequential benefits.*
>
> *Or in the alternative*
>
> *A writ of mandamus may kindly be issued to the respondents to give all financial and other benefits to the petitioner for service rendered by him with the respondents w.e.f. 3.8.1989 till 2.8.2005 after setting aside the penalty of dismissal imposed upon the petitioner, in order to enable the petitioner to get his pension and other financial benefits due to him on account of service rendered and for this purpose grant extraordinary leave to the petitioner for the period required.*
>
> *(4) For a writ of mandamus to the respondents to produce entire relevant record*

before this Hon'ble Court including the complete record of Annexure P-16 i.e., the noting sheets dealing with the case of the petitioner and other similarly situated doctors viz. Dr. Hemant Sharma."

2. Petitioner joined the Health Department as a Medical Officer in the year 1989. Finance (Regulations) Department, Government of Himachal Pradesh issued an Office Memorandum dated 22.03.2001 (Annexure P-1) on the subject: *"Grant of Extraordinary Leave To The State Government Employees To Serve Outside Government"*. In terms of the said Memorandum, the employees of the State Government were given an opportunity to avail Extraordinary Leave subject to maximum of five years in case they seek employment outside the Government (within the country) on the terms and conditions, as stood enumerated in the said Office Memorandum. Clause-VII of the said Memorandum, *inter alia,* provided that before allowing any employee to avail Extraordinary Leave, the concerned Administrative Secretary was to take a view as to whether the Department could spare the services of concerned employee. It further stood mentioned in this Clause that such leave shall not be allowed in case the Department feels that services of the concerned employee could not be spared in exigencies of public service.

3. Petitioner before this Court, who at the relevant time was serving as Medical Officer in MGMSC Khaneri, Rampur Bushahar, vide Annexure P-2 dated 28.05.2005, made a request to the competent authority to consider his case for grant of Extraordinary Leave for five years. This was followed by another communication dated 02.08.2005 (Annexure P-4), in which, it was stated by the petitioner that as he could not continue to serve as a Government servant in the prevailing circumstances, he was proceeding on leave w.e.f. 02.08.2005 afternoon. It was further mentioned in this communication that he presumed that as leave was under consideration for sanction, his departure be deemed to be as proceeded on Extraordinary Leave w.e.f. 02.08.2005. It was also mentioned in this communication that in the alternative, he was requesting to allow him to proceed on premature retirement.

4. Vide Annexure P-6, dated 5th August, 2005, Principal Secretary (Health), Government of Himachal Pradesh rejected the request of the petitioner for premature retirement, in view of the fact that neither Extraordinary Leave stood granted in favour of the petitioner by the competent authority in terms of Clause-VII of Annexure P-1 nor his request for premature retirement stood accepted by the competent authority.

5. As the petitioner was willfully absenting himself from duty w.e.f. 2nd August, 2005, a Memorandum was issued to him, i.e., Memorandum dated 7th April, 2006 (Annexure P-8), vide which, he was called

upon to submit his response within two days to the Article ofCharges, which stood appended with this Memorandum, vide which, the petitioner was informed that an inquiry was proposed to be held against him under Rule 14 of the CCS (CCA) Rules, 1965. The Article of Charges framed against the petitioner were, *inter alia*, to the effect that whileworking as a Medical Officer in MGMSC Khaneri (Rampur), he willfully absented himself from duty w.e.f. 03.08.2005 without prior permission/sanction of competent authority, which amounted to unbecoming of a Government servant and was in violation of Rule 3 ofthe CCS (Conduct) Rules, 1964. It was further a charge against him that the petitioner while working as Medical Officer in MGMSC Khaneri (Rampur), was indulging in private practice at Rampur, which also amounted to unbecoming of a Government servant.

6. To cut short the facts, post receipt of response to said Memorandum, as the Disciplinary Authority was not satisfied with the response of the petitioner, accordingly, an Inquiry Officer was appointed, who submitted his report, which is appended with the petition as Annexure P-10, relevant portion of which is quoted hereinbelow:

> *"....BOTH THE ARTICLE OF CHARGES AS MENTIONED ABOVE WHICH HAVE BEEN FRAMED AGAINST THE CHARGED OFFICER Dr.*
>
> *Hemant Kumar MO MGMSC Khaneri, Rampur ARE TRUE AND CORRECT and I have arrived on this conclusion due to the following facts:-*
>
> *Though Dr. Hemant Kumar applied for the Extra Ordinary Leave/Premature retirement on some personal (Domestic) circumstances on 28.05.2005 but without waiting for the approval/sanction of these, he proceeded on leave and submitted his departure report to the SMO I/C MGMSC Khaneri (Rampur) in anticipation of sanctionof E.O.L./Premature retirement and when the CO was asked to join back after he was conveyed therejection of his Premature retirement request he never reported back for his duties in MGMSC Khaneri (Rampur) presuming that his request for E.O.L. is still under the consideration of the Government. Thus the CO has erred by proceeding on E.O.L. without the prior approval/sanction of the competent authority.*
>
> *The charged officer himself has admitted in the statement recorded during the course of inquiry annexed at Sr. No. 2 and in the written statement submitted by the CO to the Principal Secretary (Health) H.P. on dated 15.08.2006 annexed at Sr. No. 8 that he is doing Private Practice at Rampur presuming that His E.O.L. request to the*

H.P. Government is under the Government consideration and it is certain to be sanctioned in his favour and in the meantime he has got every right to do Private Practice to earn his Livelihood. Also the Inquiry conducted by Dr. Rajinder Singh Bist SMO MGMSC Khaneri Rampur indicates that Dr. Hemant Kumar is doing Private practice in Deep MedicalCenter Rampur. Here also the Charge of indulgence in the Private Practice by the CO is proved because unless the request of grant of E.O.L. has been accorded by the competent authority the officer willbe considered as on duty and not on E.O.L. and while on duty a Government Medical Officer cannot indulge in Private Practice."

The petitioner was given an opportunity to respond to the inquiry report vide Annexure P-11 and he submitted his response vide Annexure P-12. Being dissatisfied with the response so submitted by him, the Disciplinary Authority, vide order dated 14th August, 2008 (Annexure P-13), imposed the penalty of dismissal from service with immediate effect upon the petitioner."

7. Petitioner was given an opportunity to respond to the inquiry report vide Annexure P-11 and he submitted his response vide Annexure P-12. Being dissatisfied with the response so submitted by him, the Disciplinary Authority vide order dated 14th August, 2008 (Annexure P-13), imposed the penalty of dismissal from service with immediate effect upon the petitioner.

8. Feeling aggrieved, he filed an appeal, which was also dismissed by the Appellate Authority vide order order dated 27.11.2008 (Annexure P-15). These orders stand assailed by the petitioner before this Court.

9. Learned counsel for the petitioner argued that the disciplinary proceedings which stood initiated against the petitioner were bad in law for the reason that petitioner was ordered to be dismissed from service, purportedly on the ground that he submitted his resignation, whereas at no stage the petitioner had submitted his resignation. She further argued that the order passed by the Disciplinary Authority, vide which, the services of the petitioner stood dismissed, was a non-speaking order and so was the order vide which the Appellate Authority dismissed the appeal of the petitioner. Lastly, it was submitted by learned counsel for the petitioner that even otherwise, the punishment which has been imposed upon the petitioner is harsh and not in proportion with the alleged mis-conduct of the petitioner. In this regard, she relied upon the judgment of Hon'ble Supreme Court in *Chairman- cum-Managing Director, Coal India Limited and another* Vs. *Mukul Kumar Choudhuri and others*, (2009) 15 Supreme Curt Cases 620.

10. No other point was urged.

11. Learned Senior Additional Advocate General, on the other hand, defended the act of the respondent-Department by stating that the petitioner was rightly removed from service, because he did not conduct himself in a manner in which a Government employee has to. Mr. Vaidya argued that the petitioner having been appointed as a Medical Officer, was duty bound to perform his duties, yet he willfully absented himself from duty in the garb of the applications submitted by him for Extraordinary Leave, which was never accepted by the competent authority and further his request for premature retirement was also neveraccepted by the competent authority. He further argued that it cannot be said that the order passed by the Disciplinary Authority or the Appellate Authority are unreasonable orders, for the reason that it is not in dispute, as is clearly borne out from the report of the Inquiry Officer that the petitioner willfully absented himself from duty. As per him, the Disciplinary Authority, in these circumstance, rightly passed the order of dismissal of the petitioner from service, as it was not the case of the petitioner that the findings returned in this regard by the Inquiry Officer ere not correct, which required a detailed answer in the order which was passed by the Disciplinary Authority. On these basis, he submitted that the Disciplinary Authority and the Appellate Authority have rightly passed appropriate orders, keeping in view the conduct of the petitioner and this petition being devoid of any merit, be dismissed.

12. I have heard learned counsel for the parties and have also gone through the pleadings as well as the judgment cited by learned counsel for the petitioner.

13. At the very outset, this Court would like to observe that in exercise of its power of judicial review against the decision of the Disciplinary Authority or the Appellate Authority, as the case may be, this Court is not to act as an Appellate Authority, but primarily has to see asto whether the Disciplinary proceedings were conducted in a mannerwhich is in consonance with the CCS(CCA) Rules, 1965 and whether the petitioner was given a fair opportunity to put forth his case or not. It is not the case of the petitioner that the disciplinary proceedings were conducted by the Inquiry Officer in violation of the provisions of CCS(CCA) Rules or that he was not heard. Further, as far as the contention of learned counsel for the petitioner that the order passed by the Disciplinary Authority or for that matter by the Appellate Authority, are non-speaking orders, this Court is of the view that keeping in view thefact that the allegation against the petitioner was of willful absence from duty, which duly stood proved from the record itself, there was no necessity for the Disciplinary Authority or the Appellate Authority to have had passed a lengthy order, because perusal of the orders passed demonstrate that by no stretch of imagination it can be said that the orders passed by the Disciplinary Authority or the Appellate Authority, are

non-speaking orders. This Court reiterates that speaking orders does not *ipso facto* means that they have to be lengthy orders also. If the order, may be brief, spells out the reasons as to why it has been passed, then it is a speaking order and it is not necessary that only lengthy order can be said to be a speaking order.

14. Coming to the facts of this case, here the petitioner happened to be a Medical Officer. In his capacity as such, he was appointed in the rural area of the State of Himachal Pradesh. It is not in dispute that there was an Office Memorandum issued by the Government of Himachal Pradesh, permitting employees of the Government of Himachal Pradesh to go on Extraordinary Leave, but an employee only had a right of being considered to be granted Extraordinary Leave in terms of Clause VII of the Memorandum. In this case, the petitioner, who happened to be a Class-I Officer and not a novice, after applying for Extraordinary Leave, mis-conducted himself by proceeding on leave without the same being sanctioned in his favour. Not only this, when in his application, he made an alternative prayer of being retied prematurely, which was rejected by the authority concerned, a prudent person would have immediately re-joined his duties, which he did not do. This clearly proves the intent of the petitioner that he was no more interested in performing his duties as a Medical Officer. The reasons as to why he was no more interested to perform the duties of a Medical Officer, are clearly borne out from the record that he was indeed having his own private practice and, that too, when he happened to be a Government employee. This kind of conduct from a Medical Officer is least expected. The judgment relied upon by learned counsel for the petitioner with regard to proportionality of punishment that can be imposed upon a person, in my considered view, has no applicability as far as this case is concerned. Hon'ble Supreme Court in *Chairman-cum-Managing Director, Coal India Limited and another* Vs. *Mukul Kumar Choudhuri and others,* (2009) 15 Supreme Curt Cases 620 has been pleased to hold as under:

> *"19. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review."*

No doubt, the doctrine of proportionality has to be taken into consideration while imposing punishment upon an employee in case he is found guilty of misconduct, but in my considered view, there cannot be any straitjacket formula in this regard and the proportionality will depend upon facts of each and every case. In this case, we are dealing with a Medical Officer. This Court places a Medical Officer akin to a soldier, who guards our Border. A Medical Officer cannot be equated with any other employee and the issue of willful absence from service in the case of a Medical Officer has serious and different connotations as compared to any other employee. In this view of the matter, this Court is of the view that the punishment which has been imposed upon the petitioner by the Disciplinary Authority and which has been upheld by the Appellate Authority, by no stretch of imagination, can be said to be harsh or disproportionate to the misconduct of the petitioner.

15. In view of the observations made hereinabove, as this Court finds no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Shri Chandu Lal ....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No. 3423 of 2019
Date of Decision: 21.09.2020

Constitution of India, 1950- Articles 14 & 226- Pensionary benefits- Minimum qualifying service of 10 years- Whether service rendered on daily wage basis, can be counted?- Held, services rendered for five years on daily wage basis is to be treated as one year of regular service for calculating qualifying service for grant of pension. (Para 8)

Cases referred:

Mool Raj Upadhyaya Vs. State of H.P. and others 1994 Supp.(2) SCC 316;

Whether approved for reporting? *Yes.*

For the petitioner: Mr. L.N. Sharma, Advocate.

For the respondents: Mr. Somesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

Learned Additional Advocate General, on instructions, submits that the Court may pass appropriate orders on the merits of the case.

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

The petitioner was initially engaged as a Beldar on daily wage basis in the year 1994. His services stood regularized w.e.f. 01.01.2002. He superannuated from service on 31.08.2011 after completion of 9 years and 8 months of total regular service with the respondents. His claim is that in terms of the law declared by the Hon'ble Supreme Court in ***Sunder Singh*** *Vs.* ***The State of Himachal Pradesh and others****, Civil Appeal No. 6309 of 2017, decided on 8th March, 2018,* the services rendered by him on daily wage basis have to be taken into consideration by treating five years service so rendered as one year service rendered on regular basis for pension to enable him to fulfill the minimum eligibility criteria of 10 years service for the purpose of getting pension post superannuation.

3. The case of the petitioner is resisted by the State, *inter alia,* on the ground that the judgment which has been passed by the Hon'ble Supreme Court in *Sunder Singh's case (supra)* has to be read only vis-a-vis those persons who stood regularized in terms of the decision so rendered by the Hon'ble Supreme Court in ***Mool Raj Upadhyaya*** *Vs.* ***State of H.P. and others*** 1994 Supp.(2) SCC 316 and as the petitioner is not the beneficiary of the judgment in *Mool Raj Upadhyaya's* case, therefore, he is not entitled for the relief as claimed.

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

5. It is not in dispute that the petitioner was initially appointed as a Beldar on daily wage basis in the year 1994. It is also not in dispute that his services were regularized in the year 2007, however, the same were ordered to be regularized w.e.f. 01.01.2002. The petitioner superannuated from service of the respondent on 31.08.2011 after completion of 9 years and 8 months service on regular basis. It is also not in dispute that had the petitioner completed 10 years of service, then he would have been eligible for grant of pension.

6. Hon'ble Supreme Court in *Sunder Singh* Vs. *The State of Himachal Pradesh and others,* Civil Appeal No. 6309 of 2017, decided on 8th March, 2018 has been pleased to hold as under:

> *"2. The appellants represent class of Class-IV employees who were recruited initially as daily wagers such as Peon/Chowkidar/ Sweeper/Farrash/Malis/Rasoia etc. Their services, thereafter, were regularized pursuant to the decision of this Court in Mool Raj Upadhyaya Vs. State of H.P. and Ors. 1994 Supp(2) SCC 316 Regularization was after 10 years of service.*
>
> *3. It is undisputed that the post-regularization an employee who had served for 10 years is entitled to pension for which work charge service is counted. Earlier, in terms of O.M.*

dated 14.05.1998, 50% of daily-wage service was also counted for pension after regularization but the rules have undergone change.

4. Since the appellants have not rendered the requisite 10 years of service they have been denied pension.

5. Even though strictly construing the Rules, the appellants may not be entitled to pension. However, reading the rules consistent with Articles 14, 38 and 39 of the Constitution of India and applying the doctrine of proportionate equality, we are of the view that they are entitled to weightage of service rendered as daily wagers towards regular service for the purpose of pension.

6. Accordingly, we direct that w.e.f 01.01.2018, the appellants or other similarly placed Class-IV employees will be entitled to pension if they have been duly regularized and have been completed total eligible service for more than 10 years. Daily wage service of 5 years will be treated equal to one year of regular service for pension. If on that basis, their services are more than 8 years but less than 10 years, their service will be reckoned as ten years."

7. The ratio of the judgment so delivered by Hon'ble Supreme Court is that the services which have been rendered by a daily wager on daily wage basis before his regularization are not *non est* and in a situation where the person is not likely to receive pension after superannuation because there is some short fall in the service which renders one eligible for receipt of pension, then the benefit of past service rendered by such a person on daily wage basis, has to be given by treating five years service as one year of regular service for pension.

8. The contention of the State that judgment of the Hon'ble Supreme Court in *Sunder Singh's case (supra)* has to be read only vis-a-vis those persons who stood regularized in terms of the decision so rendered by the Hon'ble Supreme Court in *Mool Raj Upadhyaya's case (supra),* in my considered view, cannot be said to be correct interpretation of the judgment of the Hon'ble Supreme Court. Once the Hon'ble Supreme Court has been pleased to lay down the law that services rendered for five years on daily wage basis is to be treated as one year of regular service for calculating the service for grant of pension, then the same cannot be confined to the beneficiaries of the judgment in *Mool Raj Upadhyaya's case.*

9. The things can be perceived from another perspective also. The judgment of the Hon'ble Supreme Court in *Mool Raj Upadhyaya's* case is to the extent that the Policy of the State Government with regard to regularization of the employees in various Departments of the State stood approved by the Hon'ble Supreme Court in terms of the said judgment with modification and the effect of the said judgment was that once a daily wager completed 10 years of service with at least 240 days in each calendar year, then the same confers upon such an employee the right of regularization. Subsequently, what the State has done is that it has come up with different regularization Policies at different time and the period of service on daily wages stands reduced from 10 years to 8 years etc. In this view of the matter also, it cannot be said that the judgment of the Hon'ble Supreme Court in *Sunder Singh's case (supra)* will not be applicable

to persons like the petitioner, because the petitioner is also the beneficiary of the Policy of the State Government, wherein, his services were regularized post completion of requisite number of years service.

10. Accordingly, this petition is allowed and the respondents are directed to treat five years service rendered by the petitioner on daily wage basis as one year regular service for the purpose of conferring the benefit of pension to him. Pensionary benefits be released to the petitioner within a period of three months from today. In the event of the same being done within the said period, the State shall not be liable to pay any interest upon the arrears, however, in case the arrears of pension are not paid within a period of three months from today, then the arrears shall entail interest @6% per annum as from the date of filing of the petition. Miscellaneous applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Prabhu Kumar ..... Petitioner.

Versus

State of H.P. & ors ..... Respondents.

CWP No. 3634 of 2019
Reserved on: 22.9.2020.
Decided on: 29.9.2020.

Rights of Persons with Disabilities Act, 2016 (Act) - Section 2 (r) - 'Person with benchmark disability'- Meaning of- Held, 'Person with benchmark disability' means a person with not less than forty percent of a specified disability. (Para 4)

Rights of Persons with Disabilities Act, 2016 (Act) - Section 2 (zc), Schedule – 'Specified disability'- Held, locomotor disability forms part of physical disability and therefore is a 'specified disability' under the Act. (Para 4)

Rights of Persons with Disabilities Act, 2016 (Act) - Sections 2 (r) & 33 – Identification of posts for persons with benchmark disability- Held, State Government is required to constitute an Expert Committee with representation of persons with benchmark disabilities for identification of posts which can be held by persons with benchmark disability- The only limitation is that a physically handicapped person to become eligible for such post must have minimum disability of 40%. (Para 4)

Rights of Persons with Disabilities Act, 2016 (Act) – Section 34 (1) , second proviso- Exemption from reservation of posts for physically handicapped persons- Held, in consultation of Chief Commissioner of State, State Government may exempt any of its establishment from provisions of this Section mandating reservation of seats for physically handicapped persons. (Para 4)

Rights of Persons with Disabilities Act, 2016 (Act) – Sections 2(r), 33 & 34, Schedule- Benchmark disability- Whether Government can stipulate a maximum limit of disability for determining eligibility of candidate to particular post?- Held,

appropriate Government can prescribe a maximum eligibility limit of disability for persons belonging to physically handicapped category for posts reserved for them under the provisions of the Act. (Para 4)

Rights of Persons with Disabilities Act, 2016 (Act) – Section 34 – Intendment- Held, intention of Act is not to accept reduced standards of efficiency in performance of functions of a particular post merely because employee suffers from a disability. (Para 4)

Cases referred:

Ashok Kumar Vs. State of Bihar (2017) 4 SCC 357;
Chandra Prakash TiwariVs. Shakuntala Shukla (2002) 6 SCC 127;
of India Vs. S. Vinodh Kumar (2007) 8 SCC 100;
Munindra Kumar Vs. Rajiv Govil (1991) 3 SCC 368;
Rashmi Mishra Vs. M.P. Public Service Commission (2006) 12 SCC 724;
Amlan Jyoti Borooah Vs. State of Assam (2009) 3 SCC 227;
Manish Kumar ShahiVs. State of Bihar (2010) 12 SCC 576;
Madan Lal Vs. Stateof J&K (1995) 3 SCC 486;
Marripatti Nagaraja Vs. State of A.P. (2007) 11 SCC 522;
Dhananjay Malik Vs. State of Uttaranchal (2008) 4 SCC 171;
K.A. Nagamani Vs. Indian Airlines(2009) 5 SCC 515;
Vijendra Kumar Verma Vs. Public Service Commission (2011) 1 SCC 150;
Ramesh Chandra Shah Vs. Anil Joshi (2013) 11 SCC 309;
State (UT of Chandigarh) Vs. Jasmine Kaur (2014) 10 SCC 521;
Pradeep Kumar Rai Vs. Dinesh Kumar Pandey (2015) 11 SCC 493;
Madras Institute of Development Studies Vs. K. Sivasubramaniyan (2016) 1 SCC 454;

Whether approved for reporting? Yes.

For the petitioner	:	Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar,Advocate.
For the respondents	:	Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Vikas Rathore, Mr. Desh Raj Thakur, Addl. AGs, Ms. Seema Sharma, Mr. Bhupinder Thakur & Ms. Svaneel Jaswal, Dy. AGs for respondents No. 1 and 2. Mr. Vikrant Thakur, Advocate, for respondent No. 3.

Jyotsna Rewal Dua, *Judge*

Whether the respondents could prescribe 60% as the upper limit of disability for determining the eligibility of physically handicapped candidates for the post of Assistant District Attorney reserved under the provisions of the Rights of Persons with Disabilities Act, 2016, is the main question raisedin this writ petition.

2. *Facts.*

2(i) Under the Recruitment and Promotion Rules, the post of Assistant Public Prosecutor is to be filled up 100% by direct recruitment. The qualifications required for this post are :

> *"A. Essential qualifications:*
>
> *i) Professional Degree in Law from a recognizedUniversity or its equivalent and*
>
> *ii) At least two years experience as an advocate.*
>
> *B. Desirable qualification(s):*
>
> *Knowledge of customs, manners dialects of Himachal Pradesh suitability for appointment in the peculiar conditions prevailing in the Pradesh."*

Column No. 16 of the R&P Rules provides for reservation for the post as under:

> *"16. Reservation: The appointment to the Service shall be subject to orders regarding reservation in the service for Scheduled Castes/Schedules Tribes/other Backward Classes/other categories of persons issued by the Himachal Pradesh Government from time to time."*

2(ii) Requisition for filling up 20 posts of Assistant District Attorneys (ADA)(class-I gazetted) by way of direct recruitment on contract basis, was sent by respondent No. 2 [Director of Prosecution(Home)] to respondent No. 3-Himachal Pradesh Public Service Commission. Column No. 18 of this requisition gives following category wise split up of twenty posts:-

18(a) Are any posts reserved for SC/ST/OBC/Ex-serviceman or any other category of candidates? Please give clear details of the reservations.	1. *General* 2. *Schedule Caste* 3. *OBC* 4. *Ex-servicemen(Gen.)* 5. *Ex-servicemen (ST)* 6. *Physically Handicapped (having not less than 40% disability and more than 60% disability in one leg or one arm).*	*=09* *=03* *=03* *=02* *=01* *=02*
	Total	*20*

Two out of 20 requisitioned posts were meant for physically handicapped persons with disability ranging from 40%to 60% in one leg or one arm.

2(iii) On the basis of above requisition, respondent No. 3 issued an advertisement on 2.5.2018, inviting applications forvarious posts in different departments including 24 posts of Assistant District Attorneys [20(requisitioned)+04 backlog posts]. Two posts were reserved for persons belonging to physically handicapped category *'having not less than 40% disability and more than 60% disability in one leg or one arm'*. Instruction No.

(ix) of the advertisement provided that *"if any person with*

disability requires scribe/reader, having disability of 40% or more, he/she has to request for the same in writing to the Commission alongwith copy of disability certificate issued by the competent authority at least seven days prior to the screening test for the concerned post. Such applications will be entertained on merit and as per rules."

2(iv) Petitioner is a practicing Advocate and member of Shimla Bar Association. Medical certificate dated 9.3.2010 issued by State Medical Board reflects the petitioner as physically disabled person with 90% permanent disability. The nature of his disability is 'left shoulder disarticulation' and falls under Locomotor impaired category. Petitioner participated in the selection process. He qualified the written test on 4.7.2019under general (physically handicapped) category, for which, two posts were reserved by the respondents in the advertisement dated 2.5.2018. Against these two posts reserved for physically handicapped category, only five candidates including the petitioner were declared successful in the written test. Petitioner was called and he appeared before the Interview Board on 2.8.2019. Respondent No. 3 thereafter

issued a press note on 3.8.2019 recommending his name to respondent No. 2 for appointment to the post of Assistant District Attorney against General (physically handicapped) category. Respondent No. 2 vide notification dated 19.9.2019 issued appointment orders in favour of the candidates recommended by respondent No. 3. Petitioner was however left out from this list. Appointment order was not issued in his favour. Upon information sought by the petitioner under Right to Information Act, respondent No. 2 vide its communication dated 19.9.2019 informed respondent No. 3 that Shri Prabhu Kumar (petitioner) was ineligible for appointment as Assistant District Attorney as "he does not fulfill essential requirements mentioned at point No. 18 of the requisition as per which a candidate should not be having less than 40% disability and more than 60% disability in one leg or one arm. On screening of the candidature of Shri Prabhu Kumar it has been found that he is 90% disabled (left shoulder disarticulation), which is above the maximum limit fixed under handicapped quota."

Aggrieved against the rejection of his candidature at the stage of issuance of appointment order, petitioner has preferred instant writ petition, with following prayers:-

> *"1. That appropriate writ order or direction may very kindly be issued directing the respondent No. 1 to implement the recommendation made by the respondent No. 3 i.e. H.P. Public Service Commission, whereby, the name of the petitioner has been recommended for the post of Assistant District Attorney (Class-I Gazetted), by further directing the respondent No. 1 to appoint the petitioner as Assistant District Attorney (Class-I Gazetted) and the communication dated 19th September, 2019 (Annexure P-11) may very kindly be quashed and set aside.*
>
> *2. That appropriate writ order or direction may very kindly be issued and the condition of not having more than 60% disability in one leg or one arm as provided against column-18 of the requisition (Annexure P-2) may very kindly be quashed and set aside, by further quashing the similar condition imposed in advertisement No. 8 of 2018 (Annexure P-4), dated 2nd May, 2018, in the interest of law and justice."*

3. We have heard learned Senior Counsel for the petitioner, Learned Advocate General for respondents No. 1 and 2, learned Counsel representing respondent No. 3 and gone through the record.

3(i) Factual position in the case is not in dispute. Petitioner participated in the selection process for two posts of Assistant District Attorney, reserved for physically handicapped category. Despite recommendation of his name by H.P. Public Service Commission for appointment to the post, respondents No. 1 and 2 did not issue the appointment order in his favour on the ground that the physically disability of the petitioner exceeds the limit of 60% prescribed in the requisition as well as in the advertisement.

3(ii) Two questions arise in this writ petition for determination:-

a. Whether the respondents could have fixed a maximum cap of disability for determining the eligibility of a candidate belonging to physically handicapped category for the posts in question?

b. Whether after participating in the selection process under the impugned advertisement, is it open for the petitioner to challenge the fixation of maximum eligible limit of physical disability by the respondents in the requisition as well as in the advertisement?

4. First Point.

4(i) It will be appropriate, to first refer to the relevant provisions of The Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as 'Act'). Under Section 2(r) of the Act, *'person with benchmark disability'* means a person with not less than forty percent of a specified disability. The Section reads as under:

> *"2(r) "persons with benchmark disability" means a person with not less than forty percent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority."*

'Specified disability' has been defined under Section 2(zc) to mean the disability as specified in the schedule. Under the schedule attached to the Act, Locomotor disability forms part of physical disability and is, therefore, a specified disabilityunder the Act.

Petitioner possesses the minimum benchmark laid under Section 2(r) of the Act as he suffers from a specified disability which is not less than 40%.

4(ii) Section 33 of the Act provides for identification of the posts for reservation. The section reads as follows:-

> *"33. Identification of posts for reservation.—The appropriate Government shall—*
>
> *(i) identify posts in the establishments which can be held by*

respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34;

(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and

(iii) undertake periodic review of the identified posts at an interval not exceeding three years."

In accordance with provisions of Section 33, the appropriate government has to identify the posts for reservation, which can be held by respective category of persons with benchmark disability in respect of such reserved vacancies inaccordance with provisions of Section 34. In relation to 'State government', the 'appropriate government' under Section 2(b)(ii) means the State Government. State government has to constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts. State government in the instant case has apparently identified the post of Assistant District Attorney to be filled up from persons with physical disability of one leg or one arm. The only restrictivecondition under Section 33 readwith Section 2(r) is that a physically handicapped person to become eligible for such post must have minimum disability of 40%.

Section 34 of the Act deals with reservation in following manner:

*"34. **Reservation**.—(1) Every appropriate Government shall appoint in every Government establishment, not less than four percent of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent for persons with benchmark disabilities under clauses (d) and (e), namely:—*

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learningdisability and mental illness;

(e) multiple disabilities from amongst persons underclauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit."

Under the second proviso to Section 34(1), appropriate government in consultation with the Chief Commissioner of the State government, as the case may be, by issuing a notification can exempt any government establishment from provisions of this section. It is admitted case of the parties that no such exemption notification has been issued for respondent-Home department and it is for this reason that two posts of ADAs have been advertised for physically handicapped persons in accordance with Sections 33 and 34 of the Act.

The Rights of Persons with Disabilities Act, 2016 only prescribes a minimum benchmark of 40% disability for a physically handicapped person to become eligible for the posts meant for physically handicapped category reserved under the provisions of the Act. There is no ceiling on the maximum extent of disability in the Act. Petitioner has also placed on record an office memorandum dated 22.6.2017 issued by the government of Himachal Pradesh, Department of Personnel. The memorandum has been issued with a view to consolidate the

existing instructions and to bring them in line with Act of 2016. Clause-9 thereof pertains to degree of disability for reservation and is as under:-

> *"9.* ***DEGREE OF DISABILITY FOR RESERVATION:*** *Only such persons would be eligible for reservation in services/posts who suffer from not less than 40 percent of therelevant disability. A person who wants to avail benefit of reservation would have to submit a Disability Certificate issued by a competent authority. At the time of initial appointment against a vacancy* ***reserved for persons with benchmark disabilities,*** *the appointing authority shall ensure that the candidate is eligible to get the benefit of reservation."*

4(iii) When the Act does not provide for fixing any maximum cap of physical disability, even then would it still be permissible for the respondents to fix a ceiling limit of disability for applying for a post reserved for physically disabled person under the provisions of the Act, is the question raised herein. Respondents No. 1 and 2 in their reply have submitted that a person with minimum disability of 40% would not *ipso-facto* become entitled for automatic appointment. The head of the establishment has the competency to prescribe the conditions or restrictions, which can be imposed for assessing the suitability ofa person for a post keeping in view the nature of the job, work, duties, function to be performed by the incumbent of a post. There can be no quarrel with this position. Even under clause-9 of the memorandum dated 22.6.2017, only the minimum benchmark of disability i.e. 40% as is also the benchmark underthe Act, has been provided. It has been though expressed therein that at the time of initial appointment, the appointing authority shall ensure that the candidate with benchmark disability is eligible to get the benefit of reservation. The provisions of the Act readwith memorandum issued by the State government gives the authority to the appointing authority to ensure at the stage of appointment that the selected candidateis eligible for the benefit of reservation.

(2019) 4 Supreme Court Cases 237 , titled ***V. Surendra Mohan*** versus ***State of Tamil Nadu and others*** wasa case concerning legality of 50% disability fixed as maximum limit of eligibility for partially blind and deaf categories of disabled persons for the post of Civil Judges. Following issues were framed by the Apex Court for consideration:

> "12.1.(1) Whether the appellant who was suffering with disability of 70% (visual impairing) was eligible to participate in the selection as per notification dated 26.08.2014 of the Tamil Nadu Public Service Commission?
>
> 12.2.(2) Whether the condition of 40%-50% disability for partially blind and partially deaf categories of disabled persons is a valid condition?

12.3.(3) Whether the decision of the State Government vide letter dated 08.08.2014 providing that physically disabled persons that is partially deaf and partially blind to the extent of 40%-50% disability are alone eligible, is in breach of the provisions of 1995 Act and deserves to be set aside?"

It was noticed by the Hon'ble Apex Court that the writ petitioner having 70% disability had not challenged the disability range of 40% to 50%, fixed in the advertisement for partially blind and deaf persons. It was also observed by the Hon'ble Apex Court that the maximum eligibility limit of 50% disability for physically handicapped category for the post of Judicial Officers was fixed in consultation with the High Court and that High Court being the guardian of subordinate judiciary was well aware about the requirements for appointment in judicial service and therefore has a say in the eligibility of a person. Para No. 40 being relevant in this regard is reproduced hereinafter:

" 40. From the facts as noticed above, the State Government has consulted both the Public Service Commission as well as the High Court in reference to appointment of disabled persons on the post of Civil Judge (Junior Division). There is consensus in the view of State Government, Public Service Commission and the High Court that partially blind and partially deaf persons suffering with disability be allowed to participate in the recruitment, who has disability of 40%-50%. The High Court being well aware about the requirements for the appointment in the judicial service and it being guardian of subordinate judiciary, has a say in the eligibility of a person, who seeks appointment on the post of Civil Judge (Junior Division). Judicial service being part of Public Service, the State in consultation with the High court is fully empowered to lay down the eligibilities for selection on the post of Civil Judge (Junior Division). The Government Order dated 08.08.2014 supplements the Rules, 2007 and in no manner contravene any of the provisions of the Rules. ***The condition of having 40%-50% disability was prescribed by the Public Service Commission as per the Government Order issued by the State of Tamil Nadu after consultation with the High Court. The above condition in no manner can be said to be invalid. Learned counsel for the appellant has submitted that restricting the disability to 40%-50% in reference to persons having partial blindness is clearly denying the of reservation as provided under Section 33 of the Act, 1995 and is not in accord with Section 33 of the Act."***

Noticing Section 33 of the 1995 Act, it was held by the Hon'ble Apex Court that it is well within the power of appointing authority to prescribe eligibility conditions looking to the nature of the job to be performed by the holder of a post. A Judicial Officer in the State has to possess reasonable limit of the faculties of hearing, sight and speech in order to hear cases and write judgment. Therefore, stipulating a maximum limit of 50% disability in hearing/visual impairment as a condition to become eligible for the post is a legitimate restriction and said prescription does not violate any statutory provision nor contravenes any of the provisions of the 1995 Act. It will be apposite to extract hereinafter paras-44, 45 and 46:-

> *"44. The legal position with regard to reservation of posts for persons with disability is now well established that every appropriate Government is obliged to reserve posts for persons or class of persons with disability. In the present case, we are concerned with partial disability. The present is not a case where the respondent has not reserved the post for partial disability as required by Section 33 of the 1995 Act. Thus, requirement of reservation as mandated by Section 33 is clearly fulfilled.* ***The issue is regarding eligibility of appellant to participate in the selection and as to whether the requirement in the advertisement that only those, who suffer from disability of 40%-50% are eligible, is contrary to the 1995 Act or is in breach of any statutory provision. The State, which is appointing authority of Public Service in consultation with the High Court with reference to post of Civil Judge (Junior Division) can very well lay down the essential eligibilities and requirement for the post. When the State, High Court and Public Service Commission are of the view that disability, which is suitable for appointment on the post of Civil Judge should be between 40%-50%, the said prescription does not violate any statutory provision nor contravene any of the provisions of the 1995 Act. It is well within the power of appointing authority to prescribe eligibility looking to the nature of the job, which is to be performed by holder of a post.***
>
> 45. *A judicial officer in a State has to possess reasonable limit of the faculties of hearing, sight and speech in order to hear cases and write judgments and, therefore, stipulating a limit of 50% disability in hearing impairment or visual impairment as a condition to be eligible for the post is a legitimate restriction i.e. fair, logical and reasonable. The High Court in its additional statement has incapsulated the functions and duties of Civil Judge in following words:-*

"7. That in so far as the area of discharge of functions and duties of the judicial officers viz., Civil Judges is concerned this involves performances of strenuous duties:- they have to read documents, pleadings and ascertain facts and issues; monitor proceedings to ensure that all applicable rules and procedures are strictly followed without any violation; adviseadvocates, litigants and Court personnel regarding conduct, issues, and proceedings; participate in judicial proceedings to help in resolving disputes; preside over hearings and hear allegations made by plaintiffs and defendants to determine whether the evidence supports the charges or the averments made; write decisions on cases independently after reading and analysing evidence and documents; while recording

evidence observe the demeanour of witnesses etc. Impaired vision can only make it extremely difficult, even impossible, to perform any of these functions at all. All these apart, he/she has to perform duties such as conducting inquiries, recording dying declarations, going through identification parades, record statements of victims, conduct in-camera proceedings, passing orders on remand and extension and other administrative functions. In so far as District judges are concerned, apart from performing their usual judicial duties, they have to perform a myriad administrative duties also. Therefore, creating any reservation in appointment for those with disabilities beyond the 50% level is far from advisable as it may create practical and seemingly other avoidable complications. Moreover, given the need to prepare judgments based on the case papers and other material records in a confidential manner, the assistance of a scribe or the like completely takes away the secrecy and discreetness that come with the demands of the post."

46. The reasons as given above by the respondent No.3 fully justified the requirement ofdisability to the extent of 50% which is reasonable,just and fair. High Court did not commit any error indismissing the writ petition filed by the appellant. Inview of the foregoing discussions, we, thus, came tothe conclusion that prescription of disability to the extent of 40%-50% for recruitment for the post of CivilJudge (Junior Division) was valid and does not contravene any of the provisions of the 1995 Act orany other statutory provision. Issue Nos. 2 and 3 areanswered accordingly. We, thus, do not find any meritin this appeal and the same is

accordingly dismissed."

Provisions of 2016 Act involved in the instant casevis-a-vis fixing ceiling limit of disability are not different to the relevant provisions of now repealed 1995 Act which was under consideration in the aforesaid judgment. In view of law laid downin V. Surendra Mohan's case supra, it is no more *res-integra* thatprescribing a maximum eligibility limit of disability for the persons belonging to physically handicapped category persons for the posts reserved for them under the provisions of the Act, does not contravene any of the provisions of the 2016 Act.

4(iv) The only aspect which now remains to be examinedin the instant case is regarding the mode and manner of determining the maximum limit of disability. In ***(2009) 14 SCC 546,*** titled ***Union of India*** vs. ***Devender Kumar Pant***, Hon'ble Apex Court held that intention of the Disabilities Act is not to accept reduced standards of efficiency in performance of functions of a particular post merely because the employee suffers from a disability. In the instant case respondents No. 1 and 2 in their reply have simply submitted that head of every establishment has the competency to prescribe conditions or restrictions for assessing suitability of a person for a post, keeping in view the nature of job, work, duties, functions to be performed by the incumbent of a post. The action of respondent No. 2 in placing a cap of 60% as benchmark disability of one leg/one arm for the post of ADA has been sought to be justifiedon the ground that ADA is required to perform multifarious duties and functions. The respondents have not placed on record any material to show as to how and by adopting what process, under which of the provisions of the Act/instructions etc., the ceiling limit of 60% disability was fixed by them for determining the eligibility of a candidate belonging to physically handicapped (locomotor impaired) category for the post of Assistant District Attorney. How the issue was deliberated, who deliberated the issue, whether any Committee of experts in the concerned field of medicine (locomotor disability) was constituted to determine the maximum eligibility limit of disability for the post of ADA, whether any decision in that regard was taken, is not forthcoming from the reply. In fact, following para of the reply reflects the confusion writ large in respondent No. 2-department about fixation of 60% disability as maximum eligibility limit for the post of ADAs:-

> *".....it is submitted that the upper limit of disability of60% has been incorporated keeping in view the legitimate aim on suitability of a candidate to a particular post. However, the matter is being taken up with the Department of Social Justice & Empowerment i.e. Administrative Department to provide the detail of identification of posts and extent of disability and the replying respondent, reserves its right to file supplementary reply at any stage hereinafter, as and when the outcome of the deliberations is received...."*

Respondents, it appears are themselves not clear about the extent of maximum disability which should have beenprescribed for physically handicapped category candidates for the post of ADA. The Act is a beneficial legislation enacted for the welfare of persons with disabilities. It was incumbent upon the respondents to deliberate over the issue with experts for determining the maximum extent of disability vis-a-vis the eligibility of disabled persons for the posts in question. Such determination should not be solely left to the discretion of the employer. We have the example of this case where even after the completion of selection process, respondents are themselves not certain about soundness of prescribing 60% as the maximum eligible limit of disability. We, therefore, direct the respondent- State through respondent No. 1 personnel department to issue necessary directions to all concerned departments etc. for henceforth fixing maximum eligibility limit of disability for persons belonging to physically handicapped category, for the posts reserved for them under 2016 Act, only after due deliberation over the issue with Department of Social Justice & Empowerment in consultation with committee of experts in the concerned field of medicine to be constituted by the State for thesaid purpose.

4(v) Second point.

Following the ratio of V. Surendra Mohan's case supra, we have already held that maximum limit of disability can be fixed to determine eligibility of candidates belonging to physically handicapped category for the posts reserved for them in accordance with provisions of 2016 Act. In the instant case, requisition was sent by respondent No. 2 to respondent No. 3 with ceiling limit of 60% on the extent of disability. The advertisement was accordingly issued by respondent No. 3 on 2.5.2018 for 24 posts of Assistant District Attorneys wherein two posts were reserved for physically handicapped category with disability range between 40% to 60% in one leg or one arm. Petitioner was aware of these terms and conditions of the advertisement. He though suffered from 90% permanent locomotor disability of left shoulder disarticulation and as suchwas not eligible for the posts, yet he participated in the selection process. It is only after rejection of his candidature after culmination of the selection process, that he preferred this writ petition challenging the maximum eligibility limit of disability fixed at 60% under the requisition and in the advertisement. The law in respect of challenging the conditions of advertisementafter participating in the selection process is well settled. In thisregard, it would be profitable to refer to **(2019) 15 SCC 633**, titled **Union of India and others Vs. C. Girija and others and connected matters**, wherein following previous judgments of Hon'ble Apex Court on the issue were noticed viz. **Ashok Kumar Vs. State of Bihar (2017) 4 SCC 357; Chandra Prakash Tiwari** Vs. **Shakuntala Shukla (2002) 6 SCC 127; of India Vs. S. Vinodh Kumar (2007) 8 SCC 100; Munindra Kumar Vs. Rajiv** Govil (1991) 3 SCC 368; Rashmi Mishra Vs. M.P. Public Service Commission (2006) 12 SCC 724; Amlan Jyoti Borooah Vs. State of Assam (2009) 3 SCC 227; Manish Kumar ShahiVs. State of Bihar (2010) 12 SCC 576 ; Madan Lal Vs. Stateof J&K (1995) 3 SCC 486 ; Marripatti Nagaraja Vs. State of

A.P. (2007) 11 SCC 522 ; Dhananjay Malik Vs. State of Uttaranchal (2008) 4 SCC 171;K.A. Nagamani Vs. Indian Airlines(2009) 5 SCC 515 ; Vijendra Kumar Verma Vs. Public Service Commission (2011) 1 SCC 150 ; Ramesh Chandra Shah Vs. Anil Joshi (2013) 11 SCC 309 ; State (UT of Chandigarh) Vs. Jasmine Kaur (2014) 10 SCC 521 ; Pradeep Kumar Rai Vs. Dinesh Kumar Pandey (2015) 11 SCC 493 and Madras Institute of Development Studies Vs. K. Sivasubramaniyan (2016) 1 SCC 454. The broader principles which can be extracted from the above judgments, are:- (i) when a candidate appears in the examination without objection and is subsequently found to be not successful, his challenge to the selection process is precluded; (ii) question of entertaining a petition challenging an examination would not arise where a candidate had appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was lacuna therein merely because his or hers result was not palatable; (iii) those who consciously take part in the selection process cannot thereafter turn around and question the method of selection and its outcome; conduct of such persons disentitle them from questioning the selection process; (iv)after participating in the selection process, challenge to the same after declaration of result cannot be allowed. The candidates cannot approbate and reprobate at the same time.

Having fixed 60% disability as maximum eligibility limit for physically handicapped candidates for the posts in question, having completed the entire selection process under these conditions prescribed in the requisition as well as in the advertisement in question, respondents at this stage cannot even be directed to consider and examine the case of the petitioner for appointment to the post in question, who suffers from 90% disability vis-a-vis his suitability for the post in question. There may be many physically handicapped persons with disability in one arm or leg ranging between 60% to 90%, who might not have applied for the post in view of the express conditions of eligibility stipulated in the advertisement in question. Thus no relief can be granted to the petitioner at this stage.

5. The sum and substance of above discussion is:-

a) Respondents have the right to fix the extent of maximum disability for determining the eligibility of candidates belonging to physically handicapped category for the posts reserved for them under The Rights of Persons with Disabilities Act, 2016. The ceiling limit of disability, however, has to be determined by the employer after due deliberations with Department of Social Justice & Empowerment and in consultation with committee of experts in the concerned field of medicine to be constituted by respondent No. 1 for the purpose. We accordingly direct the State government through respondent No.
1 to forthwith issue necessary instructions in this regard to all concerned departments for compliance henceforth.

b) Petitioner with 90% permanent disability (locomotor impairment @ left shoulder disarticulation), having participated in the selection process for the post of Assistant District Attorney, under the advertisement dated 2.5.2018

wherein physically handicapped candidates with disability ranging from 40% to 60% in one arm or one leg were eligible for the posts meant for physically handicapped quota, is now estopped from challenging the fixation of maximum limit of 60% disability in the advertisement after the conclusion of selection process.

With above observations and directions, the writ petition is disposed alongwith pending application(s), if any.

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

Nisha Devi ....Petitioner.

Vs.

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

CWP No. 4433 of 2015
Date of Decision: 04.09.2020

Constitution of India, 1950- Articles 14 & 226- **Grant-in-Aid Rules, 2007 (Rules)**- Appointment as PTA Teacher -Setting aside of appointment pursuant to report of Inquiry Committee- Challenge thereto by way of Writ petition- Held, appointment of petitioner was set aside on basis of report of Inquiry Committee that her selection was not inconsonance with procedure laid down in the guidelines- Appeal of petitioner was dismissed by Appellate Authority- Findings of Inquiry Committee were never set aside- No infirmity in the report of Inquiry Committee- Criteria adopted by subsequent Selection Committee was completely objective and petitioner was placed at 6th place in merit- Petition dismissed. (Para 10 to 14)

Whether approved for reporting? *Yes.*

For the petitioner: Mr. Shyam Singh Chauhan, Advocate.

For the respondents: M/s Somesh Raj and Dinesh Thakur, Additional Advocate Generals, for respondents No. 1 to 3.

None for respondent No. 4.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

"(i) That the order dated 30.08.2011 & 07.04.2015 orders passed by the enquiry committee and Ld. Deputy Commissioner may kindly be quashed with all consequential benefit while issuing the writ of certiorari.

(ii) That the petitioner may kindly be allowed to work as PTA teacher as per grant in aid Rules while issuing the writ in the nature of mandamus and any other order which the Hon'ble Court may deem fit be passed in the interest of justice."

2. Brief facts necessary for the adjudication of present petition are that the petitioner was initially appointed as a Lecturer in the subject of Economics under the Grant-in-Aid Rules in September, 2007 in Government Senior Secondary School Baryara, Tehsil Sadar Mandi, District Mandi, H.P. Her appointment was assailed by one Promila by way of a complaint. The appointment of the petitioner was set aside by the Inquiry Committee comprising of SDM, Sadar Mandi, District Mandi, H.P., who was the Chairman of the Committee, Principal of the concerned School as well as Subject Specialist. A copy of order dated 15th October, 2008, passed by the Inquiry Committee is appended with the petition as Annexure P-1. The reasonings on which the Inquiry Committee set aside the appointment of the petitioner are reproduced hereinbelow:

> *"**Findings:***
>
> *In view of above discussions, the committee has come to the conclusion that proper procedure to select the candidate for the above said post was not followed and adopted by the PTA and hence the appointment of Nisha Devi as Lecturer (Economics) in GSSS Baryara made by the PTA of the said School is not acceptable as per instructions contained in Para No. 11 of the guidelines of the notification No. EDN-A-Kha(7)3/2006, dated the 27th May, 2008. Since proper procedure has not been followed by the PTA selection committee, the claim of the complainant for appointment in place of respondent also do not succeeds. Copy of this enquiry report be sent to the Principal-cum-Chairman (PTA) GSSS Baryara and PTA of the concerned school for further necessary action."*

An appeal was preferred by the petitioner against this order, which was also dismissed by the Appellate Authority vide Annexure P-2, dated 06.02.2009.

3. Feeling aggrieved, the petitioner filed a Writ Petition before this Court, i.e., CWP No. 1099 of 2009, which was disposed of by this Court alongwith other writ petitions by a common judgment dated 18th March, 2010 in the following terms:

> *"..In view of the above clarification issued by the Director of Higher Education, Himachal Pradesh, the impugned orders are liable to be set aside. Ordered accordingly. However, we make it clear that it will be open to the Enquiry Committee to consider the matters afresh in the light of the instruction referred to above. The needful, if required, shall be done within a period of four months from the date of the production of a copy of this judgment by either side. It is also made clear that in the cases of those teachers who are working in the schools, in case they have not been paid their due wages, the same shall be paid and the State shall ensure that the required grant-in-aid is given to the Schools, as per the Rules forthwith."*

4. Thereafter, the Inquiry Committee had a re-look in the entire matter in terms of the judgment passed by this Court and vide Annexure P-4, the candidature of the petitioner was again held to be bad for appointment on the ground that in terms of the criteria adopted by the Committee for assessing the merit of the candidates concerned, the petitioner was 6th in the merit list. This order passed by the Inquiry Committee dated 30th August, 2011 was assailed by way of an appeal by the petitioner in the year 2015 and the same was dismissed by the learned Appellate Authority vide Annexure P-6, dated 07.04.2015, *inter alia*, on the ground that the appeal stood preferred by the

appellant after a lapse of more than 3 ½ years and the same was not accompanied by an application for condonation of delay and appeal against the recommendations of the Committee could be made to the Deputy Commissioner only within thirty days.

5. Feeling aggrieved, the petitioner has filed this writ petition praying for the reliefs mentioned hereinabove.

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

7. The initial appointment of the petitioner was set aside by the Inquiry Committee vide order dated 15th October, 2008, *inter alia,* on the ground that proper procedure to select the candidate for the post in issue was not followed by the PTA and Instructions contained in Para-11 of the Guidelines of Notification dated 27th May, 2008 were not adhered to while offering appointment to the petitioner. This order was upheld by the Appellate Authority. When the petitioner filed a writ petition before this Court, the same was disposed of by this Court vide judgment dated 18th March, 2010 with the direction that the matter shall be looked into afresh by the Inquiry Committee in terms of the contents of the judgment of this Court as well as communication dated 24th September, 2009, which stands quoted in the said judgment.

8. The contention of learned counsel for the petitioner is that subsequent order passed by the Inquiry Committee is not sustainable in law, as the Committee has failed to appreciate that this Court in CWP No. 525 of 2009, titled as *Ravinder Singh Vs. State of H.P. and others,* decided on 04.08.2009, has held that the subsequent Committee is not to interfere with the earlier selections made, if the PTA which made the previous appointment, had followed a valid criteria for making the appointment.

9. Learned counsel for the petitioner has argued that as the procedure which was followed by the earlier PTA while offering appointment of the post in issue to the petitioner was a valid criteria, the subsequent order passed by the Inquiry Committee holding that the petitioner was not eligible for the post in issue on merit in not sustainable in law.

10. No other point has been urged.

11. In my considered view, there is no merit in the arguments put forth by learned counsel for the petitioner. This Court in *Ravinder Singh's case (supra),* in fact, laid down that the earlier appointment, if properly made, are not to be interfered by the subsequent Inquiry Committee until and unless subsequent Inquiry Committee comes to the conclusion that the criteria adopted by the earlier PTA for appointment of the candidate, was not sustainable in law.

12. Facts of this case demonstrate that the Inquiry Committee vide its earlier order dated 15th October, 2008 (Annexure P-1), had set aside appointment of the petitioner by holding that the process which stood initiated by the PTA for selecting the candidate, was not in consonance with the Notification in issue pertaining to the appointment of teachers by the PTA. These findings have not been set aside on merit. The subsequent Committee formulated a criteria for assessing the eligibility of the candidates, as is evident from the contents of the report of the Inquiry Committee and the criteria so adopted was completely objective, which assessed the merit of a candidate on the basis of marks scored by him or her Matriculation onwards and the same included the marks obtained in Matric, +2, BA/Graduation, B.Ed. and MA. Maximum 10 marks were envisaged for all these classes and assessment of a candidate was made out of 50 marks. The subsequent Selection Committee by applying this criteria, held that amongst the candidates, who had appeared for the post in issue, the petitioner was placed at 6th in merit.

13. During the course of arguments, leaned counsel for the petitioner could not demonstrate that the marks which were so granted to the petitioner by the Selection Committee, were contrary to the record. That being the case, as from amongst the candidates who appeared for being

appointed as teacher on PTA basis, as the petitioner was not most meritorious and further as her initial appointment stood set aside by the Inquiry Committee initially on the ground that her appointment was made in violation of the provisions of selection in vogue at the relevant time, this Court does not find any infirmity with the report of the Inquiry Committee, which held that the petitioner was not entitled to be given appointment, as she was placed 6th in merit amongst candidates who had participated in the process. As far as the contention that order passed by the Appellate Authority holding that the appeal filed was barred by limitation is concerned, though there is no infirmity in the same, however, no further observation is required to be made in this regard, as this Court has decided this petition on merit.

14. Accordingly, in view of the observations made hereinabove, as there is no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Sunita Devi ....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWPOA No. 4801 of 2019
Date of Decision: 25.09.2020

Constitution of India, 1950- Articles 14 & 226- Challenge to selection to a post made by Expert Committee- Court's interference- Held, in absence of any allegation of malafides against the Selection Committee or that selection of private respondent was due to extraneous reasons, Court cannot enter into footsteps of experts who interviewed the candidates and selected best person in their wisdom. (Para 6)

Whether approved for reporting? *Yes.*

For the petitioner: Ms. Manju Dhatwalia, Advocate, vice Mr. Anshul Bansal, Advocate.

For the respondents: M/s Somesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, for respondents No. 1 to 4.

Mr. Ashok K. Tyagi, Advocate, for respondent No. 5.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(i) That the selection of respondent No. 5 may kindly be quashed and set aside and respondent may kindly be directed to engage the petitioner."*

2. The case of the petitioner is that she applied for the post of Asha Worker under Post Office Burma Papeli, Tehsil Nahan, District Sirmaur, H.P., which comes under BMO Tehsil Nahan, District Sirmaur. Despite the fact that the petitioner fulfilled the eligibility criteria to be appointed as Asha Worker and was most meritorious amongst the candidates who participated in the process, yet ignoring her merit, the authority concerned has offered appointment to respondent No. 5, who is neither a deserving candidate nor belongs to the poor strata of the society. On this count, the petitioner has filed the present petition praying for the relief already enumerated hereinabove.

3. The petition stands opposed by the respondents. Respondents No. 1 to 4 in their reply have submitted that in the interview which was held for the selection of Asha Worker, as the claim of the petitioner was not found to be most meritorious, therefore, appointment was not offered to her and the same was offered to the candidate who was found to be most meritorious by the Selection Committee.

4. In the separate reply which has been filed by respondent No. 5, the stand taken therein is that respondent No. 5 also fulfilled the eligibility criteria for appointment as Asha Worker and the contention made in the petition with regard to the factum of the replying respondent not belonging to poor strata of the society was completely incorrect. Said respondent has thus pleaded that as there is no infirmity in her selection as Asha Worker, the petition being without any merit, be dismissed.

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

6. Though an averment has been made in the petition that the selected candidate was not eligible to be appointed as Asha Worker, but during the course of arguments and on the strength of documents on record, this fact could not be established by the petitioner. Record does not demonstrates that the selected candidate was not eligible to be appointed as Asha Worker. In these circumstances, in the absence of there being any *malafides* alleged against the Selection Committee that the selection of respondent No. 5 by the said Committee was not on merit, but due to some extraneous reasons, this Court cannot enter into the footsteps of the experts, who interviewed the candidates and selected the best candidate in their wisdom. Hence, this Court finds no merit in this petition, because the petitioner has not been able to substantiate that she was the most meritorious amongst the candidates who appeared for the appointment to the post of Asha Worker.

7. Accordingly, as there is no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Sh. Kishori Lal and Ors. .....Petitioners

Versus

Smt. Lajwanti and Ors. .....Respondents

CMPMO No. 368 of 2020
Decided on 15.9.2020

Code of Civil Procedure, 1908- Order VIII Rule 1- Acceptance of written statement by Court after 90 days from service of defendants when no extension in time in filing it, was sought- Challenge thereto – Held, defendants were initially proceeded against ex-parte- Order was set aside by Court and written statement was filed thereafter on the date fixed for filing it- No objection was raised by plaintiffs when written statement was filed in the Court- Rather plaintiffs took time in filing replication to it- Rules of procedure are made to advance the cause of justice and not to defeat it- Petition dismissed. (Para 2 to 4).

Cases referred:

Salem Advocate Bar Association, T.N. versus Union of India, (2005)6 Supreme Court Cases 344;

Whether approved for reporting? Yes.

For the petitioners : Mr. Naresh K. Sharma, Advocate.

For the respondents : Nemo.

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with order dated 27.2.2020, passed by the learned Senior Civil Judge Nadaun, District Hamirpur, H.P., whereby written statement having been filed by defendants No. 1 and 2, has been taken on record, petitioners-plaintiffs (in short "*the plaintiffs*") have approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to set aside order dated 27.2.2020.

2. Having heard learned counsel for the plaintiffs and perused material available on record, this Court finds no illegality and infirmity in order dated 27.2.2020, because bare perusal of the same clearly reveals that no objection, if any, ever came to be raised on behalf of the plaintiffs with regard to delay in filing the written statement by the defendants, rather order impugned before this Court itself suggests that after filing of the written statement by the respondents-defendants (in short "the defendants"), plaintiffs themselves sought time for filing replication and as such, matter came to be adjourned to 3.8.2020.

3. Precisely, grouse of the petitioner, as can be gathered from the pleadings as well as submissions made by the learned counsel for the petitioner is that court below could not have permitted the defendants to file written statement beyond the stipulated period of 90 days that too without entertaining any application for extension of time. While referring to the zimini orders placed on record, learned counsel representing the plaintiff vehemently argued that despite there being repeated opportunities, defendants failed to file written statement, but vide impugned order dated 27.2.2020, court below without there being any request made on behalf of the defendants for extension of time allowed them to file written statement, however having carefully perused order dated 3.2.2020 passed by the court below, this Court finds that defendants No. 1 and 2 were proceeded *ex-parte* on 13.3.2019 and as such, they preferred two applications under Order 9 Rule 7 CPC, praying therein to set-aside *ex-parte* orders and this application came to be finally disposed of vide order dated 3.2.2020, whereby court below while setting aside *ex-parte* order permitted the defendants to file written statement on or before 27.2.2020. It is not in dispute that on 27.2.2020, when matter was listed before the court below, defendants filed written statement and as such, no illegality can be said to have been committed by the court below while permitting the defendants to file written statement. No specific challenge ever came to be laid on behalf of the plaintiffs against the order dated 3.2.2020, whereby the court below itself permitted the defendants to file written statement on or before 27.2.2020.

4. Otherwise also, it is well settled by now that whenever technicalities are pitted against substantial justice, it is the substantial justice, which is to prevail. It has been categorically held by the Hon'ble Apex Court in **Salem Advocate Bar Association, T.N. versus Union of India,** (2005)6 Supreme Court Cases 344, that rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. Hon'ble Apex Court has categorically held in the aforesaid judgment that the rules or procedure are handmaid of justice and not its mistress. While interpreting the word "shall" as provided Order 8 Rule 1, Hon'ble Apex Court has held that though use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The relevant paras of the judgment is reproduced herein-below:-:-

> *"20. The use of the word 'shall' in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.*
>
> *21. In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order 8, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order 8 Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1."*

4. Consequently, in view of the above, no interference is warranted and present petition is dismissed being devoid of any merits.

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

Himachal Pradesh Power Corporation Ltd. & another ...Non-applicants/appellants.

Versus

Indira & others ..Applicants/Respondents.

CMP No.6028 of 2020 in RFA No.388 of 2018
Date of Decision: September 16, 2020

Land Acquisition Act, 1894 (Act)- Sections 18 & 19- Reference to District Judge- Particulars of reference and duty of Land Acquisition Collector- Held, while making reference to Court, Collector is required to state the particulars mentioned in clauses (a) to (d) of sub-section (1) of Section 19 of the Act including details of any trees, buildings or standing crops on the land- It is his duty to send full information to the Court regarding entire acquired land. (Para 4)

Cases referred:
Ram Kumar and others vs. Union of India and others, (1991) 2 SCC 247;

Whether approved for reporting? Yes

For the Non-applicants/

Appellants: Mr.Shashi Shirshoo, Advocate, through Video Conferencing.

For the Respondents: Mr.Ajay Chauhan, Advocate, for applicants/respondents No.1 and 2, through Video Conferencing.

Mr.Raju Ram Rahi, Deputy Advocate General, for proforma respondents No.3 and 4, through Video Conferencing.

Vivek Singh Thakur, J (Oral)

This application has been filed seeking direction to the non-applicants/appellants to deposit entire enhanced amount of compensation in the Registry of this Court. It is complained on behalf of the applicants/respondents/claimants that non-applicants/appellants, in compliance of order dated 29.11.2018, whereby execution and operation of the impugned Award was stayed till further orders but subject to deposit of entire awarded amount alongwith up-to-date interest, have not deposited entire amount of compensation.

2. In response to the application, it is contended by and on behalf of non-applicants/appellants that compensation amount, specifically with respect to those Khasra numbers, which were mentioned in Reference Petition by the applicants/ respondents/claimants, has been deposited but not qua other Khasra numbers as non-applicants/appellants are not liable to deposit the amount with respect to rest of the Khasra numbers.

3. Sections 18 and 19 of the Land Acquisition, 1894 (hereinafter referred to as 'the Act'), are relevant for deciding present controversy, which read as under:-

> "18. Reference to Court.-(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made,-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

19. Collector's statement to the Court.-(1) In making the reference, the Collector shall state, for the information of the Court, in writing under his hand,-

(a) the situation and extend of the land, with particulars of any trees, buildings or standing crops thereon;

(b) the names of the persons whom he has reason to think interested in such land;

(c) the amount awarded for damages and paid or tendered under sections 5 and 17, or either of them, and the amount of compensation awarded under section 11;

[cc) the amount paid or deposited under sub-section (3A) of section 17; and]

(d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.

(2) To the said statement, shall be attached a Schedule giving the particulars of the notices served upon, and of the statements in writing made or delivered by, the parties interested, respectively."

4. Learned counsel for the applicants/respondents/ claimants, to advance his cause, has also relied upon judgment of the Apex Court in ***Ram Kumar and others vs. Union of India and others, (1991) 2 SCC 247***, wherein it is held as under:-

"... ... ... Under Section 18 of the Act the only requirement for the person interested who had not accepted the award was to move a written application to the Collector requiring that the matter be referred for the determination of the Court. One of the grounds for not accepting the award was the amount of compensation. Once such application was moved it was the duty of the Collector to make a reference to the court. Under Section 19 of the Act while making the reference the Collector was required to state for the information of the court the particulars as mentioned in clauses *(a)* to *(d)* of sub-section (1) of Section 19 of the Act. Thus it was the duty of the Collector to mention not only the situation and extent of land but even particulars of any trees, buildings or standing crops thereon. The khasra No. or area as entered in the revenue records and the Union of India or the State acquiring such land should not be allowed to take any advantage of such ignorance of the agriculturists. Once an application is moved for making a reference under Section 18 of the Act it becomes the duty of the

Collector to send full information to the court regarding the entire land acquired and it is thereafter the duty of the court to decide the matter in accordance with law.

5. On perusal of record, it is found that Collector has made reference to the Court under Section 18 of the Act and in column No.5 thereof, he has given detail of name and address of persons found to be interested in the land and nature of each person interested wherein he has communicated two names Indira Devi and Kamla Devi as owners of 128867/8302800 with mention of land as Khata No.85.

6. In Reference Petition, submitted by and on behalf of Indira Devi and Kamla Devi, 20 Khasra numbers measuring 196 Bighas 3 Biswas, situate in Mohal Jaincha Majhai Sub-Tehsil Dadahu, District Sirmour, H.P., in Khata Khatauni No.85/11 min, have been mentioned. In case any Khasra number pertaining to Khata Khatauni No.85 has been left out in the petition then also, it does not make any difference as reference of Khata Khatauni No.85 has been given by the Collector in his reference to the Court.

7. In view of above, especially for provisions of Sections 18 and 19 of the Act and pronouncement of the Supreme Court in *Ram Kumar's case* supra, I find that Award of the Reference Court shall cover all Khasra numbers belonging to the claimants falling in Khata Khatauni No.85, as communicated by Collector.

8. Therefore, non-applicants/appellants are directed to calculate amount accordingly and deposit the same in the Registry of this Court within six weeks from today, if not already deposited.

Application stands disposed of.

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

Suresh Chand and Ors. .....Petitioners

Versus

State of H.P. and Ors. . .....Respondents.

Cr.MMO No. 554 of 2018
Reserved on 17.8.2020
Date of Decision: 31. 8.2020

Code of Criminal Procedure, 1973- Sections 227 & 228- Discharge or framing of charge- Duty of Court- Held, existence of constituents of an offence is a sine qua non for exercise of such jurisdiction- Once the facts and ingredients of Section concerned exist, Court would be right in presuming that there is ground to proceed and frame charge against the accused. (Para 11)

Code of Criminal Procedure, 1973- Sections 227 & 228- Discharge or framing of charge- Duty of Court- Held, it is duty of Court to sift through material on record to find out whether it reasonably connects the accused with crime or not? - Court must keep in mind interest of person arraigned as an accused who may be put to ordeals of trial on basis of flippant and vague evidence. (Para 14)

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Quashing of FIR registered for gang rape etc.- Held, both families though closely related to each other but having animosity on account of ancestral property- Civil litigation pending between them- Despite that victim and accused 'S' had intimate relationship between them and she having direct access to his room- Story of abduction of prosecutrix on that particular night and administering drugs to her by petitioners extremely doubtful- No drug detected in her blood- Victim changing her version during investigation itself which is contrary to case set up by her father and brother- Conduct of complainant party extremely doubtful- FIR was registered to wreak vengeance on petitioners- Petition allowed- FIR quashed with all consequential proceedings- Order of Trial Court framing charge set aside. (Para 21 to 27)

Cases referred:

Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460;
Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia & Anr., (1989) 1 SCC 71;
Central Bureau of Investigation Vs. K. Narayana Rao (2012) 9 SCC 512;
L. Krishna Reddy v. State by Station House Officer and Ors (2014) 14 SCC 401;
Varun Bhardwaj v. State of H.P., Latest HLJ 2017 (HP) 707;
State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699;
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335;
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;

Whether approved for reporting? Yes.

For the petitioners:	Mr. Sanjeev Kuthiala, Senior Advocate, with Ms. Anaida Kuthiala, Advocate.
For the respondents:	Mr. Sudhir Bhatnagar, Additional Advocate General, for the respondent-State.
	Mr. K.D. Sood, Senior Advocate with Mr. Sukrit Sood, Advocate, for respondents No. 2 and 3.

Sandeep Sharma, J.

By way of instant petition filed under Section 482 Cr.PC, prayer has been made on behalf of the petitioners for quashing of FIR No. 91 of 2014 dated 15.4.2014, registered at PS Nurpur, District Kangra, HP, under Sections 376-D and 109 of IPC, order dated 12.11.2018, passed by the learned Additional Sessions Judge-1, Kangra, at Dharamshala, whereby he proceeded to frame charges under Section 376-D of IPC against petitioners No.1 and 3 namely Suresh Chand Kapila and Sumesh Kapila and under Section 109 IPC against petitioner No.2 namely Smt. Sudershana Devi and consequent criminal proceedings i.e. pending before the court below.

2. Precisely, facts of the case, which led to lodging of FIR sought to be quashed in the instant proceedings, are that on 15.4.2014, respondent No.2 Kuldeep Chand (herein after referred to as "the complainant"), who is brother of petitioner No.1, brother in law of petitioner No.2 and uncle (Chachu) of petitioner No.3, got his statement recorded under Section 154 Cr.PC at Police Station Nurpur, District Kangra, stating therein that in the intervening night of 13/14.4.2014, while he was sleeping in his house along with his family members and had put lock on the door, his daughter-respondent No.2 (herein after referred to as the victim-prosecutrix), came and asked for key of the door so that she could shoo away the dogs barking outside. The complainant alleged that since he is a heart patient and had taken medicine, he gave her the keys, but after five minutes, he found that victim-prosecutrix was not on her bed. He stated that when victim-prosecutrix did not answer his calls, he woke up his son. He alleged that at 3:00 AM, in the night, his son Shivam went towards Bazaar to find her, but he came back without knowing her whereabouts. He stated that again, on the next day, at 6:00 AM, he sent his son towards the Khud to ascertain the whereabouts of his daughter (victim-prosecutrix), but she was not found. At 8/9:00 AM, he disclosed the entire incident to Baldev Singh Sandhu and at 6:40 PM, registered the missing report of victim-prosecutrix at the Police Station and told to the police that he has suspicision that his younger brother namely Suresh Chand, his wife Sudershana Devi and son Sumesh i.e. petitioners herein, may have made his daughter run away. On inquiry, allegedly petitioner No.1 though initially refused to identify his niece (victim-prosecutrix) when he was shown photographs by the police, but after 5-7 minutes disclosed to the police that victim-prosecutrix is sleeping on the first floor of his house. Police in the presence of respectable members of the society found the victim-prosecutrix in the first floor of the house of

the petitioners in drowsy condition. After having seen victim-prosecutrix, complainant alleged that petitioner No.3 Sumesh Kumar, has committed rape on his daughter after administering her drugs. Police after having recorded the statement of respondent No.2-victim-prosecutrix and her brother under Section 161 Cr.PC also got the statement of victim-prosecutrix recorded under Section 164 Cr.PC before JMIC and thereafter FIR sought to be quashed in the instant proceedings came to be lodged against the petitioners under Sections 376 and 120 B of IPC.

3. After completion of investigation, police presented challan in the competent court of law, perusal whereof reveals that during investigation, no case was found to have been committed by the petitioners under Sections 376 and 120-B of the IPC and as such, those were deleted, however, in challan prepared on the basis of investigation, police alleged that the accused have committed offence punishable under Sections 376-D and 109 of IPC.

4. Having taken note of the material annexed with aforesaid challan, learned Additional Sessions Jduge-1 Kangra at Dharamshala, HP, vide order dated 12.11.2018 proceeded to frame charges against petitioner No.1 and 3 under Section 376-D of IPC and under Section 109 of IPC against petitioner No.2. In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein for quashment of FIR, order dated 12.1.2018, whereby charges under Sections 376-D and 109 IPC have been framed against them by the learned Additional Sessions Judge-I Kangra at Dharamshala as well as consequent proceedings pending in the court below.

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

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

7. A three-Judge Bench of the Hon'ble Apex Court in case titled ***State of Karnataka vs. L. Muniswamy and others*, 1977 (2) SCC 699**, held that High Court while exercising power under Section 482 Cr.PC is entitled to quash the proceedings, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed.

8. Subsequently, in case titled ***State of Haryana and others vs. Bhajan Lal and others*, *1992 Supp (1) SCC 335***, the Hon'ble Apex Court while elaborately discussing the scope and competence of High Court to quash criminal proceedings under Section 482 Cr.PC laid down certain principles governing the jurisdiction of High Court to exercise its power. After passing of aforesaid judgment, issue with regard to exercise of power under Section 482 Cr.PC, again came to be considered by the Hon'ble Apex Court in case bearing Criminal Appeal No.577 of 2017 (arising out of SLP (CrL.) No. 287 of 2017) titled ***Vineet Kumar and Ors. v. State of U.P. and Anr.***, wherein it has been held that saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. court proceedings ought not to be permitted to degenerate into a weapon of harassment or persecution.

9. The Hon'ble Apex Court in ***Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293***, relying upon its earlier judgment titled as ***Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330***, reiterated that High Court has inherent powers under Section 482 Cr.PC., to quash the proceedings against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. In the aforesaid judgment, the Hon'ble Apex Court concluded that

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

> ***"22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)***
>
> > ***29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.***
>
> > ***30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by***

an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

> ***30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?***
>
> ***30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.***
>
> ***30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?***
>
> ***30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?***
>
> ***30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."***

10. It is quite apparent from the bare perusal of aforesaid judgments passed by the Hon'ble Apex Court from time to time that where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him/her due to private and personal grudge, High Court while exercising power under Section 482 Cr.PC can proceed to quash the proceedings

11. The Hon'ble Apex Court in case titled ***Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460*** has held that framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Cr.PC unless the accused is discharged under Section 227 Cr.PC. In the aforesaid judgment, the Hon'ble Apex Court held that under Sections 227 and 228 Cr.PC, the Court is required to consider the record of the case and the documents submitted therewith and after hearing the parties may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall proceed to frame the charge. In the judgment (supra), the Hon'ble Apex Court has further held that once the facts and ingredients of the Section concerned exist, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly, but most importantly, the Hon'ble Apex Court in the aforesaid judgment has carefully concluded that the satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. At this stage, this Court

deems it fit to reproduce the following paras of aforesaid judgment having been passed by the Hon'ble Apex Court as follows:-

> ***"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.***
>
> ***18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.***
>
> ***19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of State of Bihar v. Ramesh Singh (1977) 4 SCC 39:***
>
> > ***"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— ... (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be***

> ***meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."***

12. There cannot be any quarrel with the aforesaid proposition of law that at the time of framing charge, Court is not required to evaluate the evidence on record, but it is well settled now that while framing charge, court is not expected to merely act as a post office and charge the accused on the basis of charge presented before it. Hon'ble Apex Court in catena of judgments has held that it is salutary duty of the courts to prevent the abuse of the process or miscarriage of justice and sift through the material to ascertain whether a prima-facie case, if any, exists against the accused or not.

13. This Court has already dealt with in detail aforesaid aspect of the matter in case titled ***Varun Bhardwaj v. State of H.P., Latest HLJ 2017 (HP) 707***, relevant paras whereof are reproduced herein below:-

> ***"20. This Court after carefully examining the document made available on record by the Investigating Agency sees substantial force in the argument having been made by the learned counsel for the petitioner that there is/was no material much less substantial available on record to frame charge under Section 307 of the IPC. Similarly, perusal of impugned order passed by the Court below reproduced herein above, nowhere suggests that court below before proceeding to frame charge under Section 228***

of the Cr.PC against the accused carefully sifted/perused the material made available on record to ensure/ascertain whether prima-facie case exists against the accused or not? The Hon'ble Apex Court in L. Krishna Reddy's case supra, has specifically held that while framing charge under Section 228 Cr.PC, court must keep in mind the interest of the person arraigned as an accused, who may be put to the ordeals of trial on the basis of flippant and vague evidence. In the instant case, perusal of impugned order nowhere suggests that learned trial Court while proceeding to frame charge made an endeavor to sift/peruse the material adduced on record by the Investigating Agency. There appears to be no application of mind by the learned court below while charging under Section 307 Cr.PC. The Hon'ble Apex Court further held that once a case is presented to it by the prosecution, it is bounden duty of Court to sift through the material to ascertain whether a prima-facie case has been established or not. But even if otherwise, ratio as laid down by the Hon'ble Apex Court in other cases cited above are also taken into consideration, it clearly emerge from the same that in all probabilities, learned court below while framing charge is required to ascertain whether prima-facie case exists or not. Needles to say exercise, if any, carried out by the Court while ascertaining whether prima-facie case, if any, exists against the accused or not, must reflect in order, whereby charge is proposed to be framed. But in the instant case, as has been discussed in detail, there appears to be no attempt, if any, made by the learned trial Court to ascertain whether prima-facie case exists against the accused at the time of framing of charge or not and as such, impugned order is not sustainable being totally contrary to the law laid down by the Hon'ble Apex Court in the judgment referred herein above.

21. True, it is jurisdiction of this Court under Section 397 of the Cr.PC is very limited but same can be exercised so as to examine the correctness, illegality or proprietary of order passed by the trial Court or inferior court as the case may be. The legality, proprietary or correctness of an order passed by an inferior court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. In the judgments referred herein above, the Hon'ble Apex Court has held that jurisdiction vested in this Court in terms of Section 397 Cr.PC can be exercised to the fact that there is a palpable error, non-compliance with the provision of law or where decision is completely erroneous or where the judicial discretion is exercised arbitrarily.

22. Hence, in the instant case, for the reasons stated above, this Court sees substantial reason to exercise its revisionary power to correct impugned order, which on the face of it is not based upon the principles as have been laid down in the judgments recorded by the Apex Court while discussing scope of power of Court to frame charge under Section 228 of the Cr.PC. In the Vineet Kumar's case supra, the Hon'ble Supreme Court has held that Court cannot permit prosecution to go on if the case falls in one of the categories as enumerated in the case titled State of Haryana and others vs. Bhajan Lal and others, because judicial process is a solemn proceeding and same should not be an instrument of oppression or, needless harassment. This court has no hesitation to conclude after carefully examining the impugned order vis-à-vis , material available on record that learned court below merely acted as a post office, who accepted the charge sheet under Section 173 of the Cr.PC as verbatim without making on effort to ascertain whether prima-facie case exists against the accused or not? Impugned order nowhere reveals that learned court below while passing impugned order made an effort to sift through the material produced before it to conclude whether prima-facie case is made out against the petitioner. Hence, this Court has reason to conclude that great prejudice has been caused to the petitioner."

14. This Court, having taken note of the judgment rendered by the Hon'ble Apex Court in **L. Krishna Reddy v. State by Station House Officer and Ors (2014) 14 SCC 401,** has held that while framing charge under Section 228 Cr.PC, court must keep in mind the interest of the person arraigned as an accused, who may be put to the ordeals of trial on the basis of flippant and vague evidence. In ***L. Krishna Reddy's case*** supra, the Hon'ble Apex Court has categorically held that once a case is presented to the learned trial Court by the prosecution, it is bounden duty of Court to sift through the material to ascertain whether a prima-facie case is made out or not. True, it is that in numerous judgments, the Hon'ble Apex Court has observed that at the stage of framing charge, Courts need not undertake an elaborate enquiry while sifting and weighing the material but same time, it has been also held that court needs to consider whether evidentiary material on record, would reasonably connect the accused with the crime or not.

15. Now being guided by the aforesaid law laid down by the Hon'ble Apex Court, which has been followed by this Court in number of cases, this Court shall proceed to examine and consider the prayer made in the instant petition vis-à-vis factual matrix of the case.

16. Precisely, case of the prosecution against the petitioners is as emerge from the charge sheet filed before the court below under Section 173 Cr.PC is that on the date of the alleged incident, petitioners herein forcibly took the victim-prosecutrix on the roof of their house and thereafter, petitioner No.3 allegedly sexually assaulted her against her wishes and as such, they all are liable to be punished and sentenced for having committed offence punishable under Section 376-D IPC. Before ascertaining the sustainability, if any, of the charge under Section 376-D IPC, this Court deems it necessary to take note of the provision contained under Section 376–D of the Code, which reads as under:

> ***"376-D Gang rape: Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:***
>
> ***Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:***
>
> ***Provided further that any fine imposed under this section shall be paid to the victim."***

Having perused aforesaid provision of law, it emerges that where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape punishable under the aforesaid provision of law.

17. Respondents in their reply to the instant petition as well as in the challan filed under Section 173 Cr.PC have categorically admitted factum with regard to pendency of civil dispute inter-se parties on account of some property. Besides above, averments contained in the petition, which stand un-rebutted reveal that petitioners as well as respondents No. 2 and 3, at whose behest FIR sought to be quashed came to be lodged, are closely related to each other and have been fighting with each other for years together on account of some property/house left by their forefathers. Petitioner No.1 filed Civil Suit for declaration of permanent prohibitory injunction in the learned trial Court, which was allowed. Respondent No.3 filed an appeal against the aforesaid judgment rendered

by the court below, which was partly allowed, against which both the brothers filed RSA No. 595 of 2012 and RSA No. 628 of 2012, which were decided by this Hon'ble Court on 8.9.2014 remanding the case to the trial Court to decide afresh and out of the said findings, presently, RSA No. 1 of 2018 titled Kuldeep Chand v. Suresh Chand and cross appeal titled Suresh Chand v. Kuldeep Chand is pending. Since despite repeated opportunities, no reply has been filed by respondents No.2 and 3 to the petition, averments contained in the same are presumed to be correct, especially when such averments have been virtually admitted by the respondent-State in its reply as well as in charge sheet filed under Section 173 Cr.PC.

18. Having heard Mr. Sanjeev Kuthiala, learned Senior counsel representing the petitioner and perused material available on record, this Court finds force in the submission made on behalf of the petitioners that an attempt has been made to falsely implicate petitioners in the case registered against them. Similarly, this Court finds from the record that petitioner No. 1 and respondent No.3 have an old animosity with each other on account of some property dispute and in this regard, they have already filed numerous cases against each other. Material adduced on record by the petitioners further reveals that respectable members of the society are also aware of the dispute/enmity inter-se petitioner No.1 and respondent No.3 and as such, they, after lodging of FIR sought to be quashed in the instant proceedings, also apprised the police that false case has been registered against the petitioners.

19. Leaving it aside, there appears to be no coherence and consistency in the statements made by the victim-prosecutrix, her brother and father (complainant) to the police and Judicial Magistrate under Sections 154, 161 and 164 Cr.PC, respectively, rather story put forth by the prosecution appears to be highly improbable on the face of it. In his initial version given under Section 154 Cr.PC, complainant alleged that on the date of alleged incident, he had locked his house from inside and had given keys to his daughter i.e. victim-prosecutrix, enabling her to shoo away the dogs barking outside their house. Most importantly, complainant in his initial statement stated before the police that after five minutes, he asked for keys from his daughter, but since she did not answer his calls, he sent his son to find her whereabouts. As per own statement of the complainant, his daughter went missing somewhere at 11:00 pm in the night, but missing report came to be lodged at 6:45 PM next day i.e. 14.4.2014. Victim-prosecutrix, who subsequently, came to be recovered from the first floor of the house of the petitioners in her statement recorded under Section 161 Cr.PC alleged that when she came out of the bathroom, petitioner No. 3 Sumesh gagged her mouth and forcibly took her to the roof of his house, where petitioners No. 1 and 2 were already present and thereafter, petitioner No.3 sexually assaulted her. In the aforesaid statement, victim-prosecutrix alleged that petitioner No.3 after having subjected her to sexual intercourse, made her consume 18 sleeping pills, whereafter she became unconscious and when she regained conscious, she was in Civil Hospital Nurpur (Annexure P-3). Besides above, victim-prosecutrix in her aforesaid statement claimed that in the year, 2011, petitioner No. 3 had clicked her nude photographs while she was taking bath in the bath room and thereafter, started blackmailing her. Precisely, in her aforesaid statement, she stated that petitioner No. 3 had been blackmailing her since year 2011on the pretext that in case, she does not succumb to his demands, he would upload her nude photographs on the internet and in this manner, he sexually assaulted her 40-50 times.

20. Brother of victim-prosecutrix in his statement recorded under Section 161 Cr.PC (Annexure P-2), stated that police found his sister in unconscious condition below the stairs of first floor of the house of the petitioners. He stated that on 16.5.2014, his sister disclosed to him that on 13.4.2014, while she was coming out of the bathroom, all the petitioners caught hold of her and forcibly took her to their house and administered drugs/pills, whereafter petitioner No. 3 sexually assaulted her against her wishes. He stated that when his sister refused, petitioner No. 3 gave her

beatings and hid her below the stairs of the first floor. Aforesaid statement of brother of the victim-prosecutrix, which is totally contrary to the statements of victim-prosecutrix as well as complainant (respondent No.3) appears to be highly unreliable because victim-prosecutrix in her statement recorded under Section 161 Cr.PC nowhere stated that while she was coming out of the bathroom, she was abducted/kidnapped by all the petitioners, rather she stated that petitioner No.3 forcibly took her to the roof of his house and sexually assaulted her after making her consume medicines/ pills, whereas brother of victim-prosecutrix gave altogether different version as has been noticed herein above.

21. Subsequently, victim-prosecutrix in her statement recorded under Section 164 Cr.PC before the Judicial Magistrate changed her stance and claimed that when on the alleged date of incident, she came out of the bathroom, her uncle, aunt and cousin (i.e. petitioners herein) forcibly caught hold of her and took her to the roof of the house, but while stating so, she also stated that thereafter, uncle and aunty (petitioners No. 1 and 2) went down and petitioner No.3 sexually assaulted her against her wishes. In the aforesaid statement, she alleged that after some time, petitioners, No. 1 and 2 again came back and petitioner No. 1 stated that lets make her consume drugs/ medicine, whereafter she would die and they would throw her away.

22. If the statement of victim-prosecutrix recorded under Section 164 Cr.PC is read in its entirety, it can be safely inferred that there was some kind of unnatural relationship between victim-prosecutrix and petitioner No.3, who are otherwise cousins. It appears from the record that though there was enmity inter-se petitioner and respondent No.3 on account of house left by their forefather, but victim-prosecutrix and petitioner No.3 were having some kind of relationship because medical evidence adduced on record suggests that victim-prosecutrix had sexual intercourse a number of times prior to the alleged incident coupled with the fact that DNA profile of both petitioner No. 3 and victim-prosecutrix matched completely as is evident from the MLC (Annexure P-4). As per own statement of victim-prosecutrix, she was repeatedly sexually assaulted by petitoenr No.3 since the year, 2011, but to substantiate such allegation, no material worth credence has been led on record. Having regard to the nature and intensity of dispute inter-se parties, it is highly unbelievable that petitioner No.3 kept on sexually assaulting victim-prosecutrix against her wishes for three years on the pretext that in case she refuses, he would upload her nude photographs on internet. Even it is presumed that victim-prosecutrix did not lodge complaint against petitioner No.3 on account of her fear that in the event of her lodging report, she would be defamed, but it cannot be accepted that during this period, she could not disclose such fact to her parents. Though victim-prosecutrix in her statement recorded under Section 164 Cr.PC stated that on 28.2.2014, when she had gone in the room of petitioner No.3, she broke the phone of the petitioner- Sumesh so he could not black mail her further. If it is so, there is no explanation that what prevented her after 28.2.2014, to lodge complaint against petitioner No.3. Aforesaid version of the victim/prosecutrix, who was major at the relevant time, itself suggests that she had been frequently visiting the house of the petitioner and she had direct access to the room of petitioner No.3.

23. Leaving everything aside, version put forth by victim-prosecutrix that on the date of the alleged incident, she was forcibly abducted from her house by the petitioners and then was subjected to sexual intercourse on the roof of the house, otherwise appears to be highly improbable and unbelievable in view of the fact that houses of the parties to the lis are adjacent to each other coupled with the fact that they share common courtyard. Though in the instant case, complainant in his statement recorded under Section 154 Cr.PC, alleged that petitioner No.3 raped his daughter after making her consume some medicine, but victim-prosecutrix in her statement recorded under Section 164 Cr.PC stated that first, all the petitioners abducted her and took her to the roof of their house and thereafter petitioner No.3 sexually assaulted her. Interestingly, while stating so, victim-

prosecutrix stated that petitioner Nos. 1 and 2 after leaving her there went down and thereafter, petitioner No.3 sexually assaulted her. There is no mention, if any, with regard to administration of drugs/ pills by the petitioners to the victim-prosecutrix before or while she was being subjected to sexual intercourse, rather in her aforesaid statement, victim-prosecutrix stated that after some time, petitioners No. 1 and 2 also came and said that make her consume drugs/ pills so that she dies. It is not understood that while she was being subjected to forcible sexual intercourse, what prevented her to raise alarm. Since houses of petitioner No.3 and prosecutrix are adjacent to each other and they had common courtyard, it is difficult to believe that nobody heard the cries of victim-prosecutrix and in the event of alarm being raised by victim-prosecutrix, her family members, who at the time of the alleged incident were awake because of the sudden disappearance of their daughter, would have definitely come to her rescue.

24. Interestingly, though in the case at hand, victim-prosecutrix repeatedly claimed that she was given/administered 18 pills at the time of the alleged incident, but her such version stands totally falsified in the wake of report of RFSL (Annexure P-5), which suggests that no drug was detected in the blood test of the victim-prosecutrix sent for chemical analysis. Report of RFSL completely demolishes the case of the prosecution and falsifies the version put forth by the victim-prosecutrix, which otherwise cannot be believed on account of material inconsistencies and contradictions.

25. There is another aspect of the matter that complainant in his statement recorded under Section 154 CrPC stated to the police that he has suspicion that petitioners might have made his daughter run away, but it is not understood that in case he had suspicion that petitioners may have abducted/hid his daughter, then why he did not inquire about her whereabouts from the petitioners immediately after her disappearance, rather in the case at hand, complainant waited for more than 18 hours to lodge the missing report, whereafter police allegedly recovered victim-prosecutrix from the house of the petitioners. Yet, there is another aspect of the matter, which is very relevant in the case at hand that the complainant after having seen photographs shown to him by the police fairly disclosed to the police that victim-prosecutrix is sleeping in the first floor of his house.

26. Having carefully perused statement of victim-prosecutrix recorded under Section 164 Cr.PC juxtaposing her initial statement recorded under Section 161 Cr.PC and statement of complainant respondent No.3 under Section 154 Cr.PC, this Court has no hesitation to conclude that FIR sought to be quashed in the instant proceedings has been filed with an ulterior motive for wreaking vengeance on the petitioners with a view to spite them on account of private and personal grudges. Aforesaid conclusion drawn by this Court is further substantiated by the fact that petitioners No.1 and respondent No.3 (complainant), who are real brothers have been fighting with each other tooth and nail over a house left by their ancestors, qua which, cross litigations are pending adjudication in the various courts of law. Material available on record further reveals that petitioners repeatedly lodged complaint with police that they are being harassed by respondent No.3 and his family (Annexure P-1and P-2). Apart from above, respectable persons of the society also apprised the SDM and DSP Nurpur with regard to ill intentions and ulterior motive of respondent No.3 as is evident from Annexure P-3.

27. Story put forth by the victim-prosecutrix that on the date of the alleged incident, she was forcibly taken by the petitioners to the roof of their house and then was subjected to sexual intercourse, cannot be believed being highly improbable, rather same appears to be concocted because of the peculiar facts and circumstances of the case as has been discussed herein above. No doubt, in the case at hand, there is overwhelming evidence with regard to animosity inter-se

petitioners and family of respondent No.3, but having regard to the relationship of victim-prosecutrix with petitioners No. 1 and 2, it is difficult to digest and believe that they permitted their son (petitioner No.3) to rape their own niece in front of their eyes. It is not expected in Indian society that parents would be party to such heinous crimes. Similarly, it is unbelievable that victim-prosecutrix had gone out at night and accused were waiting for her outside the house. Though respondent-complainant and victim-prosecutrix alleged that petitioners made her to consume drugs/ pills with a view to eliminate her, but it is not understood that what petitioners would have gained by eliminating her, who was otherwise closely related to them. Since there was civil dispute pending *inter-se* parties, wherein both the parties were fighting tooth and nail, it cannot be believed that in that scenario, petitioners would take risk of first abducting daughter of the complainant and then, subject her to sexual intercourse and as such, in the peculiar facts and circumstances of the case, this Court is persuaded to arrive at a conclusion that FIR sought to be quashed in the instant proceedings have been lodged solely with a view to humiliate, harass and implicate the petitioners in a false case.

28. Otherwise also, version as has been put forth by the victim-prosecutrix, if tested/analyzed in light of other evidence collected on record by the Investigating Agency, especially medical evidence, case of the prosecution is bound to fail and hence, no fruitful purpose would be served by allowing such proceedings to continue. To the contrary, petitioners would suffer irreparable loss, harassment and mental agony, if criminal proceeding in the present case, which is manifestly attended with malafide and has been maliciously instituted with an ulterior motive to settle personal scores, is allowed to continue.

29. Besides above, this Court after having carefully perused order dated 12.11.2018, passed by the learned Additional Sessions Judge-1, Kangra, at Dharamshala, framing charges against the petitioners, has no hesitation to conclude that there is/was no material much less substantial available on record, enabling the court below to frame charges under Section 376–D against petitioners No. 1 and 3 and under Section 109 against petitioner No.2. True it is, at the initial stage of framing of charge, the court is concerned not with proof but with the strong suspicion whether the accused has committed an offence, which if put to trial, could prove him guilty, but in all the judgments, which have been taken note herein above, the Hon'ble Apex Court has held that at the time of framing of charge, court should come to the conclusion that prima facie case, if any, exists to the satisfaction of the Court against the accused.

30. Hon'ble Apex Court in **L. Krishna Reddy's** Case (supra) taking note of the its other judgments passed in "***Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia & Anr.,*** (1989) 1 SCC 71 *as well as "****Central Bureau of Investigation Vs. K. Narayana Rao*** (2012) 9 SCC 512**"**, has held that Courts need not undertake an elaborate enquiry while sifting and weighing the material but court needs to consider whether evidentiary material on record, if generally accepted would reasonably connect the accused with the crime or not, it has further held that once a case is presented to the Court by the prosecution, it is the duty of the Court to sift through the material to ascertain whether prima-facie case has been established against the accused or not? However, in the case at hand, there appears to be no effort, if any, made by the court below while framing charge to sift through the material adduced on record by the Investigating Agency along with challan filed under Section 173 Cr.PC to ascertain prima-facie case, if any, against the accused. Had the court below undertook such exercise at the time of framing of charge, it would not have passed order which now stands impugned before this Court.

31. Needless to say exercise, if any, carried out by the court while ascertaining whether prima-facie case, if any, exists against the accused or not, must reflect in the order, whereby charge

is proposed to be framed. But unfortunately in the case at hand, there appears to be no attempt, if any, made by the court below to ascertain prima-facie case, if any, against the accused at the time of framing of charge and as such, order framing charges, being unsustainable in the eye of law, cannot sustain. Otherwise also, court below while framing charge under Section 376-D against petitioners No. 1 and 3, and Section 109 IPC against the petitioner No.2 appears to have swayed with emotions because in view of the facts and circumstances discussed herein above, no case much less under Section 376-D can be said to have been made out against the petitioners. Neither, there is sufficient evidence to conclude that on the date of the alleged incident, victim-prosecutrix was raped by petitioner No. 3 with the help and aid of petitioners No. 1 and 2, nor there is evidence that all the aforesaid accused acted in furtherance of common intention.

32. Moreover, this Court having perused material available on record, has no hesitation to conclude that chances of conviction, if any, on the basis of material adduced on record by the Investigating Agency, are very remote and bleak and in case, FIR sought to be quashed in the instant proceedings, order dated 12.11.2018 framing charge as well as consequent proceedings arising therefrom, is allowed to sustain, accused shall be unnecessarily put to the ordeals of protracted trial, which ultimately may lead to acquittal of the accused.

33. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, present petition is allowed and FIR No. 91 of 2014 dated 15.4.2014, registered at PS Nurpur, District Kangra, HP, order dated 12.11.2018 framing charges under Sections 376-D and 109 of IPC, passed by the learned Additional Sessions Judge-1, Kangra, at Dharamshala as well as consequent criminal proceedings, are quashed and set-aside. Accordingly, present petition is disposed of, so also pending applications, if any.

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

Naginder Singh ...Petitioner.

Versus

Hari Dass Verma ..Respondent.

Cr.MMO No. 349 of 2015
Reserved on: 24.09.2020
Date of Decision: September 25, 2020

Evidence Act, 1872 (Act)- Sections 45 & 73- Directions to accused to give handwriting specimen for comparison purposes- Held, in view of provisions of Sections 45 and 73 of Act, during trial, Magistrate has power to issue direction to any person including accused to give his specimen signature or handwriting and to send questioned handwriting/ signature along with it to the expert for opinion. (Para 16)

Code of Criminal Procedure, 1973 (Code) - Section 311-A- Directions to accused to give specimen handwriting for comparison purposes by Court - Whether accused must have been formally arrested during investigation earlier in that case?- Held, appearance and surrender of accused in Court amounts to his custody in the Court- And he has to be considered to have been arrested in that case- A person enlarged on bail under Chapter-XXXIII of Code is a person arrested in connection with relevant investigation or proceeding- Accused arrested through bailable warrant and released on bail can be directed to give specimen handwriting for comparison at later stage- Proviso to Section 311-A of Code would not be applicable in that situation. (Para 23, 22 & 33)

Cases referred:

Sushila Aggarwal and others vs. State (NCT of Delhi) and others, (2020) 5 SCC;
State of Uttar Pradesh vs. Deoman Upadhyaya, AIR 1960 SC 1125;
Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others, (1980) 2 SCC 559;
Karam Dass and 91 others vs. State of H.P., 1995 (1) Siml. L.C. 363;

Roshan Beevi v. Joint Secretary, Government of T.N., 1984 Cri. L.J. 134;
State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808;
State (Delhi Administration) vs. Pali Ram, AIR 1979 SC 14, (1979) 2 SCC 158;
State of Uttar Pradesh vs. Ram Babu Misra, AIR 1980 SC 791;
B.C. Radhakrishnan & others vs. Saju Thuruthikunnel & Another, 2014 Cri. L.J. 425;
Directorate of Enforcement vs. Deepak Mahajan and another, (1994) 3 SCC 440;
Whether approved for reporting? Yes

For the Petitioner: Mr. Mohan Singh, Advocate.

For the Respondent: Mr. Pradeep Kumar Verma, Advocate.

Vivek Singh Thakur, J.

This petition has been preferred against the impugned order dated 14.10.2015, passed by learned Additional Chief Judicial Magistrate, Court No.2, Shimla, H.P., in Cr.M.P. No. 2977-3 of 2014/12 in case No.171-3 of 2012, titled as *Hari Dass Verma vs. Naginder Singh,* allowing application filed by the complainant under Section 311-A of Criminal Procedure Code (in short 'Cr.P.C.'), whereby accused Naginder Singh has been directed to remain present in Court for giving specimen signature/handwriting during the trial pending before the Court under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act') for the purpose of comparison with the signature of accused-petitioner (hereinafter referred to as the 'accused') appended on the cheque, subject matter of the trial.

2. Main ground, assailing the impugned order canvassed before this Court is that in view of Proviso to Section 311-A Cr.P.C., trial Court has committed a mistake of law directing the accused to give his specimen signature/handwriting for the reason that accused has, at any point of time, not been arrested in connection with investigation or proceedings related to the trial, wherein he has been directed to do so.

3. To substantiate his plea, reliance has been placed on behalf of the accused on para-9 of a pronouncement of Kerala High Court reported in ***B.C. Radhakrishnan & others vs. Saju Thuruthikunnel & Another, 2014 Cri. L.J. 425;*** and para 46 of pronouncement of the Apex Court in ***Directorate of Enforcement vs. Deepak Mahajan and another, (1994) 3 SCC 440.***

4. Referring *Deepak Mahajan's case*, it has been contended on behalf of the accused that word "arrest" when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty and unless the person is deprived of personal liberty to go where he pleases, he cannot be said to have been arrested, as in a criminal case an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. It is contended that trial in present case is on the basis of a complaint filed by the complainant-respondent (hereinafter referred to as the 'complainant'), but not on the basis of police report, in which accused was never arrested and, therefore, trial Magistrate was not empowered to direct the accused to give his specimen signature/handwriting.

5. To the contrary, learned counsel for the complainant referring judgments of this High Court in ***Jitender Kumar vs. State of H.P., Latest HLJ 2009 (HP) 278;*** and judgment dated 27.04.2012, in ***Cr. Revision No. 62 of 2012, titled as State of Himachal Pradesh vs. Uday Ram,*** has contended that once petitioner was enlarged on bail after his appearance in the Court in response to bailable warrants issued to him, he has to be treated to have been arrested during

pendency of the proceedings and, therefore, he is not entitled for protection of Proviso to Section 311-A Cr.P.C. and for reasons assigned in the impugned order, he has supported it.

6. Section 311-A Cr.P.C. has been inserted by Act No.25 of 2005 w.e.f. 23.06.2006. Prior to it, there was no such provision in the Cr.P.C. However, Section 73 of Indian Evidence Act (hereinafter referred to as the 'Evidence Act') was empowering the Magistrate to compare signature, writing or seal with admitted or proved signature, writing or seal and this provision is still existing. Section 45 of the Evidence Act provides that opinion of specially skilled persons, called experts, to identify the handwriting etc., is a relevant fact and thus it empowers Court to take help of such experts. Sections 45 and 73 of the Evidence Act deal with the situation during pendency of the trial.

7. Sections 45 and 73 of the Evidence Act are reproduced as under:-

"45.Opinion of Experts.-

When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art, are relevant facts.

Such persons are called experts."

73.Comparison of signature, writing or seal with others admitted or proved.-

In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."

8. Earlier to above referred Amendment 2005 in Cr.P.C., there was no provision empowering the Magistrate to order a person to give specimen signature or handwriting for the purpose of any investigation under the Cr.P.C. except provision existing in Section 5 of the Identification of Prisoners Act, 1920 (hereinafter referred to as 'Prisoners Act'), which reads as under:-

"5. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Cr.P.C., 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a public officer:

Provided that no order shall be made directing any person to be photographed expect by a Magistrate of the first class:

Provided further, that no order shall be made under this Section unless the person has at some time been arrested in connection with such investigation or proceeding."

Section 2 (a) of the Act defines 'measurements' as including 'finger impressions and foot-print impressions'.

9. Undisputedly the Apex Court in ***State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808***, has decided that no testimonial compulsion under Article 20(3) of the Constitution is involved in a direction to give specimen signature and handwriting for the purpose of comparison.

10. The Apex Court in ***State (Delhi Administration) vs. Pali Ram, AIR 1979 SC 14, (1979) 2 SCC 158,*** has held that a Court holding an inquiry under the Criminal Procedure Code is entitled under Section 73 of the Evidence Act to direct accused person appearing before it to give his specimen/handwriting to enable the Court, by which he may be tried, to compare it with disputed writing. The Apex Court has further held that comparison within the meaning of first paragraph of Section 73, may be made by handwriting expert (Section 45) or by one familiar with handwriting of the person connected (Section 47) or by the Court and further that the two paragraphs of Section 73 are not mutually exclusive, but complementary to each other and, therefore, this Section is to be read as a whole, in the light of Section 45.

11. In ***State of Uttar Pradesh vs. Ram Babu Misra, AIR 1980 SC 791***, the Apex Court has held that under Section 73 of the Evidence Act an accused person cannot be directed to give his specimen handwriting when matter is still under investigation and there is no proceeding before the Court. In para-4 of the judgment, Apex Court has observed as under:-

> "4. The second paragraph of Sec. 73 enables the Court to direct any person present in Court to give specimen writings 'for the purpose of enabling the Court to compare' such writings with writings alleged to have been written by such person. The clear implication of the words 'for the purpose of enabling the Court to compare' is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of 'enabling the Court to compare' and not for the purpose of enabling the investigating or other agency ' to compare'. If the case is still under investigation, there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of S. 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further, S. 73 of the Evidence Act makes no distinction between a Civil Court and a Criminal Court. Would it be open to a person to seek the assistance of the Civil Court for a direction to some other person to give sample writing under S. 73 of the Evidence Act on the plea that it would help him to decide whether to institute a Civil Suit in which the question would be whether certain alleged writings are those of the other person or not? Obviously not. If not, why should it make any difference if the investigating agency seeks the assistance of the Court under S. 73 of the Evidence Act on the plea that a case might be instituted before the Court where it would be necessary to compare the writings?

12. In *Ram Babu Misra's case* supra, the Apex Court has suggested that suitable legislation may be made on the analogy of Section 5 of the Prisoners Act, to provide for the investiture of Magistrates with the power to issue directions to any person including an accused person, to give specimen signatures and writings.

13. In sequel to aforesaid suggestion of the Apex Court Section 311-A Cr.P.C. was inserted in Cr.P.C. which reads as under:-

> "311-A. Power of Magistrate to order person to give specimen signatures or handwritings.- If a Magistrate of the first Class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

> Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

14. So far as findings returned by the Kerala High Court in para-9 of *B.C. Radhakrishnan's* case, relied upon by the accused, there is no quarrel as the Proviso to Section 311-A Cr.P.C. limits power conferred on the Magistrate by this Section by providing restriction that it can be exercised only in a case where accused person had been arrested in connection with such investigation or proceeding. However, in the same judgment in paragraphs 12 and 13, it has been held that power vested with the Court under Section 73 of the Evidence Act, can be exercised by the Court directing any person present in Court to write words or figures for the purpose of enabling the Court to compare the words or figures so written with words or figures alleged to have been written by such person and this Section does not prescribe any specific time for invocation of the Court's power and, therefore, it is held that Magistrate has ample power and jurisdiction to invoke Section 73 of the Evidence Act, for directing accused to furnish specimen writing for the purpose of comparison.

15. Section 73 of the Evidence Act, empowers the Court to direct any person, not only accused, to give his specimen signatures or handwriting for the purpose of comparison of handwriting and signatures of that person during trial. Combined reading of Sections 45 and 73 of the Evidence Act infers that Court may make such comparison with the help of the expert by seeking his opinion and provisions of these Sections are applicable to Criminal as well as Civil trial. Whereas, Section 311-A Cr.P.C. deals with a case under Cr.P.C., where Magistrate of the first Class has been empowered to make an order for production or attendance of a person at the time and place specified in such order with a direction to such person to give his specimen signatures and handwriting when Magistrate is satisfied that for the purpose of any investigation or proceeding under Cr.P.C., it is expedient to direct that person, including an accused person to give such specimen signature and handwriting and in Proviso this power of the Magistrate has been limited only with respect to that person, who at some time, has been arrested in connection with such investigation or proceeding.

16. In view of the provisions of Sections 45 and 73 of the Evidence Act, coupled with pronouncement of the Apex Court in ***Pali Ram's*** case ***[(1979) 2 SCC 158],*** it is clear in no uncertain terms that during pendency of the trial, Magistrate has power to issue direction to any person, including accused to give his specimen signature or handwriting and to send the questioned handwriting/signatures alongwith specimen handwriting/ admitted signatures to the expert for opinion or to compare himself under Section 73 of the Evidence Act or to compare it with the help of person well acquainted with such handwriting or expert as provided under Sections 45 and 47 of the Evidence Act.

17. Though as observed hereinabove, Magistrate was empowered to issue direction to the accused to give his specimen signatures/handwriting under Section 73 of the Evidence Act. However, Magistrate has also referred provisions of Section 311-A Cr.P.C., in the impugned order and after considering judgments cited by the complainant, passed by this Court in *Jitender Kumar and Uday Ram's* cases, he has considered that such accused was released on bail at the initial stage of the trial on furnishing bail bonds and thus he has to be considered in deemed judicial custody of the Court at that time and, therefore, no formal arrest is required before passing any direction under Section 311-A Cr.P.C. and petitioner/accused has also assailed this portion of the order.

18. The Apex Court in paragraph 46 of *Deepak Mahajan's* case (1994) 3 SCC 440, has explained the word 'arrest' as under:-

> "46. The word 'arrest' is derived from the French word 'Arreter' meaning "to stop or stay" and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest' is given in various dictionaries depending upon the circumstances in which the said

expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in ***Roshan Beevi v. Joint Secretary, Government of T.N., 1984 Cri. L.J. 134,*** had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various textbooks and dictionaries, the *New Encyclopaedia Britannica, Halsbury's Law of England, A Dictionary of Law by L.B. Curzon, Black's Law Dictionary and Words and Phrases.* On the basis of the meaning given in those textbooks and lexicons, it has been held that:

> "[T]he word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

19. In aforesaid pronouncement in *Deepak Mahajan's* case, referring various Sections in Chapter-V of Cr.P.C., titled "Arrest of a Person" particularly under Sections 41 to 44, it has been concluded that Cr.P.C. gives power of arrest not only to Police Officer and a Magistrate but also under certain circumstances or given situation to private persons and further that when an accused person appears before the Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. It has been further held that the arrest of a person is condition precedent for taking him into 'judicial custody' thereof as the taking of the person into 'judicial custody' is followed after arrest of the person concerned by the Magistrate on appearance or surrender.

20. The Apex Court in ***Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others, (1980) 2 SCC 559,*** in para-9 has observed as under:-

> "9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. ... ..."

21. On the basis of pronouncement of the Apex Court in *Niranjan Singh's* case, this Court in ***Karam Dass and 91 others vs. State of H.P., 1995 (1) Siml. L.C. 363,*** has held that appearance and surrender of accused person in the Court amounts to his custody in the Court and thus, he has to be considered to have been arrested.

22. In Chapter-XXXIII of Cr.P.C., provisions as to bail and bonds have been provided. Section 436 Cr.P.C. deals with grant of bail to a person arrested for commission of a non-bailable offence. Section 437 Cr.P.C. provides grant of bail to a person accused of or suspected of the commission of any non-bailable offence, arrested or detained without warrant in certain cases by a Court other than High Court or Court of Session. Section 439 Cr.P.C. provides grant of bail by the High Court or Sessions Court to a person arrested, accused or suspected of commission of offence of the nature specified in Section 437(3) Cr.P.C. Section 438 Cr.P.C. empowers the Court to direct for grant of bail to a person apprehending arrest but in that case also the bail is not granted prior to arrest and it has been specifically provided in the section that High Court or Court of Session may pass a direction under this Section that in the event of such arrest, a person shall be released on bail. Therefore, for grant of bail to a person, his arrest is a precondition and during bail the said person remains under the control of the Court because of the fact that bail is granted subject to undertaking by such person to attend the Court as and when directed to do so coupled with certain other conditions imposed by the Court including joining investigation, as deemed fit and breach of

any such condition, including without permission absence from the Court, would entail arrest of a person leading to his 'judicial custody'. As held by this Court in *Jitender Kumar's* case (HJL 2009 (HP) 278 supra and the Apex Court in judgments referred supra such person notionally remains in custody of the Court and thus continues to be a person arrested. Thus a person enlarged on bail under provisions of Chapter XXXIII of Cr.P.C., is a person arrested in connection with relevant investigation or proceeding.

23. In a trial a person may be produced or may appear in the Court in compliance of notice, bailable warrants or non-bailable warrants issued against him. In case of production in execution of non-bailable warrants, he is certainly arrested during proceedings pending before the Court. In case of bailable warrants also the person is released on bail, by the officer executing bailable warrants, on furnishing personal bond as well as surety bond by the accused and in that eventuality also, he has to be considered to have been arrested by the executing officer and thereafter released on bail for assurance to appear in the Court on the date intimated through bailable warrants. In case of appearance of a person/accused in the Court in compliance of notice/summons issued to him in a criminal case, he surrenders himself before the Court and submits him for further orders, and for presence in the trial, he may be committed to judicial custody or on furnishing the personal bond with or without surety bond he may be enlarged on bail for his assurance to appear in the Court whenever required or directed to do so and in such eventuality, he surrenders himself to the custody of the Court and as held by the Apex Court for such custody arrest is a precondition. Therefore, such person is also to be considered to have been arrested in connection with proceedings pending in the Court.

24. In view of nature of issue raised on behalf of the petitioner, it would also be appropriate to discuss the meaning and nature of the 'custody with or without arrest' and also 'custody followed by arrest'.

25. In ***State of Uttar Pradesh vs. Deoman Upadhyaya, AIR 1960 SC 1125,*** it has been held by Five Judges' Bench of Supreme Court that when a person, not in custody approaches a Police Officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be against him he may appropriately be deemed to have surrendered himself to the police and Section 46 of Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody, submission to the custody by word or action by a person is sufficient. Further that a person directly giving to a Police Officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the custody of the Police Officer within meaning of Section 27 of the Evidence Act.

26. In ***Niranjan Singh' s case (1980) 2 SCC 559*** supra the Apex Court has observed as under:-

> "7. When is a person in *custody,* within the meaning of Section 430 Cr.P.C? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in *custody* for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

> 8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) in physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the Court.

27. This principle has been referred and relied by Five Judges' Bench of Supreme Court in ***Shri Gurbaksh Singh Sibbia and others vs. State of Punjab,*** reported in ***(1980) 2 SCC 565***, observing that if and when the occasion arises it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in the principle stated by this Court in ***Deoman Upadhyaya's* case** (AIR 1960 SC 1125) to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody, submission to the custody by word or action by a person is sufficient.

28. An observation has also been made by Five Judges' Bench of the Supreme Court in ***Sushila Aggarwal and others vs. State (NCT of Delhi) and others, (2020) 5 SCC 1,*** referring principle of "limited custody" or "deemed custody" when a person is on bail, by observing that observations in ***Sibbia's case*** **[(1980) 2 SCC 565]** regarding it to facilitate the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is reliable to a statement made during such event (i.e. deemed custody) and in such event there is no question or necessity of asking the accused to separately surrender and seek regular bail and if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in ***Deoman Upadhyaya's case*** (AIR 1960 SCC 1125).

29. There may be cases where custody of a person is taken prior to arrest. One example of such situation is when a person is taken in custody by the police for the purpose of interrogation/investigation but prior to his arrest and that custody may or may not be followed by arrest, depending upon the evidence and inference of interrogation of such or other persons. In case where the person is set free without furnishing personal and/or surety bonds, for such custody, neither arrest is precondition nor after taking into such custody the person can be said to have been arrested. But in those cases wherein for letting free the person furnishing of personal and/or surety bonds are necessary, then definitely, for such custody, arrest is a precondition and thus wherever a person has been enlarged on bail, he has to be deemed to have been arrested before such release.

30. Section 73 of the Evidence Act empowers the Court in all kinds of matters, Civil as well as Criminal, to direct any person to give specimen handwriting/signatures and to compare the same in the matter being adjudicated by the said Court. Whereas, Section 311-A Cr.P.C. is expansion of power of the Magistrate for issuing such directions to a person during inquiry or proceeding under Cr.P.C. irrespective of the fact whether such inquiry or proceeding is pending before him or not. Insertion of Section 311-A Cr.P.C. is for enabling the Court to pass an order, issue direction, to any person to give specimen signatures or handwriting before commencement of trial, during investigation or during trial under Cr.P.C. Proviso to this Section cannot circumvent powers of the Court under Section 73 of the Evidence Act, to give direction to any person to write words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person for adjudication of matter pending before it, as it is within jurisdiction of the Court to do so for adjudication of Civil or Criminal matter.

31. Jurisdiction and power conferred upon Court under Section 73 of the Evidence Act is not inhibited by Section 311-A of Cr.P.C. but is expanded to the cases of investigation and other proceedings which are even not pending before such Court exercising power as Magistrate.

32. In present case, presence of accused could not be ascertained on issuance of summons to him whereupon bailable warrants in the sum of `1000/- were issued on 27.06.2012 for ensuring his presence for 27.08.2012. In compliance of bailable warrants, accused had appeared in the Court on 27.08.2012 on which date, he had furnished personal bond in the sum of `10,000/- with one surety in the like amount which were attested and accepted by the trial Court, and petitioner was enlarged on bail on the basis of his undertaking, tendered in bail bonds, to appear on each and every date in the trial before the trial Court, the present Court or any other Court wherever case may be transferred, till final judgment in the trial.

33. In the light of discussion hereinabove, it is evidently clear that firstly at the time of execution of bailable warrants accused has to be considered to have been arrested by the executing Officer in connection with proceedings pending before the Court and thereafter, he appeared, surrendered and submitted himself before the Court on 27.08.2012, whereupon he was enlarged on bail on furnishing personal and surety bonds as directed by the Court and, therefore, on that day also, he has to be deemed to have been arrested and thus Proviso to Section 311-A Cr.P.C. is of no help to the accused.

34. In view of the exposition of law hereinabove, I find no ground for interference and accordingly petition is dismissed with a direction to the parties to appear before the trial Court on 28.10.2020. Record be sent immediately

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

Shashi Ram Pun .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No.1524 of 2020
Decided on: 17.9.2020

Code of Criminal Procedure, 1973 (Code) – Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)** – Sections 18, 29 & 37 – Recovery of opium (1.460 kgs. and 1.470 kgs.) from rucksacks of two accused moving together on road – Whether is it a commercial quantity for purpose of grant of bail ? – Held, case of police itself is that recovery was affected from rucksacks carried by the accused- Recovered stuff from each bag independently falls in intermediate quantity – Question whether accused purchased contraband from one source and segregated it to avoid rigors of Section 37 of Act, is a matter of trial – No material on record that they purchased opium from one source – Rigors of Section 37 of Act do not apply– Accused a Nepalese admitted on bail but subject to stringent conditions including furnishing a local surety to the satisfaction of Court. (Para 4 & 12).

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 SCC 49;
Umarmia Alias Mamumia v. State of Gujarat, (2017) 2 SCC 731;
Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218;

Whether approved for reporting? Yes.

For the Petitioner : Ms. Shashi Kiran Negi, Advocate.

For the Respondent : Mr. Sudhir Bhatnagar, Additional Advocate General, with Mr. Kunal Thakur, Deputy Advocate General.

Sandeep Sharma, Judge (oral):

Through Video Conferencing

Bail petitioner namely Shashi Ram Pun, who is behind the bars since 1.1.2020, has approached this Court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail in FIR No. 2/2020 dated 2.1.2020, under Sections 18 and 29 of the ND&PS Act, registered at Police Station Dharampur, District Solan, Himachal Pradesh.

2. Close scrutiny of status report/record reveals that on 2.1.2020, at 9:30pm, police party, which was on patrolling duty, having noticed strange activities of three persons near Jawala Mata Temple, Dharampur, stopped them. Since they (accused) after having seen police got perplexed and made an attempt to run away, police apprehended them and carried out their search. Though police was unable to associate independent witnesses, but allegedly recovered 1.460 kgs and 1.470 kgs of Opium each from the rucksack (Pithu bag) of both the accused including the present bail petitioner. Since both the accused were unable to render proper explanation qua the possession of the aforesaid quantity of contraband, police after completion of necessary codal formalities registered FIR as referred herein above, against both the accused on 2.1.2020 and since then, they are behind the bars. Challan stands filed in the competent court of law, but charges are yet to be framed as has been disclosed in the status report.

3. Mr. Kunal Thakur, learned Deputy Advocate General, while fairly admitting factum with regard to filing of challan in the competent court of law, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserves any leniency and as such, bail petition having been filed on his behalf may be rejected. Learned Deputy Advocate General further contends that since two accused came to be apprehended together by the police, the alleged contraband of 2.930 kgs came to be recovered from their bags and as such, petitioner cannot claim that quantity of contraband allegedly recovered from him is of intermediate quantity and as such, on account of specific bar under Section 37 of the Act, bail petition deserves to be rejected outrightly. Mr. Thakur, further contends that since as per investigation, contraband allegedly recovered by the police was purchased by both the accused from one source, mere transport of that by two different persons will not make the quantity of contraband intermediate, rather same is required to be considered as commercial quantity. Lastly, Mr. Thakur, contends that since bail petitioner hails from Nepal, it would be difficult to secure his presence during trial in the event of his being enlarged on bail and as such, prayer for grant of bail made on his behalf may not be accepted.

4. Having heard learned counsel for the parties and perused the material available on record, this Court finds that on the date of alleged incident, police in the absence of independent witnesses allegedly recovered 1.460 and 1.470 kgs of opium each from two bags allegedly carried by the two accused including the bail petitioner. As per own case of the Investigating Agency, 1.460 kgs of opium was recovered from the rucksack of the present bail petitioner and as such, it cannot be said that commercial quantity of opium came to be recovered from the conscious possession of the bail petitioner because as per NDPS Act, commercial quantity of "opium" is more than 2.5 kg and as such, contraband allegedly recovered from the bail petitioner can be said to be of intermediate quantity. Though Investigating Agency in its status report has made an attempt to carve out a case that since both the accused purchased the opium from one source, quantity of contraband recovered from both the accused in toto, is required to be taken into consideration while determining the quantity of contraband, but such submission deserves outright rejection for the reason that as per own case of the Investigating Agency, petitioner came to be apprehended with 1.460 kgs of opium. Whether both the accused jointly purchased the contraband from one source and thereafter,

purposely segregated that to avoid rigors of Section 37 of NDPS is matter of fact, which is required to be proved in accordance with law by leading cogent and convincing evidence on record. Otherwise also, there is no material worth credence suggestive of the fact that both the accused purchased contraband involved in the case at hand from one source and as such, this Court finds no force in the submission made on behalf of the learned Deputy Advocate General that since commercial quantity of the contraband came to be recovered from the bail petitioner, he does not deserve to be enlarged on bail on account of restriction imposed under Section 37 of the Act. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but since quantity of contraband allegedly recovered from the petitioner is intermediate coupled with the fact that bail petitioner is the first offender, prayer made on behalf of him for grant of bail deserves to be considered.

5. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly, held that one is deemed to be innocent till the time, his/her guilt is not proved in accordance with law and as such, it is not fair and just to keep him behind bars during trial indefinitely, especially when nothing remains to be recovered from him. This court also cannot lose sight of the fact that there is every likelihood of trial being delayed in the wake of COVID-19. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting him to stringent conditions.

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

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

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

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

> ***" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."***

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

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

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

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

11. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing

when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

12. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 2,00,000/- with one local surety in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

> ***(f) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***

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

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

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

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

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

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

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

1. Cr.Revision No.146 of 2020

M/s Digital Vision through its partner Konic Goyal ....Petitioner.

Versus

State of Himachal Pradesh through Drug Controller ..Respondent.

2. Cr.MMO No.180 of 2020

Parshotam Lal Goyal ....Petitioner.

Versus

State of Himachal Pradesh through Drug Controller ...Respondent.

Cr. Revision. 146 of 2020 alongwith
Cr.MMO No. 180 of 2020
Reserved on:17.07.2020
Date of Decision: September 23,2020

Drugs and Cosmetics Act, 1940 (Act) – Section 22 (1) (d) – Expression 'such other powers' – Meaning of - Held, this provision empowers Drugs Inspector to exercise such other power to perform any act which is incidental and ancillary to power conferred upon him expressly under the Act and Rules there under – It includes doing of all others acts for carrying out purposes of the Act and envisages taking of additional quantity of samples for analysis.(Para 43 & 46)

Drugs and Cosmetics Act, 1940 (Act) – Section 23 – Procedure of taking sample– Applicability – Held, procedure prescribed in Section 23 of Act is required to be adhered to at time of sampling whether it is initial sample or additional sample. (Para 48)

Drugs and Cosmetics Act, 1940 (Act) – Section 23 (5) (b) – Custody of seized stock of drugs – Held, provision does not envisage that custody of seized stock of drugs cannot be entrusted with Drugs Inspector by the Magistrate – Magistrate has the authority to pass appropriate orders with respect to custody of seized stock of drugs and it includes power to call the seized stock & release it and also to direct drawing of samples/additional samples in his presence for carrying out purposes of Act and Rules made thereunder. (Para 50 & 51).

Drugs and Cosmetics Act, 1940 (Act) – Section 22 (1)(c) & (d) – Taking of sample of drug for analysis – Held, Drugs Inspector is empowered to take sample at any other place other than place of manufacturing or retailer depending upon facts and circumstance of situation. (Para 52)

Code of Criminal Procedure, 1973 (Code) – Section 2 (h) – Investigation – Held, section 2 (h) of Code does not prohibit Magistrate from allowing investigation or part thereof including taking of sample in court premises in his presence. (Para 59).

Whether approved for reporting? Yes

For the Petitioners:	Mr.K.D.Shreedhar, Senior Advocate with Ms.Shreya Chauhan, Advocate, through Video Conferencing.
For the Respondent:	M/s Desh Raj Thakur & Shiv Pal Manhans, Additional Advocates General, with M/s Raju Ram Rahi & Gaurav Sharma, Deputy Advocate General, through Video Conferencing.

Vivek Singh Thakur, J.

These petitions, assailing orders dated 11.03.2020 and 02.05.2020, passed by learned Chief Judicial Magistrate, District Sirmaur at Nahan, H.P. (hereinafter referred to as CJM) arising out of one and the same proceedings/inquiry, are being decided by this common judgment as the same are to be adjudicated on the basis of common material.

2. A partnership firm M/s Digital Vision, having licence and approval from the Drug Licencing Authority, under Drugs and Cosmetics Act, 1940 (hereinafter referred to as the 'Act') and Rules framed thereunder, had been manufacturing amongst others, the drug Coldbest-PC Syrup since 2014, in its Manufacturing Unit at 176, Mauza Ogli, Nahan Road, Kala Amb, District Sirmaur, H.P., till 15.02.2020, when it was directed to stop manufacturing of this drug as well as all drugs having similar formula/composition under generic name or any brand name under its Drugs Manufacturing Licences, till further orders, for the reason that infant mortalities had taken place in Ramnagar area of Udhampur District (J & K) and it was observed by the team head of PGI, Chandigarh that Diethylene Glycol, purported cause of deaths, was found in Coldbest-PC Syrup pertaining to Batch No.DL5201 manufactured in September 2019, with expiry date August 2021, manufactured by the petitioner-M/s Digital Vision.

3. Vide order dated 11.03.2020, impugned in Cr.MMO No.180 of 2020 preferred by Parshotam Lal Goyal, partner of M/s Digital Vision, learned CJM, on application filed by the Drug Inspector, has permitted the Drug Inspector to draw additional samples of drug from the bulk seized by and in custody of Drug Inspector, for demand received from Government Analyst to send additional sample for testing the drug for Diethylene Glycol, as quantity sent earlier was found to be insufficient by Government Analyst to conduct test/analysis asked for.

4. Vide order dated 02.05.2020, impugned in Cr. Revision No.146 of 2020 preferred on behalf of M/s Digital Vision through its partner Konic Goyal, learned CJM has rejected the objection raised on behalf of the petitioner against sending four bottles of initial sample and twenty bottles of additional sample collectively consequently dismissing the prayer to send only four bottles i.e. sample drawn initially on 26.02.2020 to Central Drug Laboratory Kolkata, but not to send additional samples of twenty bottles, so drawn on 11.03.2020 after receiving the demand from Government Analyst, Chandigarh. Learned CJM has ordered to send initial samples of four bottles as well as additional sample of twenty bottles, but separately with a request to CDL, Kolkata, to open only initial sample at first instance and in case sample is found insufficient for conducting requisite test(s), to open additional sample of twenty bottles for conducting the analysis/test asked for.

5. During hearing, record of proceedings conducted by the Drug Inspector, was summoned through learned Deputy Advocate General, retained and perused.

6. Undisputedly, petitioner-M/s Digital Vision is a partnership firm incorporated vide registered deed of partnership made on 18.05.2009 between Parshotam Lal Goyal and his two sons Konic Goyal and Manic Goyal, residents of 28-A, Govind Nagar, Ambala Cantt, Haryana. The Deed has been registered in the office of Sub-Registrar, Nahan, in Book No.4, bearing registration No.129/09 dated 18.05.2009. Share of partner Parshotam Lal Goyal, as per copy of Deed, available on record is: 34%, whereas his two sons Konic Goyal and Manic Goyal are having share of 33% each.

7. On 15.02.2020, a letter No.DFO/D-924/7477-7513, sent by Controller Drugs, Drugs and Food Control Organization J & K (Jammu), was received by the State Drugs Controller, Himachal Pradesh, regarding infant mortalities in Ramnagar area of Udhampur District (J & K), whereby it was informed that it had been given to understand by the team Head of PGI, Chandigarh that presence of Diethylene Glycol in Coldbest-PC Syrup, Batch No.DL5201, manufactured by petitioner-M/s Digital Vision in September 2019 with expiry date of August 2021 was cause of deaths and it was requested to conduct thorough inspection of the Unit to evaluate/ascertain aspect of Diethylene Glycol impurity in the said syrup and to recall the product of the said drug, irrespective of batch, in the larger public interest. In furtherance to aforesaid information, received from Controller Drugs (J & K), Assistant Drugs Controller-cum-Drugs Licensing Authority, Himachal Pradesh, vide communication dated 15.02.2020 (By hand) had issued Show Cause Notice and Stop Manufacturing order to petitioner(s)-M/s Digital Vision, with a direction to stop manufacturing of Coldbest-PC Syrup as well as all the drugs having similar formula/composition under generic name or any brand name under its Drugs Manufacturing Licences, till further orders.

8. On 17.02.2020, another Show Cause Notice and Stop Manufacturing order was issued to petitioner-M/s Digital Vision to stop manufacturing under its drugs Manufacturing Licences till further orders for the reason that record was required by the investigation team immediately for investigation in the matter and in view of seriousness of the matter, in public interest, Assistant Drugs Controller was of the opinion that manufacturing cannot be permitted in the circumstances of the case.

9. The Joint Investigation Team had submitted its interim report dated 17.02.2020 with twenty points observation therein. Copy of the said spot/interim report was served upon petitioner(s)-M/s Digital Vision vide Show Cause Notice and 'Stop Manufacturing' order dated 25.02.2020 was also issued with a direction to adhere to 'Stop Manufacturing' order already issued on 17.02.2020 till further orders.

10. On 15.02.2020, Drug Inspector had taken five samples of drug COLDBEST-PC of different batches from premises of petitioner(s)-M/s Digital Vision with intimation to Konic Goel, partner of the firm and offered him fair price of the sample of drugs. Sixth sample of Propylene Glycol Technical Trade was also taken. All these samples are detailed hereinunder:-

Sl.No.	Code	Product	Batch No.	Expiry	Manufactured by
1.	NHN/19/94	ColdBest-PC Syrup	DL5201	08/21	Digital Vision, 176 Mauza Ogli, Nahan road, Kala-Amb, Distt. Sirmuor, H.P.
	Three sealed sample portions each of 1 bottle of 60 ml labelled claim each. (Total= 3x1x1 bottle)				

2.	NHN 19/95	ColdBest-PC Syrup	DL5872	12/21	-do-
	Three sealed sample portions each of 1 bottle of 60 ml labelled claim each. (Total= 3x1x1 bottle)				
3.	NHN/19/96	ColdBest-PC Syrup	DL2831	12/20	-do-
	Three sealed sample portions each of 1 bottle of 60 ml labelled claim each. (Total= 3x1x1 bottle)				
4.	NHN/19/97	ColdBest-PC Syrup	DL4302	05/21	Digital Vision, 176 Mauza Ogli, Nahan road, Kala-Amb, Distt. Sirmuor, H.P.
	Three sealed sample portions each of 1 bottle of 60 ml labelled claim each. (Total= 3x1x1 bottle)				
5.	NHN/19/98	ColdBest-PC Syrup	DL5028	07/21	-do-
	Three sealed sample portions each of 1 bottle of 60 ml labelled claim each. (Total= 3x1x1 bottle)				
6.	NHN/19/99	Propylene Glycol Technical Grade	BN-1A1912057	December 12, 2022	SHANDONG SHIDA SHENGHUA CHEMICAL, GROUP CO. LTD.,
	Four sealed sample portions each of 1 bottle of approx 100 ml each. (Total= 4x1x1 bottle)				

11. The aforesaid samples were sent to the Government Analyst for testing through memorandum, as prescribed in Rule 57, Form-18. During investigation, it had come to the notice that Propylene Glycol used in the manufacturing drug in question was purchased by the petitioner-M/s Digital Vision from M/s Thakur Enterprises, Ambala Cantt., therefore, a notice dated 17.02.2020 under Sections 22(1)(cca) and 18(d) of the Act was also issued to the said firm.

12. On 17.02.2020, documents and the registers were seized by the Drug Inspector under the Act, by supplying receipt thereof, on Form-16 to the petitioner-firm through its partner Purshottam Lal Goyal and, by passing an order on prescribed Form No.15, petitioner-M/s Digital Vision was also directed not to dispose of stock of four drums of Propylene Glycol available with it for twenty days from passing of the order. On the same day, a notice under Sections 22(1) (cca) and 18-A of the Act was also issued to Parshotam Lal Goyal to produce documents referred in this notice before the Drug Inspector immediately after receiving notice with rider that failing which, it shall be deemed that petitioner-M/s Digital Vision had nothing to say in the matter. However, vide reply dated 17.02.2020, it was informed on behalf of the petitioner-M/s Digital Vision that persons, with whom the requisite record was stated to be, were on leave on that day and it was further informed that the said record would be provided within three days. On 17.02.2020 itself, Drug Inspector had

asked the firm through Parshotam Lal Goyal to submit report of recall of drug in question pertaining to Batch No.DL5201 every six hourly to the office of Drugs Inspector.

13. On the basis of application dated 18.02.2020, titled as *State of Himachal Pradesh (Through Drugs Inspector, HQ. Nahan) vs. Parshotam Lal Goyal, Partner of M/s Digital Vision,* filed under Section 23(6) of the Act, vide order dated 19.02.2020, learned CJM had permitted the Drug Inspector to keep all the aforesaid seized documents/records in his possession till the same were produced before the Court of competent jurisdiction, in accordance with law.

14. On 25.02.2020, vide its final recall report, it was informed on behalf of petitioner-M/s Digital Vision that it had sold 5575 bottles of the drug Coldbest-PC Syrup, Batch No.DL5201 to the firm M/s Shiva Medical Hall, Ambala Cantt, vide Bill No.8440 dated 27.09.2019 and the said firm had sent back 565 bottles of the said drug with details and further information of the rest of the stock which was either consumed or sealed by the Department and it was informed that no stock of the said drug was left in the market.

15. On 26.02.2020, the Drug Inspector had taken three sealed sample portions, each of four bottles of 60 ml of drug Coldbest-PC Syrup, pertaining to Batch No. DL5201, from the premises of petitioner-M/s Digital Vision through Parshotam Lal Goyal out of 565 bottles of the drug recalled from the market and intimation thereof was served upon petitioner-M/s Digital Vision through Parshotam Lal Goyal vide Form No.17 and as Parshotam Lal Goyal had refused to accept fair price tendered thereof, receipt of the samples was also served upon him vide Form No.17A. Remaining quantity of drugs i.e. 553 bottles were seized by the Drug Inspector in presence of witnesses and Parshotam Lal Goyal vide Form No.16 and proceedings in this regard were reduced into writing in presence of witnesses and Parshotam Lal Goyal.

16. One sample portion, out of samples taken on 26.02.2020, was sent to the Government Analyst Chandigarh alongwith Form No.18 on the very same day (By hand) for testing. Number/Code NHN/19/103 was assigned to these samples.

17. Vide order dated 27.02.2020, passed in application dated 27.02.2020, titled as *State of Himachal Pradesh (Through Drugs Inspector, HQ. Nahan) vs. Parshotam Lal Goyal, Partner of M/s Digital Vision,* preferred under Section 23(5)(b) of the Act, by the Drug Inspector, learned CJM had permitted him to keep entire seized drug in his possession till the same was produced before the Court of competent jurisdiction, in accordance with law.

18. On 02.03.2020, a written complaint was submitted by the Assistant Drugs Controller and Drug Inspector to the Station House Officer, Police Station, Kala Amb, District Sirmaur, H.P., for registration of FIR against M/s Digital Vision, its partners and others, on the basis of analysis report of Government Analyst with respect of samples of drug Coldbest-PC Syrup, Batch No.DL5201, taken by Drug Control Officer Ambala/Drug Inspector Zone-IV, Muthi, Jammu and Drug Control Officer, FDA, Panipath (Haryana), wherein it was reported that samples of the above referred drug were 'not of standard quality' as defined in the Drugs and Cosmetics Act, 1940 and Rules thereunder, for the reason the samples did not conform to claim as per Patent & Proprietary in respect of uniformity of volume, pH and Assay of Phenylephrine Hydrochloride and on testing, contents of Diethylene Glycol ranging from 34.24% to 35.87% w/v, were also found in the samples. On the basis of this complaint, FIR No.0021 dated 02.03.2020, has been registered in Police Station, Kala Amb.

19. Vide Chemical Analyst report dated 05.03.2020, it was informed by the Government Analyst that sample of drug Coldbest-PC Syrup Batch No.DL5201, with sample Code NHN/19/94 dated 17.02.2020 was found of 'standard quality' in respect of test performed, but with remarks that sample was not tested for Diethylene Glycol due to insufficient sample quantity. Further in this report, it was mentioned that test for Average filled volume, Uniformity of volume, pH and contents of

Paracetamol, Phenylephrine HC1 and Chlorpheniramine Maleate were not done due to insufficient sample quantity.

20. Vide communication dated 06.03.2020, Drug Inspector had requested the Government Analyst to send report of sample bearing Code NHN/19/103 dated 27.02.2020 on top priority, as the same was required for investigation of the case FIR registered in Police Station, Kala Amb. This communication was also sent through E-mail, in response whereto, E-mail message dated 09.03.2020 from Government Analyst was received by the Drug Inspector as well as Drug Controller, whereby Drug Inspector was requested to provide additional samples (20x60 ml) to complete analysis as desired.

21. On 09.03.2020, petitioner-M/s Digital Vision was directed by Drug Inspector to provide details of stock of Coldbest-PC Syrup, Batch No.DL5201, received from the market, after 26.02.2020 till date. The said communication was received and replied by the aforesaid Vinod Jangid vide response dated 09.03.2020, informing therein that no physical stock of the drug concerned was received in the Factory after 25.02.2020 and stock received prior to that till 25.02.2020 was already seized by Drug Inspector on 26.02.2020.

22. Vide separate order dated 09.03.2020, order dated 17.02.2020 issued on Form No.15 not to dispose of the stock of four drums of Propylene Glycol Technical Grade, was further renewed for a period of 20 days which was received by Vinod Jangid, Sales Executive of the petitioner(s)-Digital Vision. Report dated 05.03.2020 received from the Government Analyst with respect to sample bearing Code NHN/19/94 drawn on 15.02.2020 was also served upon Vinod Jangid, Sales Executive, on the very same day, whereby it was also informed that in case petitioner-M/s Digital Vision intended to adduce evidence in controversion of the report of the Government Analyst, then it may notify in writing to the Drug Inspector within a period of 28 days from the receipt of notice.

23. On 09.03.2020 itself, for request received from Government Analyst to provide additional quantity of sample to complete the analysis as desired, Drug Inspector had filed an application before learned CJM for permission to draw additional quantity of drug (20x3x60ml bottles), for sample No.NHN/19/103 dated 26.02.2020 from the seized drug.

24. Vide order dated 11.03.2020, passed by learned CJM, application was allowed by permitting drawing of additional quantity of drug, for earlier sample, out of balance quantity of drug i.e. 553 bottles seized by the Drug Inspector on 26.02.2020 with further rider that the additional quantity of drug for sample would be taken in presence of Court by producing seized bottles in the Court. Thereafter seized drug was produced in the Court, which was sealed in six cardboard boxes and out of those boxes one large sized cardboard box containing 72 bottles was opened in presence of learned CJM and out of that box, 60 bottles were taken out and divided into three portions of 20 bottles each and packed and sealed in three small cartons by appending three impressions of the seal bearing inscription 'C.J.M. SIRMAUR H.P.', and also by appending two impressions of 'LKS' each and balance quantity of 12 bottles were repacked in the same cardboard box, which was earlier containing 72 bottles and the said box was also closed and resealed by appending the seals referred *supra* and all the three small sized sealed cardboard boxes containing the additional quantity of drug drawn for sample No.NHN/19/103 and one resealed cardboard box containing 12 bottles of Coldbest-PC Syrup alongwith other seized drug were handed over to the Drug Inspector.

25. At the time of taking sample in the Court, Forms No.17, 17A and 18 were filled-in in the Court and on perusal thereof, it is evident that this process was completed in presence of Vinod Jangid, Sales Executive, of petitioner-M/s Digital Vision, as in the backside of Form No.17, the said Vinod Jangid has stated in writing that he is working as a Sales Executive in M/s Digital Vision and Parshotam Lal Goyal, partner of the firm is not in contact from one week and he is present in the

Court of learned CJM at Nahan and Drug Inspector has drawn additional quantity of drug for the sample No.NHN/19/103 (quantity-3x1x20x60 ml) in the Court in presence of witnesses after taking permission from the Court. He has further stated that he has received copy of Form No.17 alongwith one sealed sample portion of additional quantity of sample No.NHN/19/103 (quantity 1x20x60 ml) and further that he has signed each sample portion in presence of witnesses and all sealed sample portions were sealed by the Court as well as seal of Drug Inspector.

26. After drawing additional quantity of drug for sample, memorandum of the Government Analyst with respect to additional quantity of sample was prepared in presence of Vinod Jangid and witnesses, who have also signed thereon and additional quantity of sample was sent to the Government Analyst, Chandigarh and Spot Memo was also prepared by Drug Inspector, which is also duly signed by the witnesses and Vinod Jangid.

27. Vide report dated 20.03.2020, with respect to sample No.NHN/19/103, Government Analyst had opined that sample of drug was 'not of standard quality', as defined in Drugs and Cosmetics Act and Rules framed thereunder, for the reason that samples did not conform to claim as per Patent & Proprietary in respect of uniformity of volume, pH and Assay of Phenylephrine Hydrochloride and on testing sample was found positive for Diethylene Glycol with contents of 32.30% w/v thereof in the sample. The said report was delivered upon petitioner-M/s Digital Vision (By hand) with forwarding letter dated 20.03.2020, which was received by Vinod Jangid on the very same day, whereby petitioner-firm was directed to explain its position in the matter and to show cause as to why action not be taken against it for manufacturing adulterated drug and it was also notified that in case petitioner-M/s Digital Vision intended to adduce the evidence in controversion of the report of Government Analyst, then, it may notify in writing to the Drug Inspector within a period of 28 days from receipt of the report of Government Analyst.

28. In the meantime, Government Analyst had supplied copy of report dated 16.03.2020 with respect to sample No.NHN/19/99 dated 15.02.2020 pertaining to Propylene Glycol Technical Trade, whereby it was informed that sample was 'of standard quality', as defined in the Act and Rules framed thereunder, for the reason that it conformed to claim as per Patent & Proprietary in respect of test performed. This report was also communicated to the petitioner-M/s Digital Vision, which was received by Parshotam Lal Goyal on 27.03.2020.

29. In the meanwhile, two reports of Government Analyst Tamilnadu bearing No.07718 and 7719 dated 21.02.2020 were also received from the office of Director, Drug Control, Tamilnadu, vide letter dated 24.02.2020, whereby it was informed that sample of Coldbest-PC Batch No.DL5201 was reported to be not 'of standard quality', but adulterated. These reports were also served upon the petitioner-M/s Digital Vision vide communication dated 20.03.2020.

30. It has also come on record that partners of petitioner-firm had applied for anticipatory bail in the High Court and vide order dated 23.03.2020 passed in Cr.M.P.(M) Nos.545, 546 and 548 of 2020, they were extended benefit of anticipatory bail, which, as informed, has been confirmed later on.

31. In response to communication dated 20.03.2020, vide which report dated 20.03.2020 of Government Analyst was served upon the petitioner-M/s Digital Vision through Vinod Jangid, petitioner-firm vide communication dated 15.04.2020 had notified its intention to adduce evidence in controversion to the report of Government Analyst, Regional Drugs Testing Laboratory, Chandigarh under Section 25(3) and 25(4) of the Act. Whereupon, Drug Inspector had filed an application dated 28.04.2020 titled as *State of Himachal Pradesh (Through Drugs Inspector, H.Q. Nahan) vs. M/s Digital Vision,* under Section 25(4) of the Act, with a prayer to the Court to send remaining sample portion of the sample Coldbest-PC Syrup, Batch No.DL5201, numbered as NHN/19/103 to the Director, Central Drugs Laboratory, Kolkata (CDL Kolkata) for retesting and

reanalysis as per provisions of Section 25(4) of the Act. Petitioner-M/s Digital Vision had preferred objections in this application, by opposing the sending of additional quantity of sample drawn on 11.03.2020 alongwith initial quantity.

32. As stated *supra,* vide order dated 02.05.2020, objections of petitioner-M/s Digital Vision have been rejected and learned CJM had ordered to send initial quantity of sample as well as additional quantity of sample to CDL, Kolkata.

33. Vide communication dated 09.04.2020, analysis report of Government Analyst with respect to sample Nos.NHN/19/95, 19/96, 19/97 and 19/98 were also received by Drug Inspector, wherein for want of sufficient sample quantity tests for Average filled volume, Uniformity of volume, pH and contents of Paracetamol, Phenylephrine Hydrochloride and Chlorphenirmine Maleate were not conducted. However, these samples were conformed to claim, as per Patent and Proprietary, in respect of test performed and test for Diethylene Glycol was found negative. These reports were also served upon the petitioner-M/s Digital Vision vide letter dated 04.05.2020, which were received by Parshotam Lal Goyal on 12.05.2020.

34. Cr.Revision No.146 of 2002 has been filed on 04.05.2020 by M/s Digital Vision through its partner Konic Goyal against order dated 02.05.2020, passed by learned CJM, Nahan in Cr.M.A. No.411 of 2020, quashing and setting aside the same, whereby, after rejecting objections raised on behalf of petitioner(s)-Digital Vision, learned CJM has ordered to send, four bottles of drug taken initially as sample on 26.02.2020 alongwith twenty bottles taken as additional quantity of sample on 11.03.2020, to Central Drug Laboratory, Kolkata, for chemical analysis.

35. Cr.MMO No.180 of 2020 has been preferred by petitioner Parshotam Lal Goyal, a partner of M/s Digital Vision, assailing order dated 11.03.2020, passed by learned CJM, Nahan, in Cr.M.A. No.370 of 2020, whereby learned CJM has allowed the Drug Inspector to take additional quantity of sample in absence of petitioner-Parshotam Lal Goyal. In addition, in this petition, prayer for quashing of criminal proceedings against the petitioner(s) culminated on account of FIR No.21 of 2020 and to quash and set aside all subsequent proceedings pursuant to order dated 11.03.2020, have been made.

36. I have heard Mr.K.D. Shreedhar, learned Senior Counsel, assisted by Ms.Shreya Chauhan, learned counsel, and also Mr.Shiv Pal Manhans, learned Additional Advocate General assisted by Mr.Gaurav Sharma, learned Deputy Advocate General, and have also gone through the record placed and produced before the Court.

37. On behalf of petitioner(s)-Digital Vision, referring provisions of the Act, particularly Sections 22 and 23, it has been argued that:

(a) Scheme of the Act provides sampling at only two places i.e. place of retailer or place of manufacturing, but no other place and one sample taken at manufacturing Unit is to be divided into three samples, one portion is to be sent to Government Analyst for test or analysis and second sample is to be retained by the Drug Inspector and third sample is to be given to the manufacturer and nowhere, procedure for taking additional sample has been provided in the Act;

(b) In case sample taken is damaged on the way or its quantity is found to be insufficient then, instead of taking additional sample, re-sampling was to be undertaken that too not in the Court but at the place of manufacturing or retailer but in presence of manufacturer or retailer and to such sampling different number was to be assigned again and then, it was to be sent for chemical analysis afresh, but not as additional sample;

(c) In alternative, it has been argued that even if, additional sample can be taken, then also material seized by Drug Inspector and custody whereof, through Court order, was with Drug Inspector, was to be released to the manufacturer and then only sample from manufacturer could have been taken;

(d) Custody of seized drug should have been given neither to the Drug Inspector nor to the manufacturer, but, in order to avoid tampering, removal and/or correction of defect during custody, the custody would have been given to third person;

(e) As per Scheme of the Act, learned CJM, in present case, has power to pass custody order, but does not have power to take additional sample;

(f) Even if, it is considered that learned CJM, was having power to take additional sample/re-sampling, then also, presence of manufacturer was necessary at the time of passing such order and taking additional sample/re-sampling, but in present case, as is evident from order dated 11.03.2020, only Drug Inspector Lalit Kumar alongwith Government Advocate, was present and there was none present on behalf of the manufacturer;

(g) Learned CJM had sent Whatsapp message to the petitioner(s) on 30.04.2020, asking to appear on 02.05.2020, a date, fixed for passing order for sending sample to CDL, Kolkata, on the basis of application filed by Drug Inspector, in sequel to notification of the petitioner(s)-M/s Digital Vision expressing intention to adduce evidence in controversion of the report of Government Analyst, but no such exercise was undertaken to ensure presence of petitioner(s) or its representative at the time of taking additional sample on 11.03.2020;

(h) Learned CJM has allowed the sample to be taken in Court premises and by doing so, he has participated in the process and has acted in contravention of provisions of Code of Criminal Procedure (Cr.P.C.), as such act is prohibited under Section 2(h) of Cr.P.C. as the collection of evidence is to be done by Investigating Officer or by any other person, but other than a Magistrate and by acting in this manner, he has assumed role of investigator, making him liable to appear as a witness in the case;

(i) Many samples of drug pertaining to Batch No.DL5201 and other batches of the same drug of the same quantity i.e. 1x3x60 ml sent to the same laboratory i.e. Government Analyst at Chandigarh and Government Analyst had analyzed those samples without asking for additional/further quantity and those samples were found to be of 'standard quality' prescribed under the Act and Rules framed thereunder, therefore requirement of additional sample by the same Government Analyst was not tenable and thus there is no justification to send twenty bottles of additional sample to CDL Kolkata;

(j) In report dated 20.03.2020, received from Government Analyst, with respect to sample Code NHN/19/103, there is a mention of date 26.02.2020 of taking of sample, but it is silent about additional sample taken on 11.03.2020;

(k) Procedure followed by learned CJM is totally wrong and beyond the scope of the procedure prescribed under the Act and, thus, entire process undertaken for

additional sample is vitiated and learned CJM himself is not sure about correctness and validity of process undertaken by him and for that reason only, he has ordered sending four bottles and twenty bottles to CDL, Kolkata separately with further direction to open four bottles at first instance and to open additional twenty bottles only in case requirement of further quantity is felt necessary by the said Laboratory.

(l) The order dated 11.03.2020 and additional sampling allowed thereby is vitiated as there was no information given to the petitioner(s)-M/s Digital Vision, in this regard, and there was no representation of the manufacturer at the time of allowing application and taking additional sample;

(m) In Government Analysis report, received from Chandigarh, with respect to sample Code NHN/19/103, nominal volume is stated to be 60ml and, therefore, quantity of initial sample was sufficient for conducting test. There is no provision under the Act or Rules and Regulations framed therein, however, vide impugned orders dated 11.03.2020 and 02.05.2020, learned CJM, indirectly has tried to frame new Rules and Regulations which is beyond his jurisdiction;

(n) Samples for retesting from CDL Kolkata, are to be sent for analysis with respect to those components, which have been found 'not of standard quality' by the Government Analyst, Chandigarh, and, therefore, for that purpose quantity contained in initial sample would be sufficient and unless or until additional quantity is demanded by CDL, Kolkata, there is no logic and necessity to send twenty bottles of additional sample also to CDL, Kolkata;

(o) In the lot of Batch No.DL5201 more than 5500 bottles of drug were manufactured in September 2019 and were supplied to eight States, but no adverse impact thereof, has been reported from any State except from Ramnagar (J&K), where children died of fever, thus it is wrong to presume that there was adulteration in the drug manufactured by petitioner(s);

(p) Coldbest-PC Syrup, as a scheduled drug is to be administered on the basis of prescription from the Medical Practitioner and further that drug was to be stored in a controlled temperature and the deaths of children may not be because of sub-standard drug, but for administering the drug without supervision/ prescription of Medical Officer or for any other reason like storage in adverse temperature, but Drug Inspector, on the basis of letter, received from J & K has stated that petitioner(s)-M/s Digital Vision have committed heinous crime; and

(q) Petitioner(s)-Digital Vision have manufactured drug, in consonance and in compliance with the provisions of the Act and Rules framed thereunder and Schedule attached therewith and that fact also stands proved by reports of other samples by the same Government Analyst.

(r) It is pleaded that Statute directs a thing to be done in a particular way that cannot be and shall not be done in any other way and according to petitioner(s)-M/s Digital Vision, in present case(s), Drug Inspector as well as learned CJM have acted contrary to the provisions of Statute i.e. the Act and Rules framed thereunder.

38. So far as prayer for quashing FIR No.21/2020 registered in Police Station Kala Amb and proceeding in pursuant thereto is concerned, the same has neither been argued nor pressed reserving petitioners' right to pursue that prayer in appropriate petition as this issue has neither been addressed in arguments nor stated in grounds of petition. It is submitted that in view of judgment passed by this Court in ***Maman Chand Jain vs. State of Himachal Pradesh***, reported in ***2018 Cri. L.J. 2914***, no prosecution can be launched in violation of provisions of Section 20 of the Act, but that situation has not arrived yet.

39. Learned Additional Advocate General, appearing on behalf of the respondent-State has submitted that:

(a) Though there is no express provision for additional sampling, but additional sample permitted by the Court vide order dated 11.03.2020, is in continuation of sampling earlier done as investigation in this case, is still undergoing and before completion of investigation, learned Magistrate has power to pass order, impugned herein, on the request of Drug Inspector, particularly for the reason that there was a request, received by Drug Inspector from Government Analyst Chandigarh, for providing additional quantity of sample for conducting all the tests desired by Drug Inspector;

(b) Every time Drug Inspector has associated petitioner(s) or their representative(s), but none of the partners of petitioner(s)-M/s Digital Vision, was available on 11.03.2020 as they were absconding to avoid their arrest after registration of FIR on 02.03.2020 and during that period, their only representative Vinod Jangid, Sales Executive of petitioner(s)-M/s Digital Vision, was available in the manufacturing Unit and as partners were not available, the proceedings by Drug Inspector, including taking of additional quantity of samples, have been undertaken by Drug Inspector in presence of the said Vinod Jangid and petitioner(s) have made themselves available only after getting anticipatory bail from the High Court vide order dated 23.03.2020. Therefore, plea of petitioner(s)-M/s Digital Vision that samples have been taken in absence of representative of manufacturer, is not sustainable;

(c) Drug Inspector received a mail from Government Analyst and filed an application for additional sampling in pursuant thereto and, thus, he has acted, in accordance with law;

(d) It is evident from para-13 of order dated 02.05.2020 that till then, no plea against taking additional sample/additional quantity was ever raised and not only this, in letter dated 15.04.2020, sent by petitioner(s)-M/s Digital Vision to Drug Inspector, intending to adduce evidence in controversion of the report, no objection with respect to additional quantity sent to Government Analyst Chandigarh, has been raised; and

(e) Petitioner(s)-M/s Digital Vision have been protected by learned CJM, as is evident from para-14 of the impugned order dated 02.05.2020, by directing the CDL, Kolkata to conduct test by opening samples of four bottles at first instance and to open additional sample of twenty bottles only in case of necessity.

40. In rebuttal, it is contended on behalf of petitioner(s)-M/s Digital Vision that no notice was ever issued by learned Magistrate for 11.03.2020 and objections, against additional sampling, have been preferred by the petitioner(s)-M/s Digital Vision, immediately after receiving of notice

through Whatsapp and had, notice for 11.03.2020, been issued by learned CJM, someone, representative of petitioner(s)-M/s Digital Vision, would have definitely appeared, and in case personal appearance of partners would not have been possible for any reason and/or if personal appearance would not have been considered necessary, petitioner(s) would have appointed/deputed a Lawyer to represent them and in absence of petitioner(s) or their representative, proper hearing has been denied by learned Magistrate and, therefore, order dated 11.03.2020, is not sustainable and resultantly order dated 02.05.2020 is also liable to be quashed.

41. Sections 22 and 23 of the Act, prescribing powers of Inspector and procedure of Inspectors, read as under:-

> 22.Powers of Inspectors.-(1) Subject to the provisions of section 23 and of any rules made by the Central Government in this behalf, an Inspector may, within the local limits of the area for which he is appointed,-
>
> [(a) inspect,-
>
> (i) any premises wherein any drug or cosmetic is being manufactured and the means employed for standardising and testing the drug or cosmetic;
>
> (ii) any premises wherein any drug or cosmetic is being sold, or stocked or exhibited or offered for sale, or distributed;
>
> (b) take samples of any drug or cosmetic,-
>
> (i) which is being manufactured or being sold or is stocked or exhibited or offered for sale, or is being distributed;
>
> (ii) from any person who is in the course of conveying, delivering or preparing to deliver such drug or cosmetic to a purchaser or a consignee;
>
> (c) at all reasonable times, with such assistance, if any, as he considers necessary,-
>
> (i) search any person, who, he has reason to believe, has secreted about his person, any drug or cosmetic in respect of which an offence under this Chapter has been, or is being, committed; or
>
> (ii) enter and search any place in which he has reason to believe that an offence under this Chapter has been, or is being, committed; or
>
> (iii) stop and search any vehicle, vessel or other conveyance which, he has reason to believe, is being used for carrying any drug or cosmetic in respect of which an offence under this Chapter has been, or is being, committed,
>
> and order in writing the person in possession of the drug or cosmetic in respect of which the offence has been, or is being, committed, not dispose of any stock of such drug or cosmetic for a specified period not exceeding twenty days, or, unless the alleged offence is such that the defect may be removed by the possessor of the drug or cosmetic, seize the stock of such

drug or cosmetic and any substance or article by means of which the offence has been, or is being, committed or which may be employed for the commission of such offence;]

[(cc) examine any record, register, document or any other material object found [with any person, or in any place, vehicle, vessel or other conveyance referred to in clause (c)], and seize the same if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the Rules made thereunder;]

[(cca) require any person to produce any record, register, or other document relating to the manufacture for sale or for distribution, stocking, exhibition for sale, offer for sale or distribution of any drug or cosmetic in respect of which he has reason to believe that an offence under this Chapter has been, or is being, committed;]

(d) exercise such other powers as may be necessary for carrying out the purposes of this Chapter or any rules made thereunder.

(2) The provisions of [the Code of Criminal Procedure, 1973 (2 of 1974)] shall, so far as may be, apply to any search or seizure under this Chapter as they apply to any search or seizure made under the authority of a warrant issued under Section 94 of the said Code.

[2A) Every record, register or other document seized under clause (cc) or produced under clause (cca) shall be returned to the person, from whom they were seized or who produce the same, within a period of twenty days of the date of such seizure or production, as the case may be, after copies thereof or extracts therefrom certified by that person, in such manner as may be prescribed, have been taken.]

(3) If any person wilfully obstructs an Inspector in the exercise of the powers conferred upon him by or under this Chapter or refuses to produce any record, register or other document when so required under clause (cca) of sub-section (1), he shall be punishable with imprisonment which may extend to three years, or with fine, or with both.]

23. Procedure of Inspectors.-(1) Where an Inspector takes any sample of a drug or cosmetic under this Chapter, he shall tender the fair price thereof and may require a written acknowledgement therefor.

(2) Where the price tendered under sub-section (1) is refused or where the Inspector seizes the stock of any drug or cosmetic under clause (c) of section 22, he shall tender a receipt therefor in the prescribed form.

(3) Where an Inspector takes a sample of a drug or cosmetic for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into four portions and effectively seal suitably mark the same and permit such

person to add his own seal and mark to all or any of the portions so sealed and marked:

Provided that where the sample is taken from premises whereon the drug or cosmetic is being manufactured, it shall be necessary to divide the sample into three portions only:

Provided further that where the drug or cosmetic is made up in containers of small volume, instead of dividing a sample as aforesaid, the Inspector may, and if the drug or cosmetic be such that it is likely to deteriorate or be otherwise damaged by exposure shall, take three or four, as the case may be, of the said containers after suitably marking the same and, where necessary, sealing them.

(4) The Inspector shall restore one portion of a sample so divided or one container, as the case may be, to the person from whom he takes it, and shall retain the remainder and dispose of the same as follows:-

(i) one portion or container he shall forthwith send to the Government Analyst for test or analysis;

(ii) the second he shall produce to the Court before which proceedings, if any, are instituted in respect of the drug or cosmetic; and

[(iii) the third, where taken, he shall send to the person, if any, whose name, address and other particulars have been disclosed under Section 18A.]

(5) Where an Inspector takes any action under clause (c) of section 22,-

(a) he shall use all despatch in ascertaining whether or not the drug or cosmetic contravenes any of the provisions of section 18 and, if it is ascertained that the drug or cosmetic does not so contravene forthwith revoke the order passed under the said clause or, as the case may be, take such action as may be necessary for the return of the stock seized;

(b) if he seizes the stock of the drug or cosmetic, he shall as soon as may be, inform a Judicial Magistrate and take his orders as to the custody thereof;

(c) without prejudice to the institution of any prosecution, if the alleged contravention be such that the defect may be remedied by the possessor of the drug or cosmetic, he shall, on being satisfied that the defect has been so remedied, forthwith revoke his order under the said clause.

[(6) Where an Inspector seizes any record, register, document or any other material object under clause (cc) of such-section(1) of section

22, he shall, as soon as may be, inform a Judicial Magistrate and take his orders as to the custody thereof.]

42. Section 22(1)(b)(ii) empowers an Inspector to take samples of any drug from any person, who is in course of conveying, delivering or preparing to deliver such drug to a purchaser or a consignee. Therefore, Inspector is empowered to take sample of any drug.

43. Section 22(1)(d) empowers an Inspector to exercise such other power as may be necessary for carrying out the purpose of this Chapter or any Rules made thereunder. Exercise of "such other powers" contained in Clause (d) of Section 22(1) of the Act is to be construed with reference to the powers of the Inspector expressly conferred upon him under Chapter-III of the Act, including Section 22 itself, which empowers him to take samples, search any person, enter and search any place and stop and search any vehicle and also to order in writing, to the person in possession of the drug, not to dispose of the stock and to examine any record, register, documents, or any other material object, including to require any person to produce any record, register or any other documents as prescribed under this Section. This provision definitely empowers Inspector to exercise 'such other power' to perform any act which is incidental and ancillary to the power conferred upon him expressly under the Act and Rules thereunder. Section 22 empowers Inspector to 'investigate' and during 'investigation' power of Inspector cannot be circumvented to express actions enumerated in the Act but it also extends to all other acts for carrying out the purpose of the Act as provided under Section 22(1)(d) of the Act.

44. Section 23 provides procedure to be adopted by the Inspector for taking any sample of drug under Chapter-III of the Act.

45. Section 25 provides procedure with respect to delivery of report of Government Analyst and action to be taken by Drug Inspector as well as person from whom sample was taken with respect to the reports of Government Analyst.

46. It is true that there is no specific provision for taking additional sample or additional quantity of sample specifically prescribed under Chapter-III of the Act, however, as explained hereinabove, Section 22(1)(d) empowers the Inspector to exercise other powers as may be necessary for carrying out the purposes of Chapter-III of the Act and Rules made thereunder.

47. In present case, there is no fault on the part of Inspector, in taking sample at initial stage, including with respect to quantity of the sample. However, as, according to report of team of PGI Chandigarh, Diethylene Glycol was found in Coldbest-PC Syrup of Batch No.DL5201 manufactured by petitioner(s)-M/s Digital Vision and it was considered to be cause of death of children and, therefore, a specific request was made by the Drug Inspector to Government Analyst to conduct test and analysis for Diethylene Glycol also and in response thereto, Government Analyst had requested to provide additional quantity of sample (20x60ml) to complete the analysis as desired and this additional quantity of sample was required to be taken in continuation to the initial sample taken by the Drug Inspector and, therefore, in order to meet with requirement of the Government Analyst, Drug Inspector, by virtue of provisions of Section 22(1)(d) of the Act, was empowered to take additional quantity of sample but definitely adhering to under such exercise procedure prescribed for taking sample under Section 23 of the Act. So far as, power of Inspector to take additional sample/additional quantity of sample is concerned, that flows from Section 22(1)(d) of the Act, as there is no provision in the Act describing the method and manner to be adopted for taking additional quantity of sample/additional sample in a situation like present one.

48. Undoubtedly, for sampling, procedure prescribed under Section 23 of the Act, is to be adhered to whether it is initial sample or additional sample. There is no specific provision for taking additional sample, but at the same time, where quantity of sample taken in initial sample, is

found to be insufficient for conducting tests, required necessarily for investigation under Chapter-III of the Act, there is no prohibition under the Act for taking additional quantity/additional sample in continuation to initial sample taken by the Inspector.

49. Though, in view of Section 22(1)(d) of the Act, there is no vacuum in law in this regard as this provision empowers the Inspector to cope with any situation like present one and to take appropriate action, in accordance with the provisions prescribed under the Act to take additional quantity/sample also. However, even if, it is considered that there is absence of specific provision, then also, for no prohibition in law to take additional quantity/sample, by adopting procedure, prescribed under Section 23 of the Act. Drug Inspector is definitely entitled to seek permission to do so and learned Magistrate definitely has jurisdiction to allow such request of the Drug Inspector, which is necessary for carrying out purposes of Chapter-III of the Act and Rules made thereunder.

50. Section 23(5)(b) provides that if Inspector seizes the stock of the drug, he shall as soon as may be, inform the Judicial Magistrate and take his orders as to the custody thereof. This provision does not envisage that custody is not to be entrusted to Drug Inspector, rather language of the provision sounds that Drug Inspector shall take order of the Magistrate for custody of the seized stock of the drug. In present case also, vide order dated 27.02.2020, custody of seized stock of the drug was given by learned CJM to the Drug Inspector, in consonance with provisions contained in Section 23(5)(b).

51. Power of the Magistrate to pass an order with respect to custody of the seized drug definitely includes power to call the seized stock of the drug for releasing it or to entrust custody thereof to someone else and also to draw sample/or additional sample therefrom for carrying out purposes of the Act and Rules made thereunder. Therefore, learned CJM has acted within his jurisdiction under the Act, by asking to produce sample in the Court and to draw additional quantity/sample in his presence.

52. Plea of the petitioner(s)-M/s Digital Vision that additional sample could have been taken only from the place of manufacturer or retailer is also not tenable in view of powers conferred upon Inspector under Section 22 of the Act. Power of Inspector is to be determined not by considering a part of Section in isolation. It is true that Section 22(1)(b) provides that sample can be taken from any person, who is in course of conveying, delivering or preparing to deliver such drug to a purchaser or a consignee, but at the same time, Section 22(1)(c) of the Act also empowers the Inspector to enter and search any place where he has reason to believe that an offence under Chapter-III of the Act has been or is being committed and this provision read with provision of Section 22(1)(d) of the Act definitely empowers the Drug Inspector to take sample at any other place other than, place of manufacturing or retailer depending upon the facts and circumstances of the situation/case.

53. Plea of the petitioner(s)-M/s Digital Vision that before taking additional sample, seized stock of drug would have released to the manufacturer and thereafter sample should have been been taken from the manufacturer is also not sustainable for the reason that stock of drug was seized in presence of the manufacturer and custody thereof, was obtained by the Drug Inspector through the order of learned CJM, passed under Section 23(5)(b) of the Act. Further again no such procedure is prescribed under the Act. Therefore, unless prejudice caused is established, plea of petitioner(s) is not sustainable. However, such exercise is definitely to be undertaken by giving opportunity to the manufacturer to remain present either personally or through its representative at the time of drawing additional sample. In present case, it has come on record that after lodging of FIR on 02.03.2020, partners of petitioner(s)-firm were not available for contact as disclosed by Vinod Jangid, Sales Executive of the petitioner(s)-M/s Digital Vision. From the order dated 23.03.2020,

passed by the High Court in Cr.M.P.(M) Nos.545, 546 and 548 of 2020, it can be easily inferred that partners of petitioner(s)-firm were available only after 23.03.2020 to the Investigating Agency. In such eventuality, ensuring personal presence of partners of the firm, was not possible for the Drug Inspector. As is evident from the documents placed before him as referred supra, Vinod Jangid, Sales Executive of the petitioner(s)-firm, was available throughout and Drug Inspector has communicated orders/list with the petitioner(s)-firm by delivering the same to Vinod Jangid, Sales Executive.

54. Now, question arises as to whether Vinod Jangid, was true representative of petitioner(s)-firm and its partners or not. Before registration of FIR, Parshotam Lal Goyal, partner of the firm, was dealing with the Drug Inspector on behalf of petitioner(s)-M/s Digital Vision since beginning i.e. 15.02.2020 till registration of FIR, as he has signed Form No.17 dated 15.02.2020, Form No.17, Form No.17A and Form No.16 on 26.02.2020. Order to recall drug was also served upon Parshotam Lal Goyal and in furtherance thereto, entire remaining stock of the drug, in question, belonging to Batch No.DL5201, was recalled by petitioner(s)-M/s Digital Vision. Documents of petitioner(s)-M/s Digital Vision, were also produced by Parshotam Lal Goyal, custody whereof, was assigned to Drug Inspector by learned CJM vide order dated 19.02.2020.

55. A request for supplying additional sample was received by Drug Inspector from Government Analyst, Chandigarh on 09.03.2020. On that day, Drug Inspector had extended order under Section 22(1(c) of the Act, not to dispose of stock of propylene Glycol Technical Grade, for a further period of 20 days and the said order was delivered upon the petitioner(s)-M/s Digital Vision 'through Vinod Jangid' and was duly complied with by petitioner(s)-M/s Digital Vision. On that day itself, report of Government Analyst, with respect to sample No.NHN/19/94 Coldbest-PC Syrup Batch No.DL5201, drawn on 15.02.2020, was also served upon petitioner(s)-M/s Digital Vision 'through Vinod Jangid' with notice to express intention, if any, of petitioner(s)-M/s Digital Vision to adduce evidence in controversion of the report of Government Analyst by notifying it in writing within a period of 28 days. On that very day, petitioner(s)-M/s Digital Vision, were directed to provide detail of stock Coldbest-PC Syrup Batch No.DL5201, which was received from the market after 26.02.2020 till date. This direction was served upon petitioner(s)-M/s Digital Vision 'through Vinod Jangid', whereto, Vinod Jangid had replied on the very same day, stating in writing that no physical stock of Coldbest-PC Syrup Batch No.DL5201 drug was received after 25.02.2020 and the stock received before 25.02.2020 had already been seized by the Drug Inspector.

56. It is pertinent to mention that on 04.03.2020, 'Vinod Jangid' had informed in writing that Parshotam Lal Goyal and other partners of the firm are not coming to the Factory from two days i.e. from the date of registration of FIR against the firm. Record reveals that on 11.03.2020, when additional sample was drawn in the Court, 'Vinod Jangid' was present and had witnessed production of seized stock of drug and taking of additional sample therefrom and resealing of remaining stock of drug. On the back side of Form No.17, his detailed note is there. He had refused to accept the cost of the sample drawn and, thus, Form No.17A was served upon him, copy whereof, has been duly signed by him. Request of Form No.18 to Government Analyst was also prepared in his presence and he has signed the copy thereof as a witness thereto. Detailed spot memo prepared by Drug Inspector in the Court on 11.03.2020, has also been witnessed and signed by 'Vinod Jangid'.

57. Report of Government Analyst with respect to sample number NHN/19/103, wherein additional sample was drawn and sent to Government Analyst Chandigarh, was also served upon petitioner(s)-M/s Digital Vision on 20.03.2020 alongwith forwarding letter dated 20.03.2020 'through Vinod Jangid' with note thereon that in case petitioner(s)-M/s Digital Vision intends to adduce evidence in controversion of Government Analyst, firm may notify the same to the Drug Inspector within a period of 28 days from the receipt of report. After three days thereof, petitioner(s)-M/s

Digital Vision, were provided protection of anticipatory bail by the High Court. In response to letter dated 20.03.2020 served upon them 'through Vinod Jangid', intention to adduce evidence to controvert report of the Government Analyst, was notified by petitioner(s)-M/s Digital Vision vide letter dated 15.04.2020 and in these circumstances, I find sufficient material to hold that presence of Vinod Jangid, in the Court on 11.03.2020, at the time of production of seized stock of drug and taking additional sample therefrom, was sufficient representation of petitioner(s)-M/s Digital Vision. Though, learned CJM has failed to mark his presence in its order or order-sheet, but the same does not render the order passed by learned CJM and taking additional quantity of sample at the time of production of seized stock of drug in furtherance to the order passed by learned CJM, as illegal. Failure to mark presence of Vinod Jangid, in the order-sheet, is mere irregularity which does not convert presence of Vinod Jangid in the Court into absence.

58. Presence of Vinod Jangid on 11.03.2020 in the Court at the time of production of seized drug and taking sample therefrom, indicates that petitioner(s)-M/s Digital Vision were having knowledge of filing of application by the Drug Inspector for drawing additional sample. Application was filed on 09.03.2020 and before that Drug Inspector had inquired from Vinod Jangid as to whether there is any other stock available in the Factory, received from the market after 25.02.2020 and on the very same day, additional quantity/ sample was drawn in presence of Vinod Jangid. Therefore, plea of petitioner(s)-M/s Digital Vision that they were not having information about filing of application by the Drug Inspector for taking additional quantity of sample, appears an afterthought, particularly for the reason that even after receiving the report of Government Analyst prepared after conducting test on the basis of additional sample, which was supplied on 20.03.2020 'through Vinod Jangid' to him, there is no whisper on the part of petitioner(s)-M/s Digital Vision in its response communication dated 15.04.2020, notifying intention to controvert the report by adducing evidence, objecting additional sampling by Drug Inspector on 11.03.2020 much less about absence of representation of petitioner(s)-M/s Digital Vision.

59. Section 2(h) of Cr.P.C. defines 'investigation', but does not prohibit the Magistrate from allowing investigation or part thereof, including taking of sample in the Court premises in his presence. It only says that investigation includes all proceedings under Cr.P.C. for collection of evidence conducted by Police Officer or any other Officer other than Magistrate, who is authorized by the Magistrate in this behalf. In fact, this definition is to be read with reference to Criminal Procedure Code, particularly definition of 'inquiry' provided under Section 2(g) of Cr.P.C., wherein it is defined that 'inquiry' means every inquiry other than trial conducted under Cr.P.C. by a Magistrate or Court. Further, the Act, dealing with Drugs and Cosmetics is a special law. Whereas, Cr.P.C. deals with general provisions of investigation and inquiry. In the Act, there is no such prohibition as contended by and on behalf of petitioner(s)-M/s Digital Vision and further allowing taking of sample in presence of learned Magistrate, does not amount collection of evidence by the Magistrate as learned CJM had ordered production of seized stock of Drug and allowed taking of additional sample therefrom on an application filed by Drug Inspector and the Drug Inspector in view of provisions of Section 22(1)(d) and for absence of specific provision for taking additional sample, was not only constrained but also entitled to file such application and learned Magistrate was having jurisdiction to pass an order therein allowing or disallowing the same in given facts and circumstances. Learned Magistrate has not acted for collecting the evidence but it is Drug Inspector who is doing so.

60. It is true, as contended on behalf of petitioner(s)-M/s Digital Vision, that samples of drug taken on 15.02.2020 were found of "standard quality", but in those samples, as per report dated 05.03.2020, sample from NHN/19/94, pertaining to Code No.DL5201, was found of "standard quality" but it was also mentioned in the report that sample was not tested for Diethylene Glyco. Remaining samples were pertaining to different batches and drug therein, as per reports dated

01.04.2020, was tested negative for Diethylene Glycol and sample of propylene Glycol bearing No.NHN/19/99 taken on 15.02.2020, as per report dated 16.03.2020, was also of "standard quality".

61. Perusal of report dated 05.03.2020, pertaining to sample No.NHN/19/94 dated 17.02.2020 from Batch No.DL5201, indicates that tests sample for Average filled volume, Uniformity of volume, pH and contents of Paracetamol, Phenylephrine Hydrochloride and Chlorpheniramine Maleate, was not tested due to insufficient sample quantity. Therefore, in absence of aforesaid tests, it cannot be said that sample of drug sent to Government Analyst was sufficient for conducting tests including test for Diethylene Glycol and further in absence of these tests, report declaring sample of "standard quality" is to be considered only with respect to test conducted by the Government Analyst.

62. As additional sample drawn on 11.03.2020 was sent to the Government Analyst through Form No.18 by mentioning same sample number of initial sample i.e. NHN/19/103, therefore, Government Analyst, in his report dated 20.03.2020, has rightly mentioned serial number and date of Inspector Memorandum as NHN/19/103 dated 26.02.2020. It is for the reason that additional sample was requisitioned by Government Analyst in continuation of Inspector's Memorandum dated 26.02.2020 and the additional sample was sent with reference to original number of initial sample. After resealing seized stock of drug in the Court, it has been resealed by Drug Inspector by its own seal and seal of learned CJM has been put thereon in addition thereto. Provisions of the Act provided sealing of sample by Drug Inspector, which has been done, however, it has also been sealed with seal of learned CJM also. Putting additional seal of learned CJM on the seized stock of drug, does not vitiate the procedure adopted and completed by Drug Inspector in consonance with Sections 22 and 23 of the Act for taking sample.

63. Plea of the petitioner(s)-M/s Digital Vision that instead of additional sample, re-sampling of sufficient quantity should have been done and different number to the said sample should have been assigned is also not accepted for the reason that in both eventualities, sample would have been taken from the seized stock of drug lying in custody of Drug Inspector and for that purpose no other, but same procedure, as adopted by learned CJM, would have been adopted. In my opinion, no prejudice has been caused to the petitioner(s)-M/s Digital Vision by taking additional sample as assigning of different or new number would not have changed contents of the sample of the drug.

64. Plea that in the report of Government analyst nominal value of sample has been mentioned as 60 ml and, therefore, there was or is no requirement of additional sample for having requisitioned, is not sustainable for the reason that this nominal value of 60 ml is with reference to one Unit of the sample as each bottle as also claimed by petitioner(s)-M/s Digital Vision, contains 60 ml of drug and, therefore, mentioning of nominal value of 60 ml does not construe that only 60 ml of drug was required for conducting test.

65. Plea raised on behalf of petitioner(s)-Digital Vision that retesting by CDL, Kolkata is to be conducted only with respect to components for which drug has been reported "not of standard quality" or "adulterated", is not substantiated from the provisions of the Act as Section 23 nowhere restricts retesting by CDL, in such manner and, therefore, not accepted.

66. There is no explicit prohibition for taking additional sample in situation like present one, but definitely there is explicit provision under Section 22(1)(d) of the Act enabling the Inspector to take all steps to carryout provisions of the Act and taking additional sample on the demand raised by Government Analyst, to provide sufficient quantity of sample for testing, is definitely an act on the part of Drug Inspector for carrying out the purposes of the Act. Otherwise also, Drug Inspector has power to investigate and 'investigation' is a wide term, which cannot be given a restricted meaning, in terms of explicit provisions only, but Investigating Agency would necessarily have independence to

adopt process to collect evidence, but definitely within four corners of relevant law and in present case, by approaching learned CJM and following procedure provided under Section 23 read with Section 22 of the Act, Drug Inspector has acted within the parameters of the Act.

67. In aforesaid circumstances, request of Government Analyst for sending additional sample and action in sequel thereto, taken by the Drug Inspector and also order passed by learned CJM, is in consonance with spirit of provisions of the Act and it cannot be termed as a step of framing new Regulations or creating law and procedure beyond the Statute or contrary to provisions and spirit of Statute.

68. Plea of petitioner(s)-M/s Digital Vision that at the first instance only four bottles drawn as a sample at initial stage should be sent and additional sample of twenty bottles should be sent only in case the demand is raised by CDL, Kolkata, is also rejected on the ground that petitioner-firm itself is claiming that delay in process is causing harm to its business whereas by sending four bottles of initial sample at first instance and sending of another twenty bottles of additional sample later on would definitely consume more time in comparison to the manner in which learned CJM, has ordered to send the samples to CDL, Kolkata i.e. both initial and additional sample together with direction to CDL, Kolkata, to open four bottles first to conduct requisite tests and in case quantity is found insufficient, then to open additional sample of twenty bottles.

69. Issue with respect to cause of death is not to be decided in present petition(s) and, therefore, no opinion to the arguments advanced, on this count, is being expressed by this Court.

70. Though, in Cr.MMO No.180 of 2020, prayer for quashing and setting aside criminal proceedings against petitioner(s)-M/s Digital Vision culminated on account of FIR No.21 of 2020, has been made, but learned counsel for the petitioner has not pressed this prayer in this petition with liberty to file fresh comprehensive petition exclusively for the said purpose, if necessity arises to do so. This prayer is accepted with liberty as prayed for.

71. In view of aforesaid discussion impugned orders dated 11.03.2020 and 02.05.2020 passed by learned CJM are upheld and petition(s) are dismissed, in aforesaid terms. Pending application(s), if any, also stand disposed of.

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

State of Himachal Pradesh ...Petitioner.

Versus

Kuldeep Singh ..Respondent.

Cr. Revision No. 160 of 2020
Date of Decision: September 15, 2020

Indian Penal Code, 1860 – Sections 420, 468 & 471- Forgery and use of forged documents for cheating etc. – Proof – Revision against concurrent findings of acquittal of Lower Courts – Allegations against accused being that matriculation certificate tendered by him for obtaining job was forged – Held, matriculation certificate of accused has already been held to be valid by a declaratory decree of Civil Court – Decree attained finality – No basis to hold said certificate as forged – Revision dismissed. (Para 5 to 7).

Whether approved for reporting? Yes

For the Appellant: Mr. Shiv Pal Manhans, Additional Advocate General, for the petitioner, through Video Conferencing.

For the Respondent: Mr. N.K. Thakur, Senior Advocate, with M/s Divya Raj Singh and Karan Veer Singh, Advocates, through Video Conferencing.

Vivek Singh Thakur, J (oral)

This revision petition has been preferred against the judgment dated 23.08.2019, passed by learned Additional Sessions Judge Ghumarwin District Bilaspur H.P. (Camp at Bilaspur), in Cr. Appeal No. 73/10 of 2017, titled as *The State of Himachal Pradesh vs. Kuldeep Singh,* whereby judgment of acquittal dated 24.06.2017, passed by learned Judicial Magistrate 1st Class Bilaspur H.P., in Case No.120-2 of 2005, titled as *State of Himachal Pradesh vs. Kuldeep Singh,* has been affirmed.

2. Respondent was charged under Sections 468, 471 and 420 of the Indian Penal Code (in short 'IPC') for forging his Matriculation Certificate for cheating and using the said document knowing it to be forged for getting job as a Male Health Worker and on 25.07.1997 respondent had cheated the Government of Himachal Pradesh by dishonestly inducing it to give him job as a Male Health Worker and giving him salary for the said post.

3. During trial, respondent has led defence evidence and has tendered copy of judgment dated 04.09.2006 in Civil Suit No.88/1 of 05/04, titled as *Kuldeep Singh vs. Secretary Board of School Education Haryana* and decree sheet therein as Exts.D-1 and D-2 and copy of judgment dated 09.09.2008, in Civil Appeal No.91 of 2006, titled as *The Secretary, Board of School Education, Haryana vs. Kuldeep Singh* and decree sheet therein as Exts. D-4 and D-5.

4. It has come on record that no evidence has been tendered by the prosecution to rebut the evidence produced by the respondent-accused.

5. Basis for filing challan and framing charge was letter No.1180/ver/Matriculation Examination dated 22.08.2003 issued and signed by Superintendent (Matric Exams) Board of School Education Haryana, whereby it was informed that Matriculation Certificate of respondent-Kuldeep Singh bearing Sl.No.0-104700 against Roll No.641436 was not issued by the Board of School Education Haryana. Vide judgment dated 04.09.2006 (Ex.D-1) referred above, suit of the respondent-plaintiff is decreed for the declaration to the effect that Matriculation Certificate under Sl. No.0-104700, Roll No.641436 in respect of respondent-plaintiff Kuldeep Singh is valid and authentic and letter No.1180/ver/Matriculation Examination dated 22.08.2003 issued and signed by Superintendent (Matric Exams) on behalf of Secretary Board of School Education Haryana, is illegal, null and void. The said findings of the Trial Court have been affirmed in Appeal Vide judgment and decree Exts.D-4 and D-5.

6. Very basis of framing charge against the respondent-accused was that his Matriculation Certificate has been forged by him. The said Matriculation Certificate has been declared to be valid by the Civil Court. For the record available on the file of the trial Court, the said judgment appears to have attained finality. Nothing has been brought on record to rebut this factual position.

7. On perusal of the impugned judgments, I find no illegality, irregularity or perversity, so as warranting interference of this Court exercising the revisional jurisdiction under Section 397 read with Section 401 of the Code of Criminal Procedure.

8. Accordingly, revision petition is dismissed. Pending application(s), if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Kritika Tanwar …Petitioner.

Versus

State of H.P. and another …Respondents.

CWP No. 298 of 2020
Decided on: 31.08.2020

Constitution of India, 1950 – Articles 14 & 16 – Selection and appointment to public post – Whether a candidate belonging to reserved category can be selected and appointed against seat meant for general category? – Held, open/ general category does not indicate a reservation for general caste candidates – It is a category open for all candidates be of general caste or reserved caste – Candidates belonging to reserved categories are entitled to seats from general category if they get higher marks vis-a-vis general category candidates. (Para 8 & 11).

Cases referred:
Jitendra Kumar Singh and another vs. State of Uttar Pradesh and others (2010) 3 SCC 119;
Whether approved for reporting? Yes

For the Petitioner: Mr. Rakesh Kumar Sharma, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur and Mr. Desh Raj Thakur, Additional Advocate Generals.

Justice Tarlok Singh Chauhan, J.(Oral)

Whether a candidate belonging to a reserved category can be denied the consideration against the open category, which is mentioned as 'General Category'? Is the moot question to be determined in the present petition.

2. The brief facts of the case are that the vacancy announcement for 38 posts of Constables i.e. 24 vacancies of Brass Band (Male) of Shimla District, 11 (09 M + 02 FM) of 1st HPAP Junga of Police Orchestra and 03 left out vacancies of 2nd IRBn, Sakoh of Brass Band (Male) by way of direct recruitment were made vide Government of H.P. letter No. Home (A) B (1)-4/2009 dated 12.02.2019 read with PHQ Shimla letter No. P-II (3) R&P Rules/Band Staff/2011-6067-73 dated 22.02.2019, DGP/HP, letter No. P-II (3), R&P Rules/Band Staff/2017-7152 dated 06.03.2019 and Standing Order No.1 of 2019.

3. The applications were invited from the eligible candidates off-line on prescribed format on or before 30.04.2019 upto 5.00 P.M. in the office of the District Superintendent of Police of the District of which the candidate is a native/resident.

4. As per notification of vacancies circulated vide office of Dy. Inspector General of Police, Southern Range vide letter No.2293-2500 dated 08.03.2019 in which 02 posts in Police Orchestra were advertised where 01 of them was reserved for General Category (GC)/Unreserved (UR) and 01 was advertised for GC/UR for Female Versatile Singer. No post was advertised for Female Singer SC/UR category for which the petitioner had applied in her application form. Total

13 Female Candidates had applied for the post of Constable as Versatile Singer in Police Orchestra.

5. On the basis of the application forms submitted by the candidates, the candidature of 07 eligible Female Candidates was selected and were called for professional efficiency/skill test for the post of Constable Versatile Singer whereas the candidature of 06 Female Candidates of SC/UR, OBC/IRDP category including the petitioner was rejected and they were not called for professional efficiency/skill test as they had applied for different reserved categories which were not allotted/specified as per the notification issued for the post of Versatile Singer.

6. The petitioner had applied as SC/UR Female candidate in her application form (Annexure R-3) and the same was rejected by the respondents on the ground that as per the instructions mentioned in the application form, "category and sub-category as mentioned at serial No.11 of the application form shall be treated as final and will not be changed under any circumstance during the recruitment process." It is further averred that as there was no posts advertised for Female Singer SC/UR category and the post was advertised only for general category, therefore, the claim of the petitioner could not be considered as she belonged to SC category.

7. We have heard learned counsel for the parties and have gone through the material placed on record.

8. It is more than settled that an open/general category does not indicate a reservation for general caste candidate, but a category open for all candidates be it general caste or reserve caste. The placement in the open/general category is strictly as per merit position obtained by the candidate. Accordingly, if the petitioner belongs to reserve category candidate, has obtained higher marks to that of a general caste candidate, then she cannot be denied the benefit of consideration in the general/open category.

9. In taking this view, we are supported by the judgment of the Hon'ble Supreme Court in ***Jitendra Kumar Singh and another vs. State of Uttar Pradesh and others (2010) 3 SCC 119***, wherein it was held that if a reserved category candidate gets selected on the basis of merit, he cannot be treated as a reserved candidate. It shall be apt to reproduce the relevant observations as contained in paras 49, 51 and 52 of the judgment, which are extracted below:

"49. *It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16 (1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates at par with General Category candidates. It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates.*

51. We are further of the considered opinion that the reliance placed by Mr. Rao and Dr. Dhawan on the case of Post Graduate Institute of Medical Education and Research vs. K.L.Narasimhan (1997) 6 SCC 283 is misplaced. Learned Sr. Counsel had relied on the following observations: (SCC p.293, para 5)

"5.....Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

The aforesaid lines cannot be read divorced from the entire paragraph which is as under:-

"5.It was decided that no relaxation in respect of qualifications or experience would be recommended by Scrutiny Committee for any of the applicants including candidates belonging to Dalits and Tribes. In furtherance thereof, the faculty posts would be reserved without mentioning the specialty; if the Dalit and Tribe candidates were available and found suitable, they would be treated as reserved

candidates. If no Dalit and Tribe candidate was found available, the post would be filled from general candidates; otherwise the reserved post would be carried forward to the next year/advertisement. It is settled law that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate. Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

These observations make it clear that if a reserved category candidate gets selected on the basis of merit, he cannot be treated as a reserved candidate.

52. In the present case, the concessions availed of by the reserved category candidates in age relaxation and fee concession had no relevance to the determination of the inter se merit on the basis of the final written test and interview. The ratio of the aforesaid judgment in fact permits reserved category candidates to be included in the General Category Candidates on the basis of merit."

10. An identical issue came up before the learned Single Judge of the Punjab and Haryana High Court in CWP No. 10839 of 2017, titled ***Amritpal Singh and another*** *vs.* ***State of Punjab and others*** and connected matter, decided on 20th January, 2020 wherein it was observed as under:

"Whether a candidate belonging to a reserved category, who has filled up his application for a particular reserved category but marks a wrong sub-category, can he be denied the consideration against the open category seat, which is mentioned as general category?

Answer to this question has to be given in the negative to the extent that the candidature outrightly cannot be rejected merely because a candidate belongs to a particular category. As per the constitutional provisions and the intent and purpose for which reservation has been provided therein, it is not as if the benefit of the reservation goes to the discredit or disadvantage of a reserved category candidate. The petitioners, admittedly, belong to the scheduled castes category and even if, they are not granted the benefit of reservation because of wrong filling of the sub category, their consideration against the general open seats cannot be denied to them especially when they have been found to have obtained more marks than the last selected and appointed general category candidate. If such an action of the respondents is permitted to be perpetuated, that would amount to violation of Article 14 of the Constitution of India as irrespective of the category to which the candidate belongs, he has right for consideration against the open/general category posts advertised."

11. Equally settled is the proposition that the candidate belonging to reserved categories are entitled to the seats from general category if they get higher marks entitling them to the seat in the general category and reserved categories cannot be restricted to only reserved seats and, therefore, the instructions imposing such restrictions would be violative of Article 14.

12. In view of the aforesaid discussion, we find merit in the instant petition and the same is allowed. Since one post of Police Orchestra Female (General Category) has been made subject to the final outcome of this writ petition, therefore, we direct the respondents to initiate the selection process by accepting the candidature of the petitioner under general category for the post of Police Orchestra Female and in case she is found successful, she be appointed as Constable expeditiously as possible and in no event later than 30th September, 2020.

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

14. For compliance, list on **01.10.2020.**

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Sheela Suryavanshi ...Petitioner

Versus

State of H.P. & Ors. ...Respondents

CWP No. 511 of 2020
Reserved on: 18.08.2020
Decided on: 26.08.2020

Constitution of India, 1950 - Articles 14 & 226 – Transfer of an employee by the Government – Challenge to order on ground of malafide exercise of power- Writ jurisdiction and scope of Court's interference – Held, in order to find out malafide nature of transfer order, Court might have to pierce the veil and see what was the operative reason for doing for it – If findings reveal nexus with administrative necessity, exercise of power will be upheld – However if operative reason has no such nexus then transfer will be vulnerable – In that case, it will be a mala fide use of power. (Para 9).

Constitution of India, 1950 - Articles 14 & 226 – Transfer of an employee by the Government – Challenge thereto on ground of malafide exercise of power - Writ jurisdiction and scope of Court's interference – Held, if transfer is made in order to adjust a particular person with no reasonable basis, it can be termed as malafide and would normally liable to be quashed. (Para 10).

Cases referred:

A. M. Allison vs. B. L. Sen (S) AIR 1957 SC 227;
New India Public School vs. Huda (1996) 5 SCC 510;
Rajendra Roy vs. Union of India and Anr. 1993 SC 1236;
Mrs. Shilpi Bose and Others vs. State of Bihar & Others, AIR 1991 SC 532;
Rajendra Roy vs. Union of India and another, AIR 1993 SC 1236;
B. Varadha Rao vs. State of Karnataka & Others, AIR 1986 SC 1955;

Whether approved for reporting? **Yes.**

For the Petitioner : Mr. Ram Murti Bisht, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General

with Mr. Ranjan & Mr. Vinod Thakur, Addl. A.Gs. and Ms. Svaneel Jaswal, Dy.A.G., for respondents No. 1 and 2-State.

Mr. Vinod Chauhan, Advocate, for respondent No. 3.

Tarlok Singh Chauhan, Judge

The petitioner is a Lecturer (English), who joined Government Senior Secondary School, Sanjauli, on 16.08.2017 and was thereafter ordered to be transferred vice private respondent vide order dated 23.01.2020 and aggrieved thereby has filed the instant petition for the grant of following substantive relief:-

> 2. That the impugned transfer order dated 23.01.2020 (Annexure P-1) may kindly be quashed and set aside.

2. It is argued by Shri Ram Murti Bisht, learned Advocate, for the petitioner, that the order of transfer is not sustainable, as it has been passed on extraneous consideration and with malafide intention to simply adjust private respondent No.3, who at her own request had been posted at GSSS, Theog in July, 2019 and after short stay of six month, on 01.01.2020, on the basis of D.O. note No. 199274, got herself transferred back to GSSS, Sanjauli, dislodging the petitioner.

3. The stand of the official respondents is that the petitioner was transferred vice private respondent No. 3, with the prior approval of the competent authority, on the medical ground of respondent No. 3, which fact though mentioned in the department file but could not erroneously be mentioned on the office order dated 23.01.2020.

4. To similar effect is the stand taken by respondent No. 3, wherein she has highlighted her medical ailment(s).

We have heard learned counsel for the parties and have gone through the records of the case.

5. In Black's Law Dictionary 'malafide' is said to be an intentional doing of a wrong act without just cause or excuse, it is done with an intention to inflict an injury or under such circumstances that the law will imply an evil motive to the act.

6. The Hon'ble Supreme Court has considered the question of malafide in case of transfer and the following principles are laid down in the case of **B. Varadha Rao vs. State of Karnataka & Others, AIR 1986 SC 1955**:

> "The Government is the best judge to decide how to distribute and utilize the services of its employees. However, this power must be exercised honestly, bonafide and reasonably. It should be exercised in public, interest. If the exercise of power is based on extraneous consideration or for achieving an alien purpose or an oblique motive it would amount to malafide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot but be held as in fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair."

7. Similarly in the case of **Mrs. Shilpi Bose and Others vs. State of Bihar & Others, AIR 1991 SC 532,** it is observed by the Supreme Court as under:-

> "In our opinion, the courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administrations which would not be conductive to public interest. The administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders".

8. Thereafter, in the Case of **Rajendra Roy vs. Union of India and another, AIR 1993 SC 1236**, the principle is laid down in the following manner:-

> "It may not be always possible to establish malice in fact in a straight cut manner. In an appropriate case, it is possible to draw reasonable inference of malafide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions."

9. Thus, on malafide, it can be said that the principal test of a due and proper exercise of the power is to ask the question: Was the transfer made for real administrative exigency? In finding the answer the Court might have to pierce the veil of the transfer order and see what was the operative reason for the transfer. If the findings reveal a nexus with administrative necessity, the exercise of the power will be upheld. If however, the operative reason has no such nexus then the transfer will be vulnerable. In the latter case it will be a malafide use of power and will take within its

sweep all situations where the nexus and administrative exigencies is absent. It needs to be emphasised that in the present context malafide is not limited to the personal malice of the authority making the transfer. Malafide has two components i.e. malice in law and malice in fact.

10. It may be stated here that if the transfers are made in order to adjust particular persons with no reasonable basis, such type of transfers can be termed as malafide one and would normally be liable to be quashed.

11. On the basis of the aforesaid exposition of law, it can conveniently be held that transfer in the instant case has not been made on administrative exigency but to adjust and accommodate respondent No. 3.

12. Record reveals that it was respondent No. 3, who vide letter dated 06.01.2020, addressed to the Education Minister, requested for her transfer on medical grounds as enumerated in letter, which is as under:-

> To
>
> The Hon'ble Education Minister,
> Himachal Pradesh, Shimla-2.
>
> Sub: Request for transfer on medical grounds
>
> R/Sir,
> With due respect and humble submission, I beg to lay down following few lines for your kind and sympathetic consideration please:
>
> 1. That presently I am working as PGT (English) in Govt. Girls Sr. Secondary School, Theog Distt. Shimla (HP) from July, 2019.
>
> 2. That I am suffering from Paralytic problems (brain strokes in Dec. 2018) (copy of prescription slip is enclosed) and since then under treatment in IGMC Shimla and it is very difficult for me to commute between Theog & Shimla daily due to my above problem.
>
> So, it is humbly requested, I may please be transferred on medical grounds from Govt. Girls Sr. Secondary School Theog to Govt. Sr. Secondary School Sanjauli vice Smt. Sheela Suryavanshi, PGT (English). My short stay at GSSS Theog may kindly be condoned please.

13. The medical prescription slip annexed with this application , in fact, is an OPD slip in which it was only mentioned that this is a case of post circulation stroke and the B.P. of the petitioner has been recorded alongwith the details of the medicines. Even after that respondent No. 3 procured another D.O. note on the basis of which she got herself transferred to GSSS Sanjauli.

14. No doubt, respondent No. 3 was entitled to set-forth her grievance including the medical problems to her higher authorities and seek transfer and it was for the authorities, in turn, to accede or not to such request, but under no circumstances, respondent No. 3 could have exercised external influence to have transfer effected.

15. Now, the further question is whether request made by respondent No. 3 in the aforesaid letter was genuine and bonafide. We really do not think so.

16. The record reveals that even though respondent No. 3 did suffer a paralytic (brain stroke) in 2018, but then it was on her request that she subsequently came to be transferred on mutual basis to GSSS Theog, where she remained posted from July, 2019 till the passing of the impugned transfer order. The request for transfer on mutual basis was probably made to take advantage under the policy of the transfer.

17. In **Rajendra Roy vs. Union of India and Anr. 1993 SC 1236,** the Apex Court held that "It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the order of transfer is not liable to be struck down.

18. Off late, this Court has seen a surge in litigation relating to transfer. The State of Himachal unlike other States is not evenly or uniformly developed in matters of basic infrastructure like education, health services etc. It is for this reason and rightly so that every employee tries to make an endeavour to seek posting in the district or tehsil headquarters where the infrastructure is relatively well developed. This we observe on the basis of the statistics relating to Shimla alone, where floating population is equal to permanent population. Most of these migration in urban areas is directly related with education of children and thereafter it could be for other purposes like better health facilities etc.

19. We further notice that because of cartel created by few of the employees serving in the urban and semi urban areas of Himachal Pradesh, the influential employees manage to secure their postings in and around urban areas, leaving practically no room for the other employees.

20. The instant case is one such classical example, which reflects the modus operandi being resorted to by these teachers on completion of their tenure by seeking mutual transfer or creating artificial vacancies and thereafter getting each one adjusted in such vacancies.

21. It cannot be ignored that not only the State or Country but the whole world is in the grip of pandemic COVID-19, because of which students cannot be taught physically in the class rooms and are being taught through online classes.

22. In such circumstances, the respondents are not only duty bound but are mandated by law to ensure that no monopoly in the matters of transfers is created in favour of selected fews but an endeavour has to be made to accommodate maximum number of teachers whose children are appearing for the board examination or examination for professional courses. These students can only study and attend classes on line if there is adequate and desired band-width. Even otherwise the facilities of tuition and coaching classes on online are mainly available in these places i.e. the district and tehsil headquarters, therefore, also the State is required to adopt a fair and transparent policy of transfer by calling for the details of all the teachers whose children are to appear in the Board exam or examination for professional courses like MBBS, AIEEE etc. This would not only bring about an end to the monopoly created in favour of few teachers but would also ensure benefit to the student community as a whole.

23. The Central Government, State Governments and likewise all public sector undertakings are expected to function like a 'model employer'. A model employer is under an obligation to conduct itself with high probity and expected condour and the employer, who is duty bound to act as a model employer has obligation to treat its employees equally and in appropriate manner so that the employees are not condemned to feel totally subservient to the situation. A model employer should not exploit the employees and take advantage of their helpless and misery.

24. The action of the State must be reasonable, fair, just and transparent and not arbitrary, fanciful or unjust. The right of fair treatment is an essential ingredient of justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. Wider

the discretion, the greater the chances of abuse. Absolute discretion is destructive of freedom, than of man's other inventions. Absolute discretion marks the beginning of the end of the liberty.

25. 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.*"

26. 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.

27. 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.

28. As observed above, exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively, judiciously and without prejudice.

29. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16 of the Constitution. It also means that the State should not exploit its employees nor should it seek to take advantage of their helplessness and misery. As is often said, the State must be a 'model employer'.

30. In the instant case, the incumbency of the petitioner and private respondent No. 3 is as under:-

Name: Smt. Sheela Suryavanshi (Petitioner)

Designation: Lecturer (English)

Sr. No.	Place of posting	Period

1	GSSS Halog Dhami (SML)	18.07.07 to 09.12.09 (As TGT)
2	GHS Annadale (SML)	10.12.09 to 31.03.13
3	GSSS Halog Dhami (SML)	01.04.13 to 01.04.16
4	GHS Annadale (SML)	02.04.16 to 09.06.16
5	GSSS Chikhar (SML)	10.06.16 to 27.06.17 on promotion as Lecturer
6	GSSS(G) Theog (SML)	28.06.17 to 16.08.17
7	GSSS Sanjauli (SML)	16.08.17 till date

Name: Smt. Rita Chauhan (Respondent No.3)

Designation: Lecturer English

Sr. No.	Place of posting	Period
1	GSSS Deori Khaneti (SML)	04.05.02 to 17.07.02 (As TGT)
2	GSSS Matiana (SML)	17.07.02 to 4.11.03
3	GSSS Chotta Shimla (SML)	04.11.03 to 27.09.06
4	GSSS (B) Theog (SML)	27.09.06 to 17.08.07
5	GSSS (G) Lakkar Bazar (SML)	17.08.07 to 02.07.08
6	GSSS Portmore (SML)	02.07.08 to 01.09.10
7	GSSS Bisha (SML)	01.09.10 to 03.04.12
8	GSSS Summer Hill (SML)	03.04.12 to 12.01.15
9	GSSS Baldeyn (SML)	13.01.15 to 31.05.16
10	GSSS Bhararia (SML)	01.06.16 to 27.03.17 (On promotion as Lecturer)
11	GSSS Sanjauli (SML)	27.03.17 to 24.07.19
12	GSSS (G) Theog (SML)	24.07.19 to 24.01.20
13	GSSS Sanjauli (SML)	24.01.2020 till date

31. It is not in dispute that the petitioner as also the third respondent hold a State Cadre Post, yet the petitioner has not been posted outside the district and has rather served in and around Shimla within a radius of 35 kms. in her entire service career.

32. The case of respondent No. 3 is also not different, as she except for a brief period from 01.09.2010 to 03.04.2012 when she was posted at GSSS, Bisha (Solan), has also remained posted in and around Shimla and have served within a radius of 47 kms. out of which 90% of the commutation is on the main National Highways.

33. Obviously, these postings, both in the case of the petitioner as also respondent No. 3, could not have been possible without the active support of the officials respondents.

34. As observed above, there has been a spike in cases relating to transfer and majority of these cases pertain to the respondents-department i.e. Education Department. It is for this precise reason that this Court in *CWP No. 1978 of 2019, titled as Sunita Devi vs. State of H.P. & Ors., decided on 18.03.2020* has recommended the State Government to implement online transfer in its Departments, Boards, Corporations etc. having over 500 employees by framing an online transfer policy on similar line as that of the adjoining State of Haryana.

35. In conclusion, even though we find the transfer of the petitioner to be malafide as it has been made in order to adjust the third respondent with no reasonable basis, but that does not mean that the petitioner would be entitled to be retained at GSSS Sanjauli.

36. It is a well known adage that "*Hard cases make bad law*".

37. **Robert CJ in Caperton vs. A. T. Masse**y held that extreme cases often test the bounds of established legal principles. There is a cost to yield to the desire to correct the extreme case, rather than adhering to the legal principal. The cost has been demonstrated so often that it is captured in a legal aphorism "Hard cases make bad law."

38. A Writ of Certiorari neither in England nor in India issues as a matter of course. In ***A. M. Allison vs. B. L. Sen (S) AIR 1957 SC 227***, it was observed as under:-

> "Proceedings by way of certiorari are 'not of course'. (Vide Halsbury's 'Laws of England', Hailsham Edition, Vol. 9, paras 1480 and 1481 pp. 877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice……"

39. Granting indulgence to any of the parties in this case would be causing manifest injustice to other teachers who are desirous of serving in Shimla and other district and tehsil headquarters but have failed mainly because of the cartel formed by the influential teachers like the parties in the instant case.

40. Even though the petitioner has made out a legal ground for quashing the impugned order, however, this Court is still not inclined to exercise discretion in her favour as "*justice*" is not on the side of the petitioner.

41. In the given facts and circumstances of the case as discussed above, neither the petitioner nor the third respondent deserve to be posted in their home district.

42. Accordingly, while disposing of the writ petition, we direct respondents no. 1 and 2 to transfer the petitioner as also respondent No. 3 outside their home district(s) within two weeks' from today. The respondents while effecting the transfers shall bear in mind that the same should not be amount to adjustment and should be a meaningful transfer.

43. Before parting, we hope and trust that the respondents would take all requisite steps to break the cartel and as far as possible ensure that maximum number of teachers, especially those whose children are to appear in the Board examination and examination for professional courses are afforded an opportunity to serve in the district and tehsil headquarters or wherever requisite infrastructure like adequate band width, facility of tuition etc. are available.

44. The writ petition is disposed of in the aforesaid terms, so also pending applications, if any. Parties are left to bear their own costs.

Record is ordered to be returned.

List for compliance on **10.09.2020**.

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

The General Manager .....Petitioner.

Versus

Tej Singh and Anr. ....Respondents.

CWP No. 658 of 2017
Date of Decision:17.9.2020

Industrial Disputes Act, 1947 - Section 2 (k) – 'Industrial dispute' – Existence of- Petition against award of Industrial Tribunal holding retrenchment of workman (R1) as illegal and directing payment of compensation to him jointly and severally by petitioner and respondent No.2 – Held, it is no case of workman (R1) that petitioner was the principal employer – Construction work was awarded by petitioner to respondent No. 2- Workman was engaged as driver by respondent No.2 – Petitioner had no administrative control over management of respondent No. 2 – He was not the principal employer qua the workman and petitioner could not have been saddled with liability – Award of Tribunal to the extent of holding petitioner jointly and severally liable, set aside. (Para 8 & 9)

Cases referred:

Oshiar Prasad and Ors v. Employers in Relation to Management of Sudamdih Coal Washery of M/s Bharat coking coal limited, Dhanbad, Jharkhand, (2015) 4 SCC 71;

Whether approved for reporting? Yes.

For the petitioner: Mr. C.N. Singh, Advocate.

For the respondent: Mr. V.D. Khitta, Advocate, for respondent No.1.

Mr. Karan Singh Kanwar, Advocate, for respondent No.2.

Sandeep Sharma, J. *(Oral)*

Instant petition filed under Articles 226 and 227 of the Constitution of India, lays challenge to award dated 5.4.2016, passed by the Central Government Industrial Tribunal cum

Labour Court-II Chandigarh (in short *"the Industrial Tribunal"*) in case No. ID No. 242/2012 (Tej Singh v. The General Manager, NHPC and Anr.), whereby the Tribunal below while answering the reference in favour of respondent-workman held the petitioner and respondent No. 2 liable jointly and severely to pay sum of Rs. 3,00,000/- as compensation to the workman.

22. For having bird's eye view, certain undisputed facts, which may be relevant for adjudication of the petition at hand are that petitioner-General Manager, NHPC, awarded a contract for construction of "Civil and Hydro-mechanical work of Head Race Tunnel and Associate Works" of Pabarti HE Project to respondent No.2. Respondent-workman namely Tej Singh was engaged by respondent No.2 as driver w.e.f. 5.3.2003 on the consolidated salary of Rs. 16,000/- per month, however since services of respondent No.1 came to be retrenched on 18.10.2010, without there being any notice or payment of compensation in terms of provisions contained under the Industrial Disputes Act (herein after referred to as "*the Act*"), he raised industrial dispute. Since conciliation failed *inter-se* respondents No. 1 and 2, Industrial Tribunal in exercise of powers conferred by Clause (d) of Sub- Section (1) and Sub-Section 2 (A) of Section 10 of the Act, made following reference to Industrial Tribunal:

> "*Whether the demand of Sh. Tej Singh S/o Sh. Maya Ram, Vill. Kuther, PO Chailchowk, Tehsil Chachiot, Distt. Mandi (HP) against the management of Himachal Pradesh Joint Venture Parbati HE Project, Thela Distt. Kullu (HP) in retrenching the services w.e.f. 18/10/2010 is just valid and legal? If so, what relief to the workman is entitled for and what directions are necessary in the matter?"*

23. Precisely, respondent-workman claimed before the Tribunal below that respondent No.2, who was awarded work of construction of "*Civil and Hydro-mechanical work of Head Race Tunnel and Associate Works*" by the petitioner NHPC, appointed him as driver w.e.f. 5.3.2002 and in this capacity, he worked continuously till 18.10.2020, when, his services have been illegally retrenched by respondent No.2. Respondent-workman further claimed that since his services came to be retrenched without there being any notice or payment of compensation as provided under the various provisions of the Act, he deserves to be reinstated. Respondent-workman further claimed that signatures of some of the employees were taken on blank paper and the fact of "lay off" was not brought to the notice of workman as well as the petitioner. Respondent-workman further alleged that respondent No.2 engaged numerous workers from other contracts for the execution of the work at site after his retrenchment and as such, he be ordered to be reinstated in service.

24. Aforesaid claim of the respondent-workman came to be refuted by the present petitioner, who was impleaded as one of the respondent, in the proceedings before the Tribunal on the ground that it has no role in engagement as well as disengagement of the workman as driver because respondent workman as per his own claim was appointed as driver by respondent No.2, to whom it had awarded contract for construction of Civil and Hydro-mechanical work of Head Race Tunnel and Associate Works. Besides above, the petitioner pleaded before the Industrial Tribunal that Himachal Joint Venture workers' union and management of respondent No.2 entered into negotiations and settled the matter amicably on 14.7.2011, wherein respondent No.2 agreed to make payments to the workers and last day of work was considered as 30.4.2011.

25. Respondent No.2 by way of separate reply though admitted that workman was engaged as driver at Adit-1 site and work was completed in September, 2020, but denied that services of the respondent workman were retrenched in violation of provisions contained under the Act. Respondent No.2 claimed that after completion of work in September, 2020, settlement was effected between workers union and its management, as a consequence of which, 192 workers out of

total 196, were paid retrenchment benefits except the present workman. Respondent No.2 claimed that services of the workman were retrenched in view of the settlement dated 26.6.2011.

26. On the basis of aforesaid pleadings adduced on record as well as evidence led on record by the respective parties, Tribunal below allowed the reference in favour of the respondent workman and held the petitioner as well as respondent No.2 liable jointly and severely to pay compensation to the tune of Rs. 3.00 lac to the respondent workman. While holding the claimant entitled for compensation to the tune of Rs. 3.00 lac, Industrial Tribunal ordered that if respondent No.1 i.e. present petitioner pays the amount, he would be at liberty to recover the same from respondent No.2 In the aforesaid background, the petitioner i.e. respondent No.1 before the Industrial Tribunal has approached this Court in the instant proceedings, praying therein to set-aside the impugned award.

27. Having heard learned counsel for the parties and perused material available on record, this Court finds substantial force in the submission made by Mr. C.N. Singh, learned counsel for the petitioner that once it stood proved that petitioner had no role, whatsoever, in the engagement or disengagement of respondent workman, Industrial Tribunal ought not have held the petitioner liable jointly and severely with respondent No.2 to pay the compensation. Otherwise also, it stands duly admitted by respondent No.2 that respondent workman was appointed by "Himachal Joint Venture" and services of the respondent workman came to be disengaged on account of settlement dated 26.6.2011 arrived *inter-se* respondent No.2 and its workers' union. Respondent No.2 specifically admitted before the Industrial Tribunal that in terms of settlement arrived *inter-se* management and its workers, 192 out of 196 workers were paid retrenchment benefits save and except the present workman, meaning thereby compensation if any, on account of retrenchment was also to be paid in case of the respondent workman by respondent No.2 not by the petitioner. Neither respondent workman nor respondent No.2 set up a case before the Industrial Tribunal that petitioner being principal employer is liable to pay the compensation.

28. Otherwise also, once it is admitted case of the parties that respondent No.2 is an independent identity having no connection with petitioner No.2, it is not understood that how Tribunal below could saddle the petitioner with liability to pay compensation jointly and severely with respondent No.2 being principal employer. As per own case set up by the respondent workman, he was appointed as driver by respondent No.2, to whom construction work was awarded by the petitioner. There is no material worth credence available on record suggestive of the fact that petitioner had any administrative control over the management of respondent No.2. Evidence led on record by the respective parties nowhere indicates that workman was able to point out that he was being paid salary or his attendance in office was being marked by the office of the petitioner and as such, Industrial Tribunal has erred while holding the petitioner liable to pay compensation being principal employer. Even otherwise also, Industrial Tribunal has ordered that if respondent No.1 pays the amount, he is at liberty to recover the same from respondent No.2, meaning thereby, Industrial Tribunal while answering reference referred to it by the Central Government, was not sure about the extent of liability of the petitioner, who otherwise by no stretch of imagination could have been held liable to pay the compensation being principal employer in the given facts and circumstances of the case.

29. Leaving everything aside, this Court having carefully perused terms of reference, which has been otherwise reproduced herein above, finds that Industrial Tribunal has exceeded its jurisdiction because in terms of terms of reference, Industrial Tribunal was to find out whether demand of respondent workman against the management of respondent No.2 in retrenching the services w.e.f. 18.10.2010 is just, valid and legal and as such, it could not have gone into the question of extent of liability, if any, of the petitioner, who has otherwise no role in appointing and

disengaging the service of the respondent-workman. Tribunal below in terms of terms of reference ought to have confined itself only to ascertain whether management of respondent No.2 legally retrenched the services of the workman or not and if yes, what necessary direction can be issued in the case at hand. Once Industrial Tribunal on the basis of material available on record had arrived at a conclusion that respondent-workman was appointed by respondent No.2 and his services were terminated in violation of the provisions contained in the Act and he was not paid compensation in terms of settlement arrived *inter-se* parties, it ought to have issued direction to respondent No.2 to pay the compensation in favour of the respondent workman, but definitely, it could not have gone into the question of liability, if any, of the petitioner.

30. It is well settled that labour Court cannot travel beyond the terms of reference. Hon'ble Apex Court in case titled ***Oshiar Prasad and Ors v. Employers in Relation to Management of Sudamdih Coal Washery of M/s Bharat coking coal limited, Dhanbad, Jharkhand***, (2015) 4 SCC 71, has held that Tribunal while answering reference has to confine its inquiry to the question referred and has no jurisdiction to travel beyond the question or/and the terms of the reference. Relevent paras of the aforesaid judgment are reproduced herein below:-

> 18. One of the questions which fell for consideration by this Court in Delhi Cloth and General Mills Co. Ltd. vs. The Workmen and Others (AIR 1967 SC 469) was that what are the powers of the appropriate Government while making a reference and the scope and jurisdiction of Industrial Tribunal under Section 10 of the Act.
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> 19. Justice Mitter, speaking for the Bench, held as under:
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> "(8) .....Under S. 10(1)(d) of the Act, it is open to the appropriate Government when it is of opinion that any industrial dispute exists to make an order in writing referring "the dispute or any matter appearing to be connected with, or relevant to the dispute,.....to a Tribunal for adjudication" under s. 10(4)
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> "10. (4) where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto."
>
> (9) From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary : "happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated :"
>
> "Something incidental to a dispute" must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct to it....."
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> 20. The same issue came up for consideration before three Judge Bench in a case reported in Pottery Mazdoor Panchayat vs. Perfect Pottery Co. Ltd. and Another, (1979) 3 SCC 762. Justice Y.V. Chandrachud - the

learned Chief Justice speaking for the Court laid down the following proposition of law:

> "10. Two questions were argued before the High Court: Firstly, whether the tribunals had jurisdiction to question the propriety or justification of the closure and secondly, whether they had jurisdiction to go into the question of retrenchment compensation. The High Court has held on the first question that the jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters incidental thereto and that the Tribunal cannot go beyond the terms of the reference made to it. On the second question the High Court has accepted the respondent's contention that the question of retrenchment compensation has to be decided under Section 33-C(2) of the Central Act.
>
> 11. Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of the business was proper and justified. In other words, by the references, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references [pic]being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management."

21. The abovesaid principle of law has been consistently reiterated in M/s Firestone Tyre & Rubber Co. of India (P) Ltd. vs. The Workmen Empoloyed, represented by Firestone Tyre employees' Union AIR 1981 SC 1626, National Engineering Industries Ltd. vs. State of Rajasthan & Ors., (2000) 1 SCC 371, Mukand Ltd. vs. Mukand Staff & Officers' Association, (2004) 10 SCC 460 and State Bank of Bikaner & Jaipur vs. Om Prakash Sharma, (2006) 5 SCC 123.

22. It is thus clear that the appropriate Government is empowered to make a reference under Section 10 of the Act only when "Industrial dispute exists" or "is apprehended between the parties". Similarly, it is also clear that the Tribunal while answering the reference has to confine its inquiry to the question(s) referred and has no jurisdiction to travel beyond the question(s) or/and the terms of the reference while answering the reference. A fortiori, no inquiry can be made on those questions, which are not specifically referred to the Tribunal while answering the reference.

23. Coming now to the facts of this case, it is an admitted case that the services of the appellants and those at whose instance the reference was made were terminated long back prior to making of the reference. These workers were, therefore, not in the services of either Contractor or/and BCCL on the date of making the reference in question. Therefore, there was no industrial dispute that "existed" or "apprehended" in relation to appellants' absorption in the services of the BCCL on the date of making the reference.

24. Indeed a dispute regarding the appellants' absorption was capable of being referred to in reference for adjudication, had the appellants been in the services of Contractor or/and BCCL. But as said above, since the appellants' services were discontinued or/and retrenched (whether rightly or wrongly) long back, the question of their absorption or

regularization in the services of BCCL, as claimed by them, did not arise and nor this issue could have been gone into on its merits for the reason that it was not legally possible to give any direction to absorb/regularize the appellants so long as they were not in the employment.

25. It is a settled principle of law that absorption and regularization in the service can be claimed or/and granted only when the contract of employment subsists and is in force inter se employee and employer. Once it comes to an end either by efflux of time or as per the terms of the Contract of employment or by its termination by the employer, then in such event, the relationship of employee and employer comes to an end and no longer subsists except for the limited purpose to examine the legality and correctness of its termination.

26. In our considered opinion, the only industrial dispute, which existed for being referred to the Industrial Tribunal for adjudication was in relation to termination of appellants' employment and - whether it was legal or not? It is an admitted fact that it was not referred to the Tribunal and, therefore, it attained finality against the appellants.
27. In our considered opinion, therefore, the reference, even if made to examine the issue of absorption of the appellants in the services of BCCL, the same was misconceived."
Also see judgment dated 20.5.2009 passed by this Court in CWP No. 9659 of 2011

31. Consequently, in view of the above, present petition is allowed and impugned award dated 5.4.2016 (Annexure P-5) is quashed and set-aside in as much as it has held the present petitioner liable jointly and severely. However, having taken note of the fact that workman despite there being settlement arrived inter-se management of respondent No.2 and workers' union has been not paid compensation like other similarly situate persons, this Court deems it fit to order that in case some amount is payable by the petitioner to respondent No.2, same may be paid after deducting the aforesaid amount of compensation so that workman who has been otherwise running from pillar to post for getting his dues since 2010, does not suffer indefinitely, for getting his admissible dues. Needless to say, amount, if any, deducted by the petitioner from bills of respondent No.2 shall be paid to the respondent workman directly but before complying with aforesaid direction petitioner may verify whether respondent No.2 has laid challenge, if any, to award impugned in the proceedings independently or not. In view of the above, present petition is disposed of alongwith pending applications, if any.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. & HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

1. CWP No. 1222 of 2020
   Vikrant Singh & others ....Petitioners.
   Versus
   State of H.P. & others ...Respondents.
2. CWP No. 1228 of 2020
   Yogesh Kumar Ver a & others. ...Petitioners
   versus
   State of H.P. & others. ...Respondents.
3. CWP No. 1230 of 2020
   Gagan Kumar Chaturvedi & others. ...Petitioners
   versus
   State of H.P. & others. ...Respondents.

CWP No. 1222 of 2020 a/w
CWP No. 1228 & 1230 of 2020
Decided on 21.9.2020

Constitution of India, 1950 – Articles 14 & 226 – Grant of increments- Entitlement- Vidya Upasaks engaged on payment of fixed monthly honorarium – Whether period spent on such engagement is to be counted for grant of increments after regularization? – Held, in view of judgment in earlier Writ, previous service as Vidya Upasaks before regularization is countable only for pension purposes - After grant of regular pay scale, levying of increments would be governed by all relevant rules and regulations. (Para 4)

Whether approved for reporting? Yes

For the petitioners: Mr. Adarsh K. Vashista, Advocate.

For the respondents: Mr. Hemant Vaid Addl. A.G. with Mr. Mr. Vikrant Chandel Dy. A.G.

Sureshwar Thakur, J (oral)

The writ petitioners were appointed as Vidya Upasaks, in the year 2000, and, they continued to serve in the afore capacity, under the respondents, upto the year 2007, whereat, they became regularized. It is apt to state here that, during, the period of the petitioners, hence serving as vidya Upasak(s), they were never on any fixed pay scales, nor obviously any accrual of increments thereon, were permissible, rather they were paid a fixed per mensem honorarium, of, Rs. 2500/-. However, certain Vidya Upasaks hence holding a status alike the writ petitioners, instituted CWPs No. 8953 of 2013 along with CWP No. 3106 of 2014, and, CWP No. 2815 of 2015, and, all the afore writ petition(s) were decided, through a common verdict, made on 15.6.2015, and, in the operative part of the afore verdict, a direction was rendered, upon, the respondents, to count the period of service rendered by them, as, Vidya Upasaks, as qualifying service, only, for the purpose of pension. A further direction was also made, upon, the respondents, to count the period of rendition of service, by the petitioners, as Vidya Upasaks, for the purpose, of, adding(s), of, annual increments.

2. The respondent State, has instituted a reply, to, the writ petition, and, in paragraph No.8 thereof, has made a categorical disclosure, vis-a-vis, the afore operative part, of, the verdict, rendered by this Court, on 15.6.2015, being completely complied with.

3. Be that as it may, the learned counsel for the petitioners, contends that the import, of, the afore sentence occurring, in the operative part of the afore verdict, inasmuch as, the apposite period being also countable for the purpose of increments, being readable and construable, qua the apposite period of rendition of service, by the petitioners, as Vidya Upasaks, whereat, they were getting, a, fixed per mensem honorarium, of, Rs. 2500/-, also, requiring the respondent concerned, to add increment(s) thereon, rather on, a, running pay scale. However, the afore argument is per-se fallacious, and, is made, on, a gross misreading, of, the afore verdict, recorded by this Court, as the import thereof, is, vis-a-vis, the requisite period of rendition of service, as Vidya Upasak, by the petitioners, being not countable for according, of, annual increments, in, the running pay scale, especially when as aforementioned, they, were being defrayed, a, per mensem honorarium, of, Rs. 2500/-. Furthermore, a further argument(s), is, made by the learned counsel, for the petitioners, for levying of increments, within the ambit of the afore sentence, occurring the operative part of the afore verdict, besides apposite levying

being postponed to a stage, whereat, the writ petitioners, became regularized, and, hence became entitled to a running pay scale. However, the afore argument is unworthy of merit, as a clear reading, of, the afore sentence occurring, in the operative part of the verdict of this Court, makes a direction, only for levying of annual increment, vis-a-vis, the period of rendition of service by the petitioners, as Vidya Upasak, and, not subsequent thereto, upon, theirs' entering into a running pay scale, qua whereto rather the apposite levying would become governed, by, all relevant thereto rules, and, regulations.

5. In view of the above discussions, the instant writ petition(s) is/are disposed of. All the applications, if any, also stand disposed of.

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

Rajesh Kumar .....Petitioner.

Vs.

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

CWPOA No.: 152 of 2019
Date of Decision:18.08.2020

Constitution of India, 1950 - Articles 14 & 226 – Challenge to selection process for training in SAS on ground that paper of English/ Hindi was not inconsonance with syllabus mentioned in recruitment notice – Held, petitioner participated in the selection process without any protest - He had also the choice of attempting required number of questions from either of two parts of paper, if he so desired – Examination took place in 2011 and he filed writ on discovering that on merit, he was not in a position to make it for the training – Petition dismissed – Public Service Commission also cautioned that in future papers to be set are strictly inconsonance with advertisement issued by it. (Para 8 & 9).

Whether approved for reporting? *Yes.*

For the petitioner: Mr. Rajesh Kumar Sharma, Advocate.

For the respondents: M/s Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, for respondent No. 1.
Mr. D.K. Khanna, Advocate, for respondent No. 2.
Respondents No. 3 to 14 are *ex parte.*
(Through Video Conferencing)

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(a) That a writ of certiorari may kindly be issued against the respondent No. 2 and test for initial selection of the candidates for training in SAS at HIPA held on 02.06.2011 may kindly be quashed and set aside.*
>
> *(b) That in alternative a writ in the nature of mandamus be issued in favour of petitioners and against the respondent No. 2 with the directions to grant the grace marks to the petitioner for SAS exam and send him for training."*

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

Respondent No. 2 issued an Advertisement on 2nd June, 2011, inviting applications for initial selection of candidates for undergoing training of SAS at HIPA, copy whereof is appended with the petition as Annexure P-1. In terms of Annexure-I appended with this Advertisement, the selection process was to consist of three papers, including Paper No. 1 of English/Hindi.

3. Note-1 therein provided that the standard of English paper shall be similar to that of the Degree examination of any recognized Indian University and standard of Hindi paper shall be similar to that of Matriculation examination of any recognized University or Board of School Education. The paper was to consist of eight questions, four in Hindi and four in English in two parts. The candidates were to attempt at least two questions from each part.

4. The grievance of the petitioner is that the paper of English/Hindi, which stands appended with the petition as Annexure P-2, was not in consonance with the Advertisement as well as Annexure appended thereto. Rather than giving four questions in Part-I and Part-II Sections of the Hindi/English paper, the respondent-Commission, to the disadvantage of the petitioner, gave five questions in Part-1, which consisted of English paper and only three questions in Part-II, which consisted of Hindi paper. On these basis, the petitioner has prayed for quashing of selection process so undertaken by the respondent-Commission.

5. Reply to the writ petition has been filed by respondent No. 2, in which, *inter alia,* the stand which has been taken by the said respondent is that the petitioner participated in the process of selection without any objection and if the petitioner had any objection with regard to the setting of papers, then he should have registered his protest at the earliest, which was not done by the petitioner. According to the said respondent, the writ was filed at a belated stage. It also stands mentioned in the reply filed by respondent No. 2 that in all, 447 candidates had applied to participate in the examination, however, 246 candidates appeared in the examination and on the basis of merit, names of 12 candidates stood recommended for undergoing training in SAS(OB) at HIPA.

6. For the purpose of record, it is pertinent to state that the private respondents were ordered to be proceeded against *ex parte,* as they chose not to appear before the Court despite being served.

7. I have heard learned counsel for the petitioner as well as learned counsel for respondents No. 1 and 2.

8. Though it cannot be disputed that the English/Hindi paper which was held by respondent No. 2 was not strictly in consonance with Note-I appended with Annexure-I of the Advertisement, yet it is also a matter of record that the petitioner participated in the process of selection, i.e., to say he appeared in the said examination without any protest. Not only this, he appeared in other examinations also and it is only after he discovered that on merit, he was not in a position to make it for the training that he chose to approach the Court. Besides this, the examination took place in the year 2011. Petitioner had the choice of attempting maximum three questions from either of the two Parts and though in Part-II, i.e., Hindi Part of the paper, the number of questions were restricted from four to three, yet the petitioner was having the choice to attempt

three questions, if he so desired. The candidates who were selected for training have already undergone the said training, as there was no stay granted in favour of the petitioner by the Court.

9. Therefore, taking into consideration the broader perspective of the matter that no fruitful purpose will be served by setting at naught the process which was undertaken by respondent No. 2 in the year 2011, this petition is being closed without disturbing the outcome of selection process undertaken by respondent No. 2. However, respondent No. 2 is cautioned that in future the papers to be set, have to be strictly in consonance with the Advertisement issued by it. Miscellaneous applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Ankit Sharma ...Petitioner

Versus

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

CWP No. 2543 of 2020
Reserved on : 01.09.2020
Date of decision: 04 .09.2020

Constitution of India, 1950- Articles 14 & 226- Rejection of bid of petitioner – Challenge thereto by way of writ- Maintainability- Held, notice inviting tenders specifically laying down that bidders would be declared qualified only if their assessed available bid capacity for construction work is equal or more than total bid value- Formula for assessing bid capacity was also laid down- Bid capacity of petitioner was less than of required standard- Terms and conditions of bid document also not challenged by him in writ- Words used in tender document cannot be ignored or treated as redundant or superfluous – No illegality in rejecting bid of petitioner as non-responsive- Petition dismissed. (Para 2 & 4)

Cases referred:
Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala, 2019 (2) Scale 134;
Bakshi Security & Personnel Service Pvt. Ltd. Vs. Devbishan Computed Pvt. Ltd., 2016 (8) SCC 446;
Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818;

Whether approved for reporting : YES

For the Petitioner: Mr.Chander Narayan Singh, Advocate

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Ranajan Sharma, Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals, Ms. Seema Sharma and Ms. Svaneel Jaswal, Deputy Advocate Generals.

Jyotsna Rewal Dua,J

Bid of the petitioner has been rejected by the respondents as non-responsive due to non-fulfillment of Tender Document conditions. Aggrieved, instant writ petition has been preferred by him.

2(i) For construction/improvement work of Circular Road in Shimla town, under Shimla Smart City Project, the respondents on 11.05.2020, issued an invitation for online bids in two cover system from eligible contractors. In response to this NIT, two bids were received. The Evaluation Committee declared one of the bids as non-responsive and accordingly, the bid of second bidder was rejected being single bidder.

2(ii) A fresh notice, inviting tenders, was issued by the respondents on 15.06.2020. Bids were invited between 24.06.2020 to 08.07.2020. In response to this NIT, four bids were received by the respondents. On scrutiny, the bid Evaluation Committee declared the bid of the petitioner as non-responsive due to his non fulfillment of bidding capacity as per Clause 28.2.a of Standard Bid Document. The Clause, being relevant, is being reproduced hereinafter :-

*"28.2.a : **Bidding Capacity :-** Bidders who meet the minimum qualification criteria will be qualified only if their assessed available bid capacity for construction works is equal to or more than the total bid value. The available bid capacity will be calculated as under :-*

Assessed Available Bid capacity = (A x N x M – B)

where

A = Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the financial year in which bids are revised at the rate of 8 percent a year) taking into account the completed as well as works in progress.

	Last Five years (excluding current year)	*Amount of work done in each financial Year*
Total annual volume of civil engineering construction work executed and payments received in the last five years preceding the year in which bids are invited. (Attach/upload certificate from Chartered Accountant)	*(Rs. In lakhs)* *Year 2014-15* *Year 2015-16* *Year 2016-17* *Year 2017-18* *Year 2018-19*	

N = Number of years prescribed for completion of the works for which bids are invited (period up to 6 months to be taken as half-year and more than 6 months as one year.

M = 2

B = Value, at the current price level, of existing commitments and on-going works to be completed during the period of completion of the works for which bids are invited. The details should be on the formats indicated in condition No. 19."

A reading of the above Clause makes it evident that eligible bidders will be declared qualified only if their assessed available bid capacity for the construction works is equal to or more than the total bid value. The total bid value of the tendered work as per tender document is Rs. 50,78,719/-. The formula for assessing the available bid capacity of the bidder is also outlined in the above extracted clause.

3. As per the stand taken by the respondents in the reply, in terms of Clause 28.2.a of the Standard Bid Document (*extracted above*), gross contract receipt of any one year out of five years, viz. 2014-2015, 2015-2016, 2016-2017, 2017-2018 and 2018-2019 was to be taken into account for determining the bid capacity of the bidder. As per Calause 28.2.a of the Standard Bid Document, the Chartered Accountant report/certificate upto the year 2018-2019 was to be taken into consideration for determining bidding capacity of the bidder. In the petitioner's case, the

Chartered Accountant's report showed his gross contract receipt as Rs. 5,33,212/- upto 2018-2019. Since this was less than the required bid capacity of Rs. 50,76,719/- under Clause 28.2.a of the Standard Bid Document, therefore, petitioner's bid was declared as non-responsive.

4. Learned counsel for the petitioner contended that petitioner's contract receipt for the year 2019-2020 cannot be excluded in determining his bidding capacity. In support of this submission, learned counsel for the petitioner made a reference to the words "financial year" occurring in Clause 28.2.a. We are afraid that the submission has been made only to be rejected. Clause 28.2.a of the Bid Document is very specific and unambiguous that assessed bidding capacity of an otherwise eligible bidder has to be equal to or more than total bid value of Rs. 50,76,719/- for him to be declared as qualified bidder. Further for assessing the bidding capacity of the bidder, a fixed formula has also been provided in the Clause. As per this formula, maximum value of Civil Engineering works executed in any one year during last five years are to be taken into account. What are those last five years, have also not been left to the bidder's speculation. Clause 28.2.a specifically denotes in column 2 of the table the last five years which are to be considered for assessing the bid capacity of the tenderer as 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19. Second column of the table in this Clause specifically excludes current year. Thus, not only the current year has been specifically excluded, but the five years which are to be included, have also been specifically mentioned in the Clause. Year 2019-2020 has not been included in the five years receipts of which are to be considered for determining the bid capacity of the tenderer.

It is not in dispute that Chartered Accountant Report/Certificate upto the year 2018-19 shows petitioner's gross receipts at Rs. 5,33,212/- i.e. less than required bid capacity of Rs. 50,76,719/-. Though, according to the respondents, even if the receipt of the petitioner for the year 2019-2020 of Rs. 28,82,650/- is considered, which as per Standard Bid Document cannot be taken into account, then also report of Chartered Accountant, dated 07.07.2020 shows his gross contract receipt as Rs. 34,15,862/- for two years i.e. 2018-2019 and 2019-2020. This again is less than the required bid capacity of Rs. 50, 76,719/-.

The petitioner has participated in the bidding process under the specific terms and conditions laid down in Standard Bid Document. The terms and conditions of bid have not even been challenged by the petitioner. Hon'ble Apex Court in **Vidarbha Irrigation Development Corporation** Vs. **M/s Anoj Kumar Garwala, 2019 (2) Scale 134,** after considering **Bakshi Security & Personnel Service Pvt. Ltd.** Vs. **Devbishan Computed Pvt. Ltd.**, **2016 (8) SCC 446** and **Afcons Infrastructure Ltd.** Vs. **Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818**, held that essential condition of a tender has to be strictly complied with and that words used in the tender document cannot be ignored or treated as redundant or superfluous. Relevant para from the judgment is reproduced hereinafter :-

> "15. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

The development work of Circular Road under the tender in question for Shimla Smart City Project is otherwise of prime importance and is a time bound project. Learned Deputy Advocate General has emphasized that in case the work is not completed during this financial year, the funds allocated for the same will lapse.

In view of the foregoing observations, looking from any angle, we find no illegality in respondents' rejecting the bid of the petitioner as non-responsive for non compliance of Clause 28.2.a of Standard Bid Document. The writ petition is accordingly dismissed. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Rati Lal .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No.3433 of 2020.
Date of decision: 04.09.2020.

Constitution of India, 1950- Articles 14 & 226- **Authorization of Residential Accommodation in Department of Prison and Correctional Services, Himachal Pradesh**- Clause 6- Standing Order dated 25.09.2019 - Overstaying in official accommodation- Direction by department to vacate premises- Challenge thereto- Held, as per Standing Order, official accommodation can be retained only for three years- Petitioner has not vacated it and now same stands allotted to some other officer- Anyone who occupies official accommodation beyond permissible period is bound by rules that govern the retention of said accommodation- Petitioner cannot claim any exemption or exception to applicability of Standing Order- Petition dismissed. (Para 4, 15 & 16)

Cases referred:

S.D. Bandi vs. Divisional Traffic Office, KSRTC & others (2013) 12 SCC 631;
Wazir Chand vs. Union of India & others (2001) 6 SCC 596;

Whether approved for reporting? *Yes*

For the Petitioner : Mr. C.D. Negi, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals, Mr. Bhupinder Thakur, Ms. Seema Sharma and Ms. Svaneel Jaswal, Deputy Advocate Generals, for respondents No. 1 to 3/State.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE.

Tarlok Singh Chauhan, Judge (Oral)

The petitioner vide letter dated 28.05.2020 (Annexure P-4) and thereafter vide Office Order dated 22.08.2020 (Annexure P-6) has been directed to vacate the official accommodation and aggrieved thereby has filed the instant writ petition for grant of the following relief:

"That impugned letter dated 28.05.2020, Annexure P-4 and office order dated 22.08.2020, Annexure P-6, may very kindly be quashed and set aside with directions to respondents No.1 to 3 to allow the petitioner to retain Government accommodation, i.e. Set No.1, District Jail, Kaithu, Shimla-171003."

2. The petitioner was posted as Warder in the District Jail, Kaithu, Shimla, vide order dated 16.04.2012 and had been staying in the jail lines. Thereafter, vide order dated 12.04.2017, the petitioner was allotted Government accommodation i.e. Set No. 1, Kaithu Jail, Complex, District Shimla and is residing there eversince.

3. On 25.09.2019, respondent No.2 framed Standing Orders under the head "Authorization of Residential Accommodation in the Department of Prisons and Correctional Services, Himachal Pradesh" and in terms of Clause-6 thereof, the Government accommodation could only be retained for a period of three years, which reads as under:

"6. The working staff of jail shall be provided Government accommodation for a period of three years. On completion of the period of three years, the said official has to vacate allotted Government accommodation."

4. It would be noticed that under Clause-6, the Government accommodation can be claimed only for a period of three years and thereafter it has to be vacated. It is in consonance with Clause-6 that petitioner, for the first time, was issued a notice dated 06.05.2020 directing him to vacate accommodation within 15 days. However, the petitioner did not vacate the same and rather filed a representation dated 08.05.2020 wherein he requested the respondents to grant him permission to retain the accommodation for a period of one year as his family had been residing with him and also on the ground that on account of Covid pandemic, it was difficult to have private accommodation.

5. Even though, the representation made by the petitioner was not considered, however, again vide order dated 28.05.2020, he was directed to vacate the premises within 15 days. The petitioner again represented on 08.06.2020.

6. The petitioner has not clearly mentioned about the outcome of the representation. However, vide Office Order dated 22.08.2020, the petitioner has been informed that 4th respondent Neelam Chaudhary has been appointed as Warder and allotted the accommodation in possession of the petitioner subject to the following conditions as contained in Annexure P-6:

"1. Government accommodation will be alloted for a period of 03 years w.e.f. the date of allotment/possession.

2. Allottee will have to keep his family with him in allotted accommodation.

3. Electricity and water charges will be paid by allottee himself.

4. The inventory list of items will be prepared at the time of possession.

5. No alteration/repair work will be done without the knowledge of undersigned."

7. We have heard Shri C.D.Negi, learned counsel for the petitioner and the learned Advocate General for the respondents/State.

8. The practice of retaining official accommodation by persons in official capacity beyond the tenure is over, has been repeatedly frowned upon by various Courts. The unauthorized occupants must recollect that the rights and duties are correlative as the rights of one person entail the duties of another person. Similarly, the duty of one person entails the rights of another person. The unauthorized occupants must appreciate that their act of overstaying in the premises directly infringes the right of another. No law or directions can entirely control this act of disobedience but for self-realization among the unauthorized occupants.

9. This was so held by the Hon'ble Supreme Court in ***S.D. Bandi*** *vs.* ***Divisional Traffic Office, KSRTC & others (2013) 12 SCC 631***, wherein it was observed as under:

> *"34. It is unfortunate that the employees, officers, representatives of people and other high dignitaries continue to stay in the residential accommodation provided by the Government of India though they are no longer entitled to such accommodation. Many of such persons continue to occupy residential accommodation commensurate with the office(s) held by them earlier and which are beyond their present entitlement. The unauthorized occupants must recollect that rights and duties are correlative as the rights of one person entail the duties of another person similarly the duty of one person entails the rights of another person. Observing this, the unauthorized occupants must appreciate that their act of overstaying in the premise directly infringes the right of another. No law or directions can entirely control this act of disobedience but for the self realization among the unauthorized occupants. The matter is disposed of with the above terms and no order is required in I.As for impleadment and intervention."*

10. Earlier to that in ***Wazir Chand*** *vs.* ***Union of India & others (2001) 6 SCC 596***, the Hon'ble Supreme Court was considering a case wherein an employee of the Railways continued to occupy the government quarters. The Hon'ble Supreme Court in its order upheld the principle that unauthorized occupants have to pay penal rents and went to the extent of holding that the Government was entitled to even withhold gratuity amount, payable to the employee, towards the penal rent. The order of the Hon'ble Supreme Court reads as under:

> "*These appeals are directed against the orders of the Central Administrative Tribunal rejecting the claim of the appellant, who happens to be a retired Railway servant. Admittedly, the appellant even after superannuation, continued to occupy the Government quarter, though being placed under hard circumstances. For such continuance, the Government, in accordance with Rules, has charged penal rent from the retired Government servant, and after adjusting the dues of the Government, the balance amount of the gratuity, which was payable, has been offered to be paid, as noted in the impugned order of the Tribunal. The appellants' main contention is that in view of the Full Bench decision of the Tribunal against which the Union of India had approached this Court and the Special Leave Application was dismissed as withdrawn, it was bounden duty of the Union of India not to withhold any gratuity amount, and therefore, the appellant would be entitled to the said gratuity amount on the date of retirement, and that not having been paid, he is also entitled to interest thereon. We are unable to accept this prayer of the appellant in the facts and circumstances of the present case. The appellant having unauthorisedly occupied the Government quarter, was liable to pay the penal rent in accordance with Rules, and therefore, there is no illegality in those dues being adjusted against the death-cum-retirement dues of the appellant. We, therefore, see no illegality in the impugned order which requires our interference. The appeals stand dismissed."*

11. At this stage, we may note that ratio laid down in ***S.D. Bandi's case*** (supra) has thereafter been reiterated by the Hon'ble Supreme Court in ***Lok Prahari*** *vs.* ***State of U.P. and others (2016) 8 SCC 389***.

12. The petitioner could not place any fact or law which could support his case for overstaying in the official accommodation without any authority of law. The petitioner is bound to follow the rule of law or else it would amount to gross indiscipline. It has to be remembered that the public servants in such like matters are not requested by the Government, but are directed and the orders of the Government are in the nature of a command for the government servants.

13. It is then argued by Shri C.D.Negi, learned counsel for the petitioner that because of the difficult and hard circumstances caused by the pandemic, it would be difficult to find the accommodation.

14. To say the least, this contention of the learned counsel for the petitioner is fallacious because we can take judicial notice of the fact that it is on account of Covid pandemic that many of the accommodations are lying vacant and if the petitioner was really serious, he should have by now occupied the same by vacating the official accommodation.

15. As observed above, the legal position is well settled. Anyone who occupies official accommodation beyond the permissible period is bound by the rules that govern the retention of the said accommodation.

16. Notably, in the present case, leniency is sought on compassionate grounds and due to pandemic. But, then it is well settled that compassion beyond law is not permissible. The Standing Orders do not permit a period beyond three years in the official accommodation and the petitioner cannot claim any exemption or exception to the applicability of the Standing Orders.

17. Not only is the petition without merit, but the stay of the petitioner in the official accommodation is totally unauthorized. Therefore, while dismissing the petition, we direct the petitioner to vacate the official accommodation latest by 13th September, 2020 or else he shall not only be liable to pay penal rent at the rate of Rs.1,000/- per day, but shall also be liable for disciplinary action.

18. The respondents, in turn, are also directed to ensure that no provision of the Standing Orders is unnecessarily diluted and to ensure that there is fair and suitable distribution of the official accommodation strictly in accordance with the Standing Orders and no one is permitted to stay in the Government accommodation beyond the period of three years, as it is one of the grounds taken by the petitioner in the petition that similarly situated Chief Warders/Warders throughout the State of Himachal Pradesh are living in the Government accommodation, though without naming any particular person.

19. Consequently, the writ petition is dismissed *in limine,* so also the pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. & HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Basant Kumar & others ....Petitioners

Versus

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

CWP No. 1604 of 2020
Decided on 15.9.2020

Constitution of India, 1950 – Articles 14 & 226 – Grant of increments- Entitlement- Vidya Upasaks engaged on payment of fixed monthly honorarium – Whether period spent on such engagement is to be counted for grant of increments after regularization? – Held, in view of judgment in earlier Writ, previous service as Vidya Upasaks before regularization is countable only for pension purposes - After grant of regular pay scale, levying of increments would be governed by all relevant rules and regulations. (Para 4)

Whether approved for reporting? Yes.

For the petitioners: Mr. Adarsh K. Vashista, Advocate.

For the respondent: Mr. Hemant Vaid Addl. A.G. with Mr. Vikrant Chandel Dy. A.G.

Sureshwar Thakur, J. (oral)

The writ petitioners were appointed as Vidya Upasaks, in the year 2000, and, they continued to serve in the afore capacity, under the respondents, upto the year 2007, whereat, they became regularized. It is apt to state here that, during, the period of the petitioners, hence serving as vidya Upasak(s), they were never on any fixed pay scales, nor obviously any accrual of increments thereon, were permissible, rather they were paid a fixed per mensem honorarium, of, Rs. 2500/-. However, certain Vidya Upasaks hence holding a status alike the writ petitioners, instituted CWPs No. 8953 of 2013 along with CWP No. 3106 of 2014, and, CWP No. 2815 of 2015, and, all the afore writ petition(s) were decided, through a common verdict, made on 15.6.2015, and, in the operative part of the afore verdict, a direction was rendered, upon, the respondents, to count the period of service rendered by them, as, Vidya Upasaks, as qualifying service, only, for the purpose of pension. A further direction was also made, upon, the respondents, to count the period of rendition of service, by the petitioners, as Vidya Upasaks, for the purpose, of, adding(s), of, annual increments.

2. The respondent State, has instituted a reply, to, the writ petition, and, in paragraph No.8 thereof, has made a categorical disclosure, vis-a-vis, the afore operative part, of, the verdict, rendered by this Court, on 15.6.2015, being completely complied with.

3. Be that as it may, the learned counsel for the petitioners, contends that the import, of, the afore sentence occurring, in the operative part of the afore verdict, inasmuch as, the apposite period being also countable for the purpose of increments, being readable and construable, qua the apposite period of rendition of service, by the petitioners, as Vidya Upasaks, whereat, they were getting, a, fixed per mensem honorarium, of, Rs. 2500/-, also, requiring the respondent concerned, to add increment(s) thereon, rather on, a, running pay scale. However, the afore argument is per-se fallacious, and, is made, on, a gross misreading, of, the afore verdict, recorded by this Court, as the import thereof, is, vis-a-vis, the requisite period of rendition of service, as Vidya Upasak, by the petitioners, being not countable for according, of, annual increments, in, the running pay scale, especially when as aforementioned, they, were being defrayed, a, per mensem honorarium, of, Rs. 2500/-. Furthermore, a further argument(s), is, made by the learned counsel, for the petitioners, for levying of increments, within the ambit of the afore sentence, occurring the operative part of the afore verdict, besides apposite levying being postponed to a stage, whereat, the writ petitioners, became regularized, and, hence became entitled to a running pay scale. However, the afore argument is unworthy of merit, as a clear reading, of, the afore sentence occurring, in the operative part of the verdict of this Court, makes a direction, only for levying of annual increment, vis-a-vis, the period of rendition of service by the petitioners, as Vidya Upasak, and, not subsequent thereto, upon, theirs' entering into a running pay scale, qua whereto rather the apposite levying would become governed, by, all relevant thereto rules, and, regulations.

5. In view of the above discussions, the instant writ petition is disposed of. All the applications, if any, also stand disposed of.

BEFORE HON'BLE MR. ANOOP CHITKARA, JUDGE.

Sandeep Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 469 of 2020
Reserved on: 10 July, 2020
Date of Decision: 15 July, 2020

Code of Criminal Procedure, 1973 (Code)- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)**- Sections 20, 29 & 37- Recovery of commercial quantity of 'charas' from occupants of bike 'B' and 'MS'- Petitioner 'SK' implicated in case on basis of material surfacing during investigation that he (petitioner) had hired 'B' and 'MS' to purchase charas from one 'GS'- Regular bail- Grant of – Held, material on record suggesting frequent phone calls between petitioner, 'B' and 'MS' and 'GS' prior to seizure of contraband from 'B" and 'MS'- Bail petitioner silent about this aspect- There is prima facie case against petitioner- Case being of commercial quantity, rigors of Section 37 of the Act will apply- Petitioner not entitled for bail- Petition dismissed. (Para 5, 17, 23 & 24)

Cases reffered;

Babua v. State of Orissa, (2001) 2 SCC 566].
Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].
Dataram Singh v. State of Uttar Pradesh, (2018) 3 SCC 22,
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240,
Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565,
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42,
N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721].
Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705].
New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].
New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].
Satpal Singh v. State of Punjab, (2018) 13 SCC 813,
State of Rajasthan, Jaipur v. Balchand, AIR 1977 SC 2447,
Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].
Union of India v. Merajuddin, (1999) 6 SCC 43,
Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738,
Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738].
Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624].
Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1,
Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1].
Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798].

Whether approved for reporting?[23] ***YES***.

For the petitioner: Mr. Virender Singh Kanwar, Advocate.

For the respondent: Mr. Nand Lal Thakur, Mr. Ashwani K. Sharma Additional Advocates General with Mr. Ram Lal Thakur, Asstt. A.G. & Mr. Rajat Chauhan, Law Officer.

Mr. Ankush Dass Sood, Senior Advocate with Ms. Shweta Joolka, Advocate as Amicus Curiae.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge

The petitioner, who is under incarceration from 15th Jan 2020, for allegedly hiring accused Balkar and Manjeet Singh for purchasing 1 kilogram and 218 grams of charas, has come up before this Court seeking bail.

2. Based on a First Information Report (FIR), the police arrested the petitioner, in FIR No.198 of 2019, dated 30.08.2019, registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called "NDPS Act"), in Police Station, Boileauganj, District Shimla, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. The petitioner filed a petition under Section 439 CrPC before Special Judge (II), Shimla, District Shimla, H.P. However, vide order dated 29.01.2020, the Court dismissed the petition, because, in the opinion of the Court, the petitioner could not cross the rigors of S. 37 of the NDPS Act and the petitioner and the main accused, from whose possession the Investigator had recovered the charas, had made multiple phone calls between them, which calls immediately preceded such seizure.

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

4. I have read the status report(s) and heard Ld. Counsel for the parties. Learned counsel for the petitioner has annexed the status report filed by the respondent-State. Learned Additional Advocate General submits that he does not want to present the new status report, and the status report filed with the petition may be considered.

FACTS:

5. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are on Aug 30, 2019, a police party headed by ASI, was on traffic control duty at Police Check Post, Khwara Chowki, Shoghi. At around 6.30 p.m., one motorcycle came from the Shimla side. Apart from the driver, it had a pillion rider. The ASI signaled the bike to stop, on which the driver parked it on the side of the road. The pillion rider had a cloth bag on his lap. The moment the police officer asked the driver of the motorcycle to show documents, the pillion rider opened the bag's zip, and the Police could notice the charas in it. On this, the Police inquired the names of the driver of the motorcycle, who revealed his name as Balkar, accused No.1, and the pillion rider told his name as Manjeet Singh, accused No.2. After that, the Police weighed the charas, which measured one kilogram and 218 grams. After completing the procedural requirement under the NDPS Act and CrPC, the Police sent the ruqa for registration of FIR and arrested these two accused persons. On the next day, the Police interrogated accused Balkar and Manjeet Singh. During the investigation, both the accused told the Investigator that Sandeep Kumar, the bail petitioner, a resident of Mohali (Punjab), had hired them to purchase the charas from one Govind Singh, resident of Kullu. The said Sandeep Kumar had also given the phone number of Govind Singh and his phone number to both these accused persons Balkar and Manjeet Singh. It transpired during the investigation that there was an exchange of calls between Sandeep Singh, Balkar, and Govind Singh. The Police obtained a call details record (CDR) to establish its case. After that, the Police started searching Sandeep Kumar and Govind Singh. On Jan 15, 2020, the Police traced the bail petitioner Sandeep Kumar from Badmazra, Panjab, and arrested him.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the evidence collected against the petitioner is legally inadmissible. He also places reliance upon the orders of this Court in Budhi Singh v. State of H.P., CrMPM 595 of 2020; Naveen Bura v. State of HP, 2018 Law Suit (HP) 478, Thakur Dass v. State of H.P., CrMPM 167 of 2010; Stynder Singh v. State of Himachal Pradesh, 2010(1) SimLC 490; and Nisar Ahmed Thakkar v. State of H.P., CrMPM 672 of 2008.

8. On the contrary, Mr. Nand Lal Thakur, learned Additional Advocate General, contends that the Police have collected sufficient evidence by tracing frequent calls made by the bail petitioner, the main accused, and the seller of charas, which prima facie points out towards his involvement. He also relies upon the decision of this Court in CrMPM 126 of 2018, Manohar Lal v. State of H.P., and CrMPM 1084 of 2020, Om Parkash v. State of H.P.

9. Ld. Amicus Curiae, Mr. Ankush Dass Sood, Sr. Advocate duly assisted by Ms. Shweta Joolka, Advocate has drawn the attention of this Court to the concepts of 'Due Process of Law,' 'reasonableness,' and 'satisfaction of the conscience of the Court,' while considering bails under NDPS Act, involving the commercial quantity of substance.

ANALYSIS AND REASONING:

10. Pre-trial incarceration needs justification depending upon the statutory restrictions, heinous nature of the offence, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

11. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows,

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

12. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

13. In **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, Supreme Court holds,

> 2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative.
> 3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime.

14. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, Supreme Court in Para 16, holds,

> The delicate light of the law favours release unless countered by the negative criteria necessitating that course.

15. In **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, Supreme Court holds,

> 1. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception.
>
> 6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.

16. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in its schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule. 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 offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. When the substance falls under commercial quantity statute mandates minimum sentence of ten years of imprisonment and a minimum fine of INR One Lac, and bail is subject to the riders mandated in S. 37 of NDPS Act.

In the present case, as per the contentions of the State, the quantity of substance seized is commercial quantity. Given the legislative mandate of S. 37 of NDPS Act, the Court can release a person, accused of an offence punishable under the NDPS Act for possessing a commercial quantity of contraband only after passing its rigors. Section 37 of the Act is extracted as under: -

> "37. Offences to be cognizable and non-bailable.

> (1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

17. Reading of Section 37(1)(b)(ii) mandates that two conditions are to be satisfied before a person/accused of possessing a commercial quantity of drugs or psychotropic substance, is to be released on bail.

18. The first condition is to provide an opportunity to the Public Prosecutor and clear her stand on the bail application. The second stipulation is that the Court must be satisfied that reasonable grounds exist for believing that the accused is not guilty of such offence and that during bail is not likely to commit any offence while on bail. If either of these two conditions is not met, the ban on granting bail operates. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Be that it may, if such a finding is arrived at by the Court, it is equivalent to giving a certificate of discharge to the accused. Even on fulfilling one of the conditions, the reasonable grounds for believing that during the bail period, the accused is not guilty of such an offence, the Court still cannot give a finding or assurance that the accused is not likely to commit any such crime. Thus, the grant of bail or denial of bail for possessing commercial quantity would depend on facts of each case.

19. JUDICIAL PRECEDENTS ON S. 37 OF NDPS ACT:

a) In **Union of India v. Merajuddin**, (1999) 6 SCC 43, a three Judges Bench of Supreme Court while cancelling the bail, observed in Para 3, as follows,

> The High Court appears to have completely ignored the mandate of Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act while granting him bail. The High Court overlooked the prescribed procedure."

b) In **Customs, New Delhi v. Ahmadalieva Nodira**, (2004) 3 SCC 549, a three Judges

Bench of Supreme Court holds,

> 7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

c) In **Union of India v. Sanjeev v. Deshpande**, (2014) 13 SCC 1, a three-judges bench of Supreme Court holds,

> 5. ...In other words, Section 37 departs from the long established principle of presumption of innocence in favour of an accused person until proved otherwise.

d) In **Satpal Singh v. State of Punjab**, (2018) 13 SCC 813, a bench of three judges of Supreme Court directed that since the quantity involved was commercial, as such High Court could not have and should not have passed the order under sections 438 or 439 CrPC, without reference to Section 37 of the NDPS Act.

e) In **Narcotics Control Bureau v Kishan Lal**, 1991 (1) SCC 705, Supreme Court holds,

> 6. Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The Narcotic Drugs And Psychotropic Substances Act is a special enactment as already noted it was enacted with a view to make stringent provision for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of Narcotic Drugs And Psychotropic Substances Act are in negative terms limiting the scope of the applicability of the provisions of Criminal Procedure Code regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under Section 439 Criminal Procedure Code are not subject to the limitation mentioned under Section 37 of Narcotic Drugs And Psychotropic Substances Act. The non-obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439 Criminal Procedure Code and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Section 37 prevails.

f) In **Babua v. State of Orissa**, (2001) 2 SCC 566, Supreme Court holds,

> **[3]** In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view.

g) In **Bijando Singh v. Md. Ibocha**, 2004(10) SCC 151, Supreme Court holds,

> 3. Being aggrieved by the order of the Special Court (NDPS), releasing the accused on bail, the appellant moved the Guwahati High Court against the said order on the ground that the order granting bail is contrary to the provisions of law and the appropriate authority never noticed the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act. The High Court, however, being of the opinion that if the attendance of the accused is secured by means of bail bonds, then he is entitled to be released on bail. The High Court, thus, in our opinion, did not consider the provisions of Section 37 of the Narcotic Drugs And Psychotropic Substances Act.

h) In **N.C.B.Trivandrarum v. Jalaluddin**, 2004 Law Suit (SC) 1598, Supreme Court observed,

> 3. ...Be that as it may another mandatory requirement of Section 37 of the Act is that where Public Prosecutor opposes the bail application, the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. In the impugned order we do not find any such satisfaction recorded by the High Court while granting bail nor there is any material available to show that the High Court applied its mind to these mandatory requirements of the Act.

i) In **Union of India v. Shiv Shanker Kesari**, (2007) 7 SCC 798, Supreme Court holds,

> 6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and. that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.
8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable'. Reason varies it, its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See : Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987)4 SCC 497 and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt Ltd and another [(1989)1 SCC 532].
9. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice &., Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that.
10. The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See : Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd., 2003(4) RCR(Civil) 265 : (2003)6 SCC 315)."
11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.
12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

j) In **N.R. Mon v. Md. Nasimuddin**, (2008) 6 SCC 721, Supreme Court holds,

9. …The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing, that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The

> expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case hand the High Court seems to have completely overlooked underlying object of Section 37.

k) In **Union of India v. Rattan Mallik @ Habul**, (2009) 2 SCC 624, Supreme Court holds,

> 14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Narcotic Drugs And Psychotropic Substances Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

l) In **Union of India v. Niyazuddin & Anr**, (2018) 13 SCC 738, Supreme Court holds,

> 7. ...Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said Section. They are :- (1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27A and (4) Of offences involving commercial quantity. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail.
>
> 8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.
>
> 9. Hence, we are satisfied that the matter needs to be considered afresh by the High Court. The impugned order is set aside and the matter is remitted to the High Court for fresh consideration. It will be open to the parties to take all available contentions before the High Court.

m) In **Sujit Tiwari v. State of Gujarat**, 2020 SCC Online SC 84, in the given facts, Supreme Court granted bail, by observing,

> 10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to comment on the merits of the allegations levelled against the present appellant. But other than the

> few *WhatsApp* messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through *WhatsApp* with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.
>
> 11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers.
>
> 12. We, however, feel that some stringent conditions will have to be imposed upon the appellant.

SUM UP:

20. From the summary of the law relating to rigors of S.37 of NDPS Act, while granting bail involving commercial quantities in the NDPS Act, the following fundamental principles emerge:

a) **The limitations on granting of bail come in only when the question of granting bail arises on merits.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

b) **In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment.** [Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738].

c) **Apart from granting opportunity to the Public Prosecutor, the other twin conditions which really have relevance are the Court's satisfaction that there**

are reasonable grounds for believing that the accused is not guilty of the alleged offence. [N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721].

d) **The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

e) **Twin conditions of S. 37 are cumulative and not alternative.** [Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549].

f) **If the statements of the prosecution witnesses are believed, then they would not result in a conviction.** [Babua v. State of Orissa, (2001) 2 SCC 566].

g) **At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail.** [Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624].

h) **While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty.** [Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798].

i) **Section 37 departs from the long-established principle of presumption of innocence in favour of an accused person until proved otherwise.** [Union of India v. Sanjeev v. Deshpande, (2014) 13 SCC 1].

j) **In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC.** [Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705].

k) **Bail must be subject to stringent conditions.** [Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84].

21. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes. Satisfying the fetters of S. 37 of the NDPS Act is candling the infertile eggs.

22. A perusal of the status report reveals the details of calls between the accused, preceding contraband's seizure. The bail petition is silent about this aspect. The Investigator has collected sufficient evidence to make out a prima facie case against the bail petitioner.

23. Without commenting on the merits of the evidence collected so far, the petitioner has failed to cross the hurdle of S. 37 of NDPS Act. The conscience of the Court does not prick to believe the petitioner’s entitlement for bail.

24. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. Suffice it to say that due to the reasons mentioned above, and keeping in view the nature of allegations, no case for bail is made out in favour of the petitioner.

25. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

26. Given the above reasoning, in my considered opinion, no case for bail is made out at this stage. Resultantly, the present petition stands dismissed. All pending applications, if any, stand closed.

27. This Court expresses its gratitude to Mr. Ankush Dass Sood, learned Senior Advocate assisted by Ms. Shweta Joolka, Advocate for rendering valuable assistance to this Court pro bono.

28. While deciding the propositions of law involved in this matter, I have considered all the similar orders/judgments pronounced by me. Thus, this order is more comprehensive and up to date. Given above, all previous decisions/orders passed by me where the proposition of law was similar, or somewhat similar, and also those passed under Section 37 of NDPS Act, be not cited as precedents.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL, JUDGE.

M/s Chamunda Construction Company .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No. 3583 of 2020.
Judgment reserved on: 23.09.2020.
Date of decision: 28.09.2020.

Constitution of India, 1950- Articles 14 & 226- Tender regarding public work- Rejection by the Committee- Challenge by way of writ jurisdiction- Court's jurisdiction- Held, award of contract is essentially a commercial transaction – State can choose its own method to arrive at a decision- It can fix its own terms of invitation to tender and that is not open to judicial scrutiny - However Court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. (Para 13)

Constitution of India, 1950- Articles 14 & 226- Tender regarding public work- Rejection by the Committee- Challenge by way of writ jurisdiction- Court's jurisdiction- Held, notice inviting tender required tenderer to have past experience in similar works to the extent of 50% of estimated cost of the project- Petitioner did not fulfil eligibility criteria mentioned in the notice to tender- Rejection of its tender at technical bid stage by the respondents is not arbitrary or unreasonable. (Para 5 & 29)

Administrative Law- Executive orders- Challenge thereto- Guiding principles for determining validity- Held, no doubt the validity of an order is to be judged by reasons so mentioned in it and not on basis of subsequent materials produced before the Court but deviation from this principle can be made where larger public interest is involved- In such circumstances, additional grounds can be looked into to examine the validity of order. (Para 30, 31 & 34)

Cases referred.

Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818 at 825-26,
Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818, 16
Air India Limited vs. Cochin International Airport Ltd.(2000) 2 SCC 617,
Assistant Collector, Central Excise vs. Dunlop India Ltd. (1985) 1 SCC 260=1984 (2) SCALE 819,
B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and others (2006) 11 SCC 548, Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa and another (2012) 6 SCC 464,
B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.(2006) 11 SCC 548,
Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and Others (2019) 6 Scale 70,
Chairman, All India Railway Recruitment Board and another vs. K.Shyam Kumar and others (2010) 6 SCC 614,
Fertilizer Corporation Kamgar Union vs. Union of India (1981) 1 SCC 568,
In Karnataka SIIDC Ltd. vs. Cavalet India Ltd.(2005) 4 SCC 456,
In Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd.(2005) 6 SCC 138,
Jagdish Mandal vs. State of Orissa (2007) 14 SCC 517,
M/s N. Ramachandra Reddy vs. State of Telangana and others, AIR 2019 SC 4182,
Michigan Rubber (India) Ltd. vs. State of Karnataka & Ors. (2012) 8 SCC 216,
Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405,
Montecarlo Ltd. vs. NTPC Ltd. (2016) 15 SCC 272 at 288,
Montecarlo vs. NTPC Ltd. AIR 2016 SC 4946,
Municipal Corporation, Ujjain and Another vs. BVG India Ltd. and Others (2018) 5 SCC 462 ,
R.D. Shetty vs. International Airport Authority (1979) 3 SCC 488,
Ramniklal N.Bhutta vs. State of Maharashtra (1997) 1 SCC 134= 1996 (8) SCALE 417
Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492=1999 (1) Arb. LR 431 (S
Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492
Sam Built Well Private Limited vs. Deepak Builders and others, (2018) 2 SCC 176,
Silppi Constructions Contractors vs. Union of India and another etc. etc. (2019) 11 Scale 592,
Tata Cellular vs. Union of India (1994) 6 SCC 651,
Tata Cellular vs. Union of India (1994) 6 SCC 651= 1995 (1) Arb. LR 193,
Whether approved for reporting?[24] *Yes*

For the Petitioner : Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocate Generals, Ms. Seema Sharma, Mr. Bhupinder Thakur and Mr. Yudhbir Thakur, Deputy Advocate Generals, for respondents No.1 to 5/State.

(Through Video Conferencing)

Tarlok Singh Chauhan, Judge

The petitioner has sought quashing of the entire tender work of Neugal Khad along Sourav Ban Vihar in Tehsil Palampur, District Kangra, H.P. regarding construction of retaining walls, wire crate works, stacking works and dredging works and has further sought quashing of the action of the respondents in rejecting the claim of the petitioner at the technical bid stage. In addition thereto, the petitioner has also sought

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[24] *Whether the reporters of the local papers may be allowed to see the Judgment?Yes*

quashing of the letter dated 29.08.2020, whereby the petitioner has been held to be a non-participating firm.

2. Respondent No.5 i.e. Executive Engineer, Jal Shakti Division, Palampur, on behalf of the Government of Himachal Pradesh, invited item rate bids for the aforesaid works. In all six number of bidders/firms/contractors including the petitioner firm participated in the e-tender process dated 03.08.2020.

3. The technical bid was opened online on 17.08.2020 by respondent No.5, who referred the same for further scrutiny by an Evaluation Committee at Jal Shakti Circle Dharamshala for further examination.

4. The Superintendent Engineer after examining the case referred it for further examination at Zonal Office by a technical Committee by respondent No.3, which found that the petitioner firm/contractor and another contractor/firm 'M/s Gagan Kumar Ohri' were not eligible as both did not fulfill the eligibility criteria that was stipulated in the Notice Inviting Tender (NIT).

5. Accordingly, respondent No.3 i.e. Chief Engineer, Dharamshala Zone referred the matter for further clarification to respondent No.2, who observed that the petitioner firm/contractor did not fulfill the eligibility criteria as the work done certificate relied upon by the petitioner firm/contractor was not of the participating firm, which meant that the petitioner firm/contractor consists of three partners viz; Sh. Pankaj Sharma, S/o Sh. Som Raj, R/o VPO Indora, Tehsil Indora, District Kangra, H.P.; Sh. Mohinder Sharma, S/o Sh. Ram Lal, R/o VPO Damtal, Tehsil Indora, District Kangra, H.P. and Sh. Naresh Padiyal, S/o late Sh. Bal Krishan, R/o Village Sheela Chowk, P.O. Sidhpur, Tehsil Dharamshala, District Kangra, H.P., each having share to the extent of 40%, 40% and 20%, respectively and the work experience furnished is of Naresh Padiyal, whose share is only to the extent of 20%. Therefore, the participating firm i.e. the petitioner firm/contractor did not fulfill the criteria of having work experience of 50% of the estimated cost. Moreover, the similar work stipulated in the NIT was of 'Wire Crate Work in Flood Protection Works', whereas, the petitioner firm /contractor partner, namely, Sh. Naresh Padiyal had furnished the work experience of construction of Science

Block/Buildings which were altogether different from the required 'Flood Protection Works' as stipulated in the NIT. Therefore, the petitioner firm/contractor was held ineligible and further process was undertaken to complete the codal formalities for final awarding the work in favour of the Lowest-1.

6. As per 'NIT', the definition of similar work as set out in the uploaded tender documents is as under:

> *"(a) Experience on similar works executed during the last seven years and details like monetary value, clients proof of satisfactory completion should be furnished before purchase of tender documents. The eligibility criteria are: Satisfactorily completed as prime contractor similar nature work, (**similar nature means firm must have completed wire crate work in flood protection works and concrete work separately or together in a work of following financial values)** at least as under:*
>
> *1. The bidder must have completed three similar works costing each not less than 40% of the given estimated cost for which the bid is invited which instant case is Rs.2,39,54,758(minimum value).*
>
> *Or*
>
> *2. The bidder must have completed two similar works costing each not less than 50% of the given estimated cost for which the bid is invited which instant case is Rs.2,99,43,447.*
>
> *Or*
>
> *3. The bidder must have completed one similar works costing not less than 80% of the given estimated cost for which th bid is invited which instant case is Rs.4,79,09,515.*
>
> *Note:- Work shall be considered completed if it is executed 90% either awarded physical quantity or financial value."*

7. The petitioner firm submitted three numbers work done certificates, which are detailed as under:

S.No.	***Name of Firm/ Contractor***	***Name of Work***	***Value and Remarks***
1.	*M/S Chamunda Construction*	*Providing flood protection work to Lunkhari Khad in Tehsil*	*38,20,393/- (less than required*

	Company	*Bangana Distt. Una (HP) (Sub Head: C/o 455 mtrs. Long earthen embankment including wire crated apron, pitching etc. from RD 5515 to RD 5960 on left bank of Lunkhari Khad.*	*criteria of 40% or 50% or 80%, as the case may be)*
2.	*Naresh Padiyal*	*Construction of Science Block in Govt. Degree College at Dharamshala, Tehsil Dharamshala, Distt. Kangra, H.P. (Sub Head: Construction of building i/c W/S &S/I and rain water harvesting system etc.*	*3,56,46,575/- This work is of construction of buildings and not of Wire Crate Work in Flood Protection Works. Moreover, it is less than the 90% of completion value against awarded amount of Rs.7.65 lacs, therefore, it is of on-going works and not of completed works.*
3.	*Naresh Padiyal*	*Construction of additional accommodation for Judicial Court Complex Block A&B at Dharamshala,Tehsil Dharamshala, Distt. Kangra, H.P. (Sub Head: Balance work of building portion i/c W/S &S/I and rain water harvesting etc.*	*4,51,03,436/- This work is of construction of buildings and not of Wire in Flood Protection Works as per NIT requirement.*

8. The respondents found the value of the work was only Rs.38.20 lacs which did not constitute either 80% or 50% or 40% of the estimated cost put to tender in question i.e. Rs.2,39,20,000/-, and, therefore, the petitioner did not fulfill the condition of NIT and his tender was accordingly rejected.

9. However, Shri B.C.Negi, Senior Advocate assisted by Shri Nitin Thakur, Advocate, for the petitioner, would contend that the act of the respondent-department in rejecting the claim of the petitioner at the technical evaluation for not submitting work of similar nature done of the firm is against the prevalent practice. In addition, he would argue that the respondent-department cannot adopt different yardsticks in judging thees works which depicts biasness and arbitrariness on the part of the respondent-department.

10. On the other hand, the learned Advocate General would argue that the petition is not maintainable as the petitioner does not fulfill the eligibility criteria and was rightly kept out of consideration of the evaluation after the technical bids.

11. We have heard the learned counsel for the parties and gone through the records of the case.

12. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decisions of the Hon'ble Supreme Court in ***R.D. Shetty*** *vs.* ***International Airport Authority (1979) 3 SCC 488, Fertilizer Corporation Kamgar Union*** *vs.* ***Union of India (1981) 1 SCC 568, Assistant Collector, Central Excise*** *vs.* ***Dunlop India Ltd. (1985) 1 SCC 260=1984 (2) SCALE 819, Tata Cellular*** *vs.* ***Union of India (1994) 6 SCC 651= 1995 (1) Arb. LR 193, Ramniklal N.Bhutta*** *vs.* ***State of Maharashtra (1997) 1 SCC 134= 1996 (8) SCALE 417*** *and* ***Raunaq International Ltd.*** *vs.* ***I.V.R. Construction Ltd. (1999) 1 SCC 492=1999 (1) Arb. LR 431 (SC).***

13**.** The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision consideration which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

14. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind

in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

15. It is well settled that the Court should not ordinarily interfere in commercial activities under its power of judicial review and reference in this regard can conveniently be made to a fairly recent judgment of the Hon'ble Supreme Court in ***Silppi Constructions Contractors*** *vs.* ***Union of India and another etc. etc. (2019) 11 Scale 592,*** wherein it was observed as under:

> *"6. Aggrieved, the original writ petitioner is before us in these petitions. This Court in a catena of judgments has laid down the principles with regard to judicial review in contractual matters. It is settled law that the writ courts should not easily interfere in commercial activities just because public sector undertakings or government agencies are involved.*
>
> *7. In Tata Cellular vs. Union of India (1994) 6 SCC 651, it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are :*
>
> > *"94. .....*
> >
> > *(1) The modern trend points to judicial restraint in administrative action.*
> >
> > *(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
> >
> > *(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
> >
> > *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.*
> >
> > *Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
> >
> > *(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*

> *(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

8. In Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492, this Court held that superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.

9. In Air India Limited vs. Cochin International Airport Ltd.(2000) 2 SCC 617, this Court once again stressed the need for overwhelming public interest to justify judicial intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

10. In Karnataka SIIDC Ltd. vs. Cavalet India Ltd.(2005) 4 SCC 456, it was held that while effective steps must be taken to realise the maximum amount, the High Court exercising its power under Article 226 of the Constitution is not competent to decide the correctness of the sale affected by the Corporation.

11. In Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd.(2005) 6 SCC 138, it was held that while exercising power of judicial review in respect of contracts, the Court should concern itself primarily with the question, whether there has been any infirmity in the decision making process. By way of judicial review, Court cannot examine details of terms of contract which have been entered into by public bodies or State.

12. In B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.(2006) 11 SCC 548, it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

13. In Jagdish Mandal vs. State of Orissa (2007) 14 SCC 517, it was held:

> ***"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts,***

certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold……."

14. In Michigan Rubber (India) Ltd. vs. State of Karnataka & Ors. (2012) 8 SCC 216, it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

15. In Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818, it was held that a mere disagreement with the decisionmaking process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

16. In Montecarlo vs. NTPC Ltd. AIR 2016 SC 4946, it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument

relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

17. In Municipal Corporation, Ujjain and Another vs. BVG India Ltd. and Others (2018) 5 SCC 462 , it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/company to carry out the work. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work.

18. Most recently this Court in Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and Others (2019) 6 Scale 70 observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes

do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

16. Similar reiteration of law can be found in another recent judgment of the Hon'ble Supreme Court in ***M/s N. Ramachandra Reddy*** *vs.* ***State of Telangana and others, AIR 2019 SC 4182***.

17. Bearing in mind the aforesaid exposition of law, we really do not find any infirmity much less an illegality in the action of the respondents in rejecting the case of the petitioner for not having requisite experience of executing similar works, as the combined value of the work of the petitioner is Rs.38.20 lacs as against the requirement of Rs.2,39,20,000/- and the same does not constitute either 80% or 50% or for that matter 40% of the estimated cost put to the tender in question.

18. Confronted with this, learned Senior counsel for the petitioner would argue that the respondents should have taken into consideration the other works of similar nature executed by one of its partner Naresh Padiyal as depicted at serial No. 2 and 3.

19. We have considered the submissions and are of the considered view that now that the respondents have evaluated similar contracts towards experience, it is not open for this Court to review the said order, especially, when the same is neither perverse, mala fide nor intended to favour one of the tenderers.

20. In drawing such conclusion, we are supported by the judgment of the Hon'ble Supreme Court in ***Afcons Infrastructure Ltd.*** *vs.* ***Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818*** at 825-26, para 4.2(a) of Section III of the tender conditions in support of certain similar contracts, as previous works experience. The question before the Hon'ble Supreme Court was whether an inter-state high speed railway project could be similar to metro civil construction work. After laying down the parameters of judicial review and referring to various judgments for the same, the Hon'ble Supreme Court held as under:

> *"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.*
>
> *16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.*

21. In ***Montecarlo Ltd.*** *vs.* ***NTPC Ltd. (2016) 15 SCC 272 at 288***, the Hon'ble Supreme Court referred to various judgments including the judgment in ***Afcons Infrastructure Ltd.***(supra) and concluded as follows:

> *"26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."*

22. Similar issue thereafter came up before the Hon'ble Supreme Court in ***Sam Built Well Private Limited*** *vs.* ***Deepak Builders and others,*** **(2018) 2 SCC 176** wherein the Hon'ble Supreme Court after placing reliance on the aforesaid judgments observed as under:

> *"12.We have already noticed that three expert committees have scrutinized Respondent No.1's tender and found Respondent No.1 to be*

ineligible. The impugned judgment of the Division Bench of the High Court expressly states that no malafides are involved in the present case. Equally, while setting aside the judgment of the learned Single Judge, the Division Bench does not state that the three expert committees have arrived at a perverse conclusion. To merely set aside the judgment of the learned Single Judge and then jump to the conclusion that Respondent No.1's tender was clearly eligible, would be directly contrary to the judgments aforestated. Not having found malafides or perversity in the technical expert reports, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical evaluation, best left to technical experts, would be outside its ken. As a result, we find that the learned Single Judge was correct in his reliance on the three expert committee reports. The Division Bench, in setting aside the aforesaid judgment, has clearly gone outside the bounds of judicial review. We, therefore, set aside the judgment of the Division Bench and restore that of the learned Single Judge."

23. It is next contended by learned Senior Counsel for the petitioner that the respondents cannot adopt two different yardsticks while carrying out the technical evaluation. He in particular has invited our attention to the proceedings of the meeting for opening of technical bids held on 16.01.2015 (Annexure P-9) regarding Swan River Flood Management Project from Daulatpur Bridge to Gagret Bridge in Main Swan River and all tributaries joining main Swan River from Daulatpur Bridge to Santokhgarh Bridge in Distt. Una (HP) (Phase-4th) (SH:- Construction of Earthen embankment including wire crated apron, stone pitching & RCC bod etc. from RD 31050/0 to 5000 on both sides of "Panjawar/Nagnoli Khad" on Right bank of Swan River (From RD 31050/0 to 2000 on both side of Khad) (For 1st km & 2nd km).

24. It is argued that while evaluating these bids of the similar nature, the respondents awarded the work to M/s R.S. Constructions after holding its work of concrete lining of Rajpura Disty at District Fatehgarh Sahib satisfactory towards experience of having successfully completed similar works.

25. We have considered the argument and in absence of any particulars and records regarding the terms and conditions of the tender, the nature of the work etc. are not in a position to uphold the contention, but nonetheless, we can definitely observe that the

respondents after specifically and clearly laying down the terms and conditions should not and cannot deviate from the conditions. After-all, the respondents being a State cannot be permitted to say that "*show me the face and I will show you the rule".*

26. Learned Senior Counsel for the petitioner would then argue that since this substantial compliance with the tender conditions regarding experience and executing the work had been made, the claim of the petitioner should not have been rejected.

27. In support of such contention, reliance is placed by the learned Senior Counsel for the petitioner, on the judgment of the Hon'ble Supreme Court in ***B.S.N. Joshi & Sons Ltd.*** *vs.* ***Nair Coal Services Ltd. and others (2006) 11 SCC 548***, more particularly, the observations made in paragraphs No. 8, 24, 28, 66(v) and 69 and another judgment of the Hon'ble Supreme Court in ***Tejas Constructions and Infrastructure Private Limited*** *vs.* ***Municipal Council, Sendhwa and another (2012) 6 SCC 464***, more particularly, the observations made in paragraphs No. 27 to 31.

28. We have gone through these judgments and find that the same are not at all applicable to the facts of the instant case. What has been laid in the aforesaid judgments is that when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by the tenderers on their own merits and if it is ultimately found that the successful bidder had in fact substantially complied with the purport and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.

29. This is not the fact situation obtaining in the instant case because as against the requirement of the bidder having executed the similar works of at least Rs.2,39,20,000/-, the petitioner had only an experience of executing work only of Rs.38.20 lacs and could not, therefore, be said to have substantially complied with the conditions of the tender and thus his claim has rightly been rejected at the technical bid stage.

30. As a last ditch effort, learned Senior Counsel for the petitioner would argue that the correctness of the order passed by the respondents can be judged only on the basis of the reasons stated in the impugned order and not on the basis of the subsequent materials, much less on the basis of the affidavit filed before this Court.

31. Strong reliance in support of such contention is placed on the judgment rendered by a Constitutional Bench of the Hon'ble Supreme Court in ***Mohinder Singh Gill and another*** *vs.* ***The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405***, wherein it was observed as under:

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."....*

32. It is not in dispute that one of the primary reasons for not considering the claim of the petitioner as per the rejection letter is that "*Further, it has been found that M/S Chamunda Construction Company VPO &Tehsil Indora Distt. Kangra HP has uploaded work done certificates which are not of the participating firm*". Whereas, now the claim of the petitioner is sought to be rejected on additional grounds as set out above.

33. Obviously, there can be no quarrel with the proposition as laid down by the Hon'ble Supreme Court in ***Mohinder Singh Gill's case*** (supra), but then it cannot be ignored that the petitioner is not eligible and cannot be awarded the work in question and the subsequent material to support the reason given by the respondents is in the larger public interest.

34. The Hon'ble Supreme Court in its subsequent judgment has clearly held that the propositions laid down in ***Mohinder Singh Gill's case*** (supra) are not applicable where larger public interest is involved and, in such circumstances, the additional ground is to be looked into to examine the validity of the order.

35. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Chairman, All India Railway Recruitment Board and another*** *vs.* ***K.Shyam Kumar and others (2010) 6 SCC 614*** and it shall be apposite to refer to paragraphs 44 and 45 of the judgment which reads as under:

> *"44. We are also of the view that the High Court has committed a grave error in taking the view that the order of the Board could be judged only on the basis of the reasons stated in the impugned order based on the report*

of vigilance and not on the subsequent materials furnished by the CBI. Possibly, the High Court had in mind the constitution bench judgment of this Court in Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Anr. (1978) 1 SCC 405.

45. We are of the view that the decision maker can always rely upon subsequent materials to support the decision already taken when larger public interest is involved. This Court in Madhyamic Shiksha Mandal, M.P. v. Abhilash Shiksha Prasar Samiti and Others, (1998) 9 SCC 236 found no irregularity in placing reliance on a subsequent report to sustain the cancellation of the examination conducted where there were serious allegations of mass copying. The principle laid down in Mohinder Singh Gill's case is not applicable where larger public interest is involved and in such situations, additional grounds can be looked into to examine the validity of an order. Finding recorded by the High Court that the report of the CBI cannot be looked into to examine the validity of order dated 04.06.2004, cannot be sustained."

36. The aforesaid judgment was then followed by the Hon'ble Supreme Court in ***PRP Exports and others*** *vs.* ***Chief Secretary, Government of Tamil Nadu and others (2014) 13 SCC 692, in 63 Moons Technologies and others*** *vs.* ***Union of India and others (2019) SCC online SC 624***, wherein the Hon'ble Supreme Court clarified that though there is no broad principles that ***Mohinder Singh Gill's*** test will not apply where a larger public interest is involved, subsequent materials in the form of facts that have taken place after the order in question is passed, can always be looked at in the larger public interest, in order to support the administrative order.

37. All the aforesaid judgments have in turn now been considered and approved by three Judge Bench of the Hon'ble Supreme Court in ***Internet and Mobile Association of India*** *vs.* ***Reserve Bank of India (2020) 3 Madras Law Journal 541,*** wherein it was observed as under:

" M.S.Gill Reasoning

6.126.The impugned Circular cannot be assailed on the basis of M. S. Gill test, for two reasons. First is that in Chairman, All India Railway Recruitment Board v. K. Shyam Kumar & Ors,(2010) 6 SCC 614, this court held that MS Gill test may not always be applicable where larger public interest is involved and that in such situations, additional grounds can be

looked into for examining the validity of an order. This was followed in PRP Exports & Ors v. Chief Secretary, Government of Tamil Nadu & Ors.,(2014) 13 SCC 69. In 63 Moons Technologies ltd. & Ors v. Union of India & Ors,(2019) SCC online SC 624, this court clarified that though there is no broad proposition that MS Gill test will not apply where larger public interest is involved, subsequent materials in the form of facts that have taken place after the order in question is passed, can always be looked at in the larger public interest, in order to support an administrative order. The second reason why the weapon of MS Gill will get blunted in this case, is that during the pendency of this case, this court passed an interim order on 21-08- 2019 directing RBI to give a point-wise reply to the detailed representation made by the writ petitioners. Pursuant to the said order, RBI gave detailed responses on 04-09-2019 and 18-09-2019. Therefore, the argument based on MS Gill test has lost its potency."

38. From the aforesaid discussion and the reasons as stated above, it is abundantly clear that the petitioner does not fulfill the eligibility criteria as per NIT and since the work for which the NIT is issued carries a special nature of work and it is the prerogative of the respondents/tender approving authority to include any term and condition as per the requirement of the work to be executed at field and the same being not perverse, arbitrary or mala fide or with an intent to benefit anyone of the contractors cannot be interfered with.

39. Accordingly, we find no merit in this writ petition and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Jawahar Lal ..... Petitioner

versus

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

CWP No.1510 of 2017
Date of Decision: 7.9.2020

Constitution of India, 1950- Article 226- Writ of mandamus for directing State to acquire land of petitioner which is actually being used by it for public purpose- State raising plea of voluntary surrender of land- Delay/ time limit in filing writ- Effect- Held, where State has not taken any steps for acquisition of land on ground that it was expressly or impliedly surrendered at relevant time by the landowner for public purpose, landowner can invoke jurisdiction of Court and refute such stand

of express or implied consent only within time within which a relief can be claimed by him in a civil suit- Question can be decided in writ petition itself. (Para 7)

Cases referred:

Shankar Dass Vs. State of Himachal Pradesh and Connected matters,2013(2) Him. L.R.(FB) 698;
K.B.Ramachandra Raje Urs (Dead) by Legal Representatives Vs. State of Karnataka and others(2016)3 Supreme Court Cases 422;
Tuka Ram Kana Joshi and others through Power of Attorney Holder versus Maharashtra Industrial Development Corporation and others (2013) 1 Supreme Court Cases 353;
Jeet Ram Vs. State of Himachal Pradesh and others, Latest HLJ 2016 (HP) 615;
State of U.P. and Others Vs. Manohar, (2005)2 Supreme Court Cases 126;

Whether approved for report? Yes.

For the Petitioner : Mr. Daleep Singh Kaith, Advocate, through video conferencing.

For the Respondents : Mr. Sudhir Bhatnagar, Additional Advocate General with

Mr. Kunal Thakur, Deputy Advocate General, through video-conferencing.

Sandeep Sharma, Judge*(oral)*

By way of instant petition filed under Article 226 of the Constitution of India, petitioner has prayed for the following reliefs:-

(i) That writ in the nature of mandamus may kindly be issued, directing the respondents to acquire the land of the petitioner measuring 6.50 biswas compromised in Khasra No.955, Khewat No. 43/42 min, Khatauni No.1366/135min, situated in Mohal Shaneri, Patwar Circle Shingla, Tehsil Rampur, District Shimla, H.P. within time bound period, since the respondents have used the above mentioned land of the petitioner for the construction of Shingla to Shaneri road.

(ii) That writ in the nature of mandamus may kindly be issued, directing the respondents to grant the compensation to the petitioner at the market value of the land prevailing at present as per the ratio laid down by this Hon'ble Court as well as Hon'ble Apex Court."

2. Precisely, the facts of the case as emerge from the pleadings adduced on record by the respective parties are that the land of the petitioner bearing Khasra No.955, Khewat No. 43/42min, Khatauni No.1366/135min, situate in Mohal Shaneri, Patwar Circle Shingla, Tehsil Rampur, District Shimla, H.P., came to be used by the respondents-State for the construction of road namely "Dakolar-Shingla- Shaneri, work whereof started in the year, 1997 and as per the reply filed by respondents No.1 to 3 construction work of aforesaid road stands completed in the year 1998, as is evident from the copies of measurement book placed on record by respondents No.1 to 3 alongwith their reply (Annexure R-1 colly). Since, other similarly situate persons received due amount of compensation on account of use of their land for the construction of road in question, petitioner also filed various representations to the Department to pay him compensation, but since no action ever came to be taken at the behest of the respondents-State qua the prayer made on behalf of the

petitioner, he was compelled to approach this Court in the instant proceedings, praying therein for the reliefs, as have been reproduced hereinabove.

3. Having heard learned counsel representing the parties and perused the material adduced on record, this Court finds that there is no dispute inter-se parties as far as use of land of the petitioner for the construction of road in question, is concerned. Respondents No.1 to 3 in their reply though have made an attempt to make out a case that no land belonging to the petitioner ever came to be utilized for the purpose of construction of road in question, but if their reply is read in its entirety, it stands virtually admitted that 315 Sq.meter of land was utilized for the construction of road in question. Aforesaid respondents in their reply have stated that road in question was constructed on the persistent demand of the inhabitants of the area as they were willing to have road facility in order to connect with the main National Highway and also to have their agricultural produce marketed at different destination in the country. Respondents No.1 to 3 have further stated that land owners including the predecessor of the petitioner had voluntarily surrendered their land in their favour, but no formal deeds were executed and as such, petitioner is not entitled to any compensation qua the land, if any, used by the respondents for the construction of the road in question. Besides above, respondents have also stated in their reply that since 1998 onwards neither predecessor of the petitioner nor the petitioner raised any objections or any demand with respect to payment of compensation and as such, present petition deserves outright rejection on the ground of inordinate delay of more than 20 years.

4. Respondent No.4, Land Acquisition Officer, HPPWD, has filed its separate reply, perusal whereof reveals that the petitioner is the co-owner of the land bearing Khasra No.955, Khewat No.41/42, Khatauni No.1366/135min, situate in Mohal Shaneri, Tehsil Rampur, District Shimla, H.P., and such land stands utilized by respondents No.1 to 3 for the construction of road in question. Respondent No.4 has categorically stated in para-4 of its reply that representation, dated 27.5.2017 *(Annexure P-4*) was received in the office and whereafter necessary action was taken to demarcate the land. Field Kanungo, Rampur in the demarcation report dated 17.7.2017 has reported that the road of HPPWD has been constructed in the land comprised in Khasra No.955/1, measuring 00-03-41 Hectares on the spot, but there is no entry to this effect in the revenue record *(Annexure R-4/1)*. It has been further stated by respondent No.4 that after demarcation, the tatima of spot was prepared *(Annexure R-4/2)* and Field Kanungo also recorded the statement of the petitioner and representatives of the PWD. Respondent No.4 in its reply has stated that since other adjoining land owners have received the compensation, petitioner should also be given compensation.

5. Though, in the case at hand an attempt has made on behalf of the respondents to defeat the claim of the petitioner on the ground of delay and laches, but there is no specific denial to the fact that petitioner had been repeatedly requesting the respondents to pay compensation.

At this stage, learned Additional Advocate General has placed reliance upon the judgment rendered by the Full Bench of this Court in **Shankar Dass Vs. State of Himachal Pradesh and Connected matters,**2013(2) Him. L.R.(FB) 698, wherein following question was referred for adjudication by Full Bench of this Court:-

> *"In cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads, on the ground that the required land has been willingly surrendered either orally or otherwise or with implied or*

express consent by the owners at the relevant time, can they seek a direction in a writ petition filed after a long time for a direction to the State to initiate land acquisition proceedings in respect of their such land which has been utilized for the purposes of construction of the road?".

6. The reference was answered by the Full Bench of this Court in the following manner:-

"As per the view of the majority, the Reference is answered as follows:

"In cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads on the ground that the required land had been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, they can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition the same can be considered in the Writ Petition itself." Post these cases in the respective Benches."

7. In the aforesaid judgment Full Bench of this Court has held that in cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads, on the ground that the required land has been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, land owners can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit.

8. In the case at hand, factum of the land having been utilized for the construction of "Dakolar-Shingla- Shaneri" road is not disputed by the respondents-State and similarly, no material, worth credence, has been placed on record by the respondent-State to demonstrate that land in question was utilized by the State for the construction of the road with the consent of the petitioner implied or otherwise. There is no cogent explanation given by the State as to why the land of the petitioner was not acquired as per the provisions of Land Acquisition Act when the land of similarly situate persons was duly acquired under the provisions of Land Acquisition Act and they have been duly compensated for utilization of their land as per law.

9. Once it stands admitted in the reply having been filed by the respondents that other land owners, whose land was also utilized for the construction of the road in question were paid due compensation, respondent-State cannot be allowed to defeat the claim of the petitioner on the ground of delay and laches.

10. The Hon'ble Supreme Court in **K.B.Ramachandra Raje Urs (Dead) by Legal Representatives Vs. State of Karnataka and others**(2016)3 Supreme Court Cases 422 has held in para 28 as under:-

"28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and again it has been said that while exercising the jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness of governmental action do arise, the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by the Court. Insofar as the knowledge of the

> appellant-writ petitioner with regard to the allotment of the land to Respondent 28 Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when Respondent 28 Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the appellant writ petitioner."

11. As per the judgment of Full Bench rendered in ***Shankar Dass case*** *supra*, though land owner(s) whose claim(s) is/are sought to be denied/refuted by the respondent-State on the ground that required land had been willingly surrendered either orally or otherwise or with implied or express consent by the owners can invoke jurisdiction of the Court within the time within which such a relief can be claimed in civil suit in the competent Court of law, but in the aforesaid judgment, it has been categorically held that once such question is thus raised in a writ petition, same can be considered in the writ petition.

12. In the case at hand, if reply of respondents No.1 to 3 is ready in its entirety, it has been categorically admitted that though revenue record annexed with the petition reveals that some land of petitioner has been used for construction of road, but since no demarcation report as well as documents has been placed on record, it cannot be ascertained that how much land of the petitioner was utilized for the construction of road. However, as has been taken note hereinabove, respondent No.4 in its reply has categorically stated that pursuant to representation received from the petitioner, land of the petitioner was demarcated i.e. Annexure R-4/1. Respondents No.1 to 3 have also admitted the factum with regard to use of land to the extent of 315 sq. Meter belonging to the petitioner for the construction of road and as such, there is no justification at all to deny the claim, as has been raised by the petitioner in the instant petition.

13. The Hon'ble Apex Court in ***Tuka Ram Kana Joshi and others through Power of Attorney Holder versus Maharashtra Industrial Development Corporation and others*** (2013) 1 Supreme Court Cases 353; has held that question of delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief, however court is required to exercise judicial discretion. The said discretion is dependent on the facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment.

14. It would be profitable to reproduce paras No.12 to 14 of the aforesaid judgment herein below:-

> *"12. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.*
>
> *13. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the*

remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide: P.S. Sadasivaswamy v. State of T.N. AIR 1974 SC 2271; State of M.P. & Ors. v. Nandlal Jaiswal & Ors., AIR 1987 SC 251; and Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors., (2009) 1 SCC 768;)

14. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non- deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Petitioners. (Vide: Durga Prasad v. Chief Controller of Imports and Exports & Ors., AIR 1970 SC 769; Collector, Land Acquisition, Anantnag & Anr. v. Mst. Katiji & Ors., AIR 1987 SC 1353; Dehri Rohtas Light Railway Company Ltd. v. District Board, Bhojpur & Ors., AIR 1993 SC 802; Dayal Singh & Ors. v. Union of India & Ors., AIR 2003 SC 1140; and Shankara Co-op Housing Society Ltd. v. M. Prabhakar & Ors., AIR 2011 SC 2161)

15. The Hon'ble Apex Court in State of U.P. and others versus Manohar (supra), has held that constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the 44th Amendment to the Constitution, Article 300A has been placed in the Constitution, which reads as follows : 300A- persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law. On the basis of aforesaid judgment rendered by Hon'ble Apex Court, this Court in catena of cases, has reiterated that no person can be deprived of his property without following due process of law.

16. The Hon'ble Supreme Court in ***State of U.P. and Others Vs. Manohar,*** (2005)2 Supreme Court Cases 126 has held as under:-

"5. As a matter of fact, the appellants were unable to produce even a scrap of evidence indicating that the land of the respondent had been taken over or acquired in any manner known to law or that he had ever been paid any compensation in respect of such acquisition. That the land was thereafter constructed upon, is not denied.

6. Having heard the learned counsel for the appellants, we are satisfied that the case projected before the Court by the appellants is utterly untenable and not worthy of emanating from any State which professes the least regard to being a welfare State. When we pointed out to the learned counsel that, at this stage at least, the State should be gracious enough to accept its mistake and promptly pay the compensation to the respondent, the State has taken an intractable attitude and persisted in opposing what appears to be a just and reasonable claim of the respondent.

7. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the 44th Amendment to the Constitution, Article 300A has been placed in the Constitution, which reads as follows: "300A- Persons not to be deprived of property save by authority of law _ No person shall be deprived of his property save by authority of law."

8. This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities. In our view, this case was an eminently fit one for exercising the writ jurisdiction of the High Court under Article 226 of the Constitution. In our view, the High Court was somewhat liberal in not imposing exemplary costs on the appellants. We would have perhaps followed suit, but for the intransigence displayed before us."

17. This Court in ***Jeet Ram Vs. State of Himachal Pradesh and others,*** Latest HLJ 2016 (HP) 615 has held as under:-

> "4. No person can be deprived of his property without following due process of law. Respondents have utilized the land of the petitioner without paying him any compensation. There is no contemporaneous record placed on record by the respondent-State to show that the petitioner had consented for the construction of the road through his land. It is evident from the contents of Annexure P-1 that the nature of land in Khasra No. 279, as per Jamabandi for the year 2001-02, is Bagicha. A valuable piece of land of the petitioner has been utilized in an arbitrary manner by the respondent-State, for the purpose of construction/widening of the Shillaru-Reog road.
>
> 5. It is also argued by Mr. Anup Rattan, Additional Advocate General, that there is delay in filing the present petition, as construction of the road on the suit land was only undertaken on 5.6.2006. Immediately thereafter, the petitioner had served a notice upon the respondents on 30.4.2007. Some action ought to have been taken on notice dated 30.4.2007. Petitioner was constrained to serve another notice on 22.9.2009. Despite that no action has been taken by the respondent-State to redress the grievance of the petitioner.
>
> 6. Legitimate right of a citizen, that too pertaining to valuable property, cannot be defeated merely on the technical objections. There ought to be difference in the approach of a private litigant vis-à-vis State. The State stands on a higher pedestal. It is the duty of the functionaries of the State to maintain the Rule of Law. There cannot be any estoppel/ waiver against the constitutional/fundamental/legal rights."

18. Respondent-State cannot deprive the person of his property without following due process of law and as such, petitioner, whose land admittedly came to be utilized for the construction of road, is also entitled to compensation, as has been paid to other similarly situate persons.

19. Consequently, in view of the above, the present petition is allowed and the respondents are directed to take steps, if not already taken, for acquisition of land belonging to the petitioner utilized by it for construction of road and thereafter pay him compensation at the prevalent market rate. Since, the petitioner had been running from pillar to post to get his due and admissible compensation for the last so many years, this Court hopes and trust that respondents would do the needful expeditiously, preferably within a period of six months from today. Pending application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL, JUDGE.

State of H.P. and others ...Petitioners

Versus

Sunder Ram ...Respondent

CWP No. 1797 of 2017
Reserved on : 02.09.2020
Date of decision: 07.09.2020

Central Civil Services (Pension) Rules, 1972 (Rules)- Pensionary benefits - Government Instructions dated 2.5.2019- Minimum qualifying service of 10 years- Computation of- Held, there was dispute regarding date of birth of employee- After inquiry, it was corrected in official records- He also admitted that it was the correct date of his birth- He stood retired on basis of corrected date of birth- From his regularization till retirement he rendered regular service for 8 years, less than the minimum required qualifying service- But service of 10 years rendered on daily wage is directed to be counted towards qualifying service for pensionary benefits as per ratio laid down in Sunder Singh vs. State, Civil Appeal No. 6309 of 2017. (Para 4 & 5)

Whether approved for reporting : YES

For the Petitioners:	Mr. Ashok Sharma, Advocate General, with Mr. Ranajan Sharma, Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals, Ms. Seema Sharma Deputy Advocate General.
For the Respondents:	Mr. J.L. Bhardwaj, Advocate

Jyotsna Rewal Dua,J.

The erstwhile H.P. State Administrative Tribunal (in short "the Tribunal") allowed the prayer of the respondent/original writ petitioner by directing the State to *'release withheld amount of leave encashment, gratuity and pension with interest at the rate of 9% per annum from the date of voluntary retirement till payment, except the gratuity, on which the interest was to be payable after three months from the retirement*'. Aggrieved, State has challenged the decision of the Tribunal by means of instant writ petition.

2. Facts :-

For convenience, the parties hereinafter are being referred to as they were before the Tribunal.

2(i) Writ petitioner was regularized as Helper on 01.04.1998 on completion of 10 years of service as daily wager.

2(ii) It appears from the record that a complaint was made in respect of petitioner's furnishing his false date of birth to the employer. A preliminary inquiry was conducted in the matter. In the preliminary inquiry report dated 16.12.2008, it was found that the birth certificate, furnished by the petitioner to the employer projecting his date of birth as 27.11.1952, was false. The report ascertained the actual date of petitioner's birth as 14.07.1946 certified on the basis of contemporary school record. While the inquiry proceeding was going on, petitioner, apparently in order to evade the penalty, sent a notice to the employer on 13.03.2009 seeking voluntary retirement. Even thereafter, petitioner was afforded an opportunity to explain his position regarding his correct date of birth. Petitioner, however, could not satisfy the competent authority about his correct date of birth and, therefore, in such circumstances expressed his willingness to retire from service citing domestic reasons. Resultantly, taking a lenient view, Office Order was issued on 31.03.2009 retiring him from service with immediate effect.

2(iii) Trying to take advantage of the Office Order, dated 31.03.2009 retiring the petitioner with immediate effect, CWP No. 7545 of 2010 was preferred by him with the following prayer :-

> *"(i) That the writ in the nature of mandamus may kindly be issued directing the respondents to release the retiral benefits i.e. GPF, Leave encashment, gratuity and commuted pension alongwith interest @ 12% per annum w.e.f. 31.03.2009 till its payment for which the petitioner humbly prays."*

This writ petition was decided on 12.05.2011. Respondents were directed to take steps for finalizing the proceedings and for disbursing the due, admissible and eligible retiral benefits to the petitioner within a period of one month.

2(iv) It is not in dispute that the respondents thereafter released the benefits which, according to them, were due and admissible to the petitioner by taking his date of retirement as 31.07.2006. Still not satisfied, the petitioner preferred CWP No. 7996 of 2013 with the following main prayer :-

> *"(i) That the writ in the nature of mandamus may kindly be issued directing the respondents to release the withhold retiral benefits i.e. remaining amount of Leave Encashment i.e. Rs. 13,083/-, Gratuity and commuted pension alongwith entire arrears as well as to pay the interest @ 12% per annum w.e.f. 01.04.2009 till its*

realization, besides directing the respondents to pay the interest @ 12% per annum on the amount already paid to the petitioner i.e. GPF and part payment of leave encashment from 01.04.2009 till its actual payment made to the petitioner for which the petitioner humbly prays."

This writ petition was allowed by the learned Tribunal as CWP(TA) No. 1957 of 2015, vide impugned judgment, dated 17.05.2016. The operative part of the judgment reads as under ;-

"6. In view of the above, the transferred application is allowed and the respondents are directed to release withheld amount of leave encashment, gratuity and pension, with interest at the rate of 9% per annum, from the date of voluntary retirement till payment except the gratuity on which the interest shall be payable after three months of the retirement."

Aggrieved, the State has preferred instant writ petition on the ground that all due and admissible benefits stand released to the petitioner by taking his date of retirement as 31.07.2006 and nothing more is due towards him.

3. Observations :-

3(i) The record shows that during the pendency of CWP No. 7545 of 2010, the respondents had issued an Office Order on 22.02.2011 in supersession to order dated 31.03.2009, reflecting the date of retirement of the petitioner as 31.07.2006. This date of retirement of the petitioner was in tune with his correct date of birth i.e. 14.07.1946.

3(ii) It is also seen from the record that after the disposal of CWP No. 7545 of 2010, petitioner had himself given an undertaking to the respondents on 23.06.2011 that he be treated as retired from service w.e.f. 31.07.2006 and his financial benefits be also determined accordingly. He had further stated therein that he accepts his date of birth as 14.07.1946. The order, dated 22.02.2011 as well as the undertaking/consent/request letter of the petitioner dated 23.06.2011 have not been disputed by the petitioner. Therefore, in the aforesaid circumstances, the date of retirement of the petitioner has to be taken as 31.07.2006 and his date of birth as 14.07.1946. Learned counsel for the petitioner also does not dispute these facts.

In the aforesaid backdrop, the impugned judgment passed by learned Tribunal directing the appellant to release retiral benefits to the petitioner by taking his date of retirement as 31.07.2006, therefore, becomes unsustainable.

4. Pension :-

The only point now raised before us by learned counsel for the petitioner is that even after retiring from service on 31.07.2006, petitioner is entitled for pension.

Presently, the respondents have not released the pension to the petitioner on the ground that from the date of his regularization w.e.f. 1.04.1998 till the date of his retirement i.e. 31.07.2006, petitioner had rendered only 8 years of regular service, which is less than 10 years of service required under CCS (Pension) Rules 1972 for release of pension. The point is no more res integra. Hon'ble Apex Court in **Sunder Singh** Vs. **State of Himachal Pradesh,** Civil Appeal No. 6309 of 2017, decided on 08.03.2018 held as under :-

> *"6. Accordingly, we direct that w.e.f. 01.01.2018, the appellants or other similarly placed Class-IV employees will be entitled to pension if they have been duly regularized and have been completed total eligible service for more than 10 years. Daily wage service of 5 years will be treated equal to one year of regular service for pension. If on that basis, their services are more than 8 years but less than 10 years, their service will be reckoned as ten years."*

It is not in dispute that services of the writ petitioner were regularized on 01.04.1998 after his putting in 10 years of daily wage service. Case of petitioner for grant of pension is covered under the judgment in Sunder Singh's case (supra). Petitioner had become a regular employee of the State prior to 2003. Therefore, he becomes entitled to pension as his case even otherwise falls within the ambit of Instruction No. NO/PWE/88-14/PEN/REP/Sunder Singh Vs. State of H.P./ES-2929-13049, issued by appellant-State on 25.02.2019 pursuant to judgment rendered by Hon'ble Apex Court in Sunder Singh's case (supra). Relevant extract from para 6 of the same is reproduced hereunder :-

> *"6. Therefore, the Administrative Department concerned, while implementing the judgment, may invariably keep the following points in view at the time of consideration of the case(s) for allowing the benefit for pension in respect of petitioner of Class-IV employees similarly situated to Shri Sunder Singh before forwarding it to the Accountant General H.P. :-*

1. *Such Class-IV Employees should have been regularized prior to 15-05-2003 and should be governed by the Central Civil Services (Pension) Rules-1972.*
2. *In view of Paras-2 & 6 of the judgment, only similarly placed Class-IV employees who have been duly regularized and have completed 10 years daily wage service and whose cases are similar to appellant Shri Sunder Singh will be entitled to pension w.e.f. 01.01.2018. The weightage of service rendered as daily wage service of five years will be treated as one year of regular service for the purpose of pension……."*

In case, admissible, two years in accordance with judgment in Sunder Singh's case (supra) are added to petitioner's eight years of regular service, then total period of his regular service will become ten years, entitling him benefit of pension.

5. Therefore, in view of the observations made above, impugned judgment passed by erstwhile H.P. State Administrative Tribunal directing the appellant to release financial benefits to the petitioner by taking his date of retirement as 31.03.2009 is quashed and set aside. Writ petitioner (respondent herein) is, however, held entitled to pension on the basis of judgment of Hon'ble Apex Court delivered in Sunder Singh's case (supra). Appellant is directed to take appropriate steps in this regard within a period of eight weeks from today.

With the aforesaid observations, the writ petition stands disposed of, so also the pending applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL, JUDGE.

Kanwar Singh Sharma .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No. 1954 of 2020.
Reserved on : 26.08.2020.
Date of decision: 02.09.2020.

Constitution of India, 1950- Articles 14 & 226- Disengagement of petitioner as an expert after expiry of contractual period allegedly on ground of his unsatisfactory performance etc.- Challenge thereto by way of Writ petition by contending that action of respondents is arbitrary- Held, passing an order for an unauthorized purpose constitutes malice in law- There was no complaint regarding working of petitioner either as Social Development Expert or as a Law Officer- Central Government vide instructions directed not to disengage employees engaged on casual or contractual basis. Contracts of other similarly situated

persons engaged by the respondents were extended- Name of petitioner qua his performance was inserted in the noting sheets subsequently for seeking justification for not continuing with his contract- It is colourable exercise and deceived by illusion- Petition allowed- Order of respondents regarding disengagement of petitioner set aside- Respondents directed to reengage petitioner on same terms and conditions on which he was working earlier till completion of project. (Para 4, 11, 34 & 38)

Cases referred:
State of Punjab vs. Gurdial Singh and others [1980] 1 S.C.R. 1071;
West Bengal State Electricity Board vs. Dilip Kumar Ray, AIR 2007 SC 976;
State of Punjab vs. V.K. Khanna & Ors., AIR 2001 SC 343;
State of A.P. and others vs. Goverdhanlal Pitti, AIR 2003 SC 1941;
Probodh Sagar vs. Punjab SEB & Ors., AIR 2000 SC 1684;
Chairman and MD, BPL Ltd. vs. S.P. Gururaja & Ors., AIR 2003 SC 4536;
Kalabharati Advertising vs. Hemant Vimalnath Narichania & Ors., AIR 2010 SC 3745;

Whether approved for reporting? *Yes*

For the Petitioner : Mr. Shrawan Dogra, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Desh Raj Thakur, Additional Advocate Generals, Ms. Seema Sharma and Mr. Bhupinder Thakur, Deputy Advocate Generals, for respondents No.1 and 2.

Mr. Manohar Lal Sharma, Advocate, for respondent No.3.

Mr. H.S.Rangra, Advocate, for respondent No.4.

Mr. Shashi Shirshoo, Central Government Counsel, for respondent No.5.

Tarlok Singh Chauhan, Judge

Aggrieved by the disengagement orders dated 12.05.2020 (Annexure P-8) and dated 08.05.2020 (Annexure P-10), the petitioner has filed the instant petition for grant of the following substantive reliefs:

> *"(i) That the disengagement orders Annexure P-8 dated 12-5-2020 and Annexure P-10 dated 8-5-2020 may kindly be quashed and set aside.*
>
> *(ii) That the respondents may kindly be directed to allow the petitioner to continue his services till the Scheme is completed in 2022, and extend his contract period like other Experts.*
>
> *(iii) That act and conduct of respondents may kindly be declared as arbitrary and discriminatory. The respondents may kindly also be directed to release the deducted salary of petitioner with interest."*

2. The petitioner retired as Senior Law Officer on 31.12.2017 from the Office of the Director, Urban Development-cum-Mission Director (Nodal Officer), Pradhan Mantri Awas Yojna, Government of Himachal Pradesh, Palika Bhawan Talland, Shimla, after having served for 37 years in different departments of the State of Himachal Pradesh.

3. Respondent No.3 i.e. National Institute of Electronics and Information Technology (NIELIT), Hotel Cedarwood, Building, Jakhoo Road Shimla, H.P. advertised various posts including the post of Social Development Specialist on 25.02.2018. Interviews were conducted by a Board constituted by respondent No.3 on 06.03.2018 in which the petitioner was selected and given appointment vide order dated 08.03.2018 as Social Development Specialist in the Office of the Municipal Council at Sundernagar, District Mandi, Himachal Pradesh and joined on 08.03.2018.

4. Immediately thereafter, respondent No.2 i.e. Mission Director, transferred the petitioner from Municipal Council, Sundernagar and placed his services at the disposal of the State Level Technical Cell, Directorate of Urban Development under "Pradhan Mantri Awas Yojna- Housing for all Project", till further orders.

5. In compliance to the orders, the petitioner joined at Shimla on 12.03.2018 itself. Thereafter vide order dated 27.06.2018, the petitioner was directed to look after the work of Law Officer in addition to the Social Development Expert.

6. On 13.03.2019, an agreement for extension of contract of the petitioner for a period of one year was executed which was valid upto 07.03.2020.

7. Some of the salient features of the agreement as contained in Clause-1, 11, 12 and 15 are extracted below:

> *"1. The individual contractor shall perform the function of Social Development Specialist at under Pradhan Mantri Awas Yojana Scheme/Project initially up to 07.03.2020. Unless extended, the contractual services shall automatically cease on the completion of the said period. The individual contractor will be paid consultancy fee of Rs.45000/- (Fourty Five Thousands only) per month.*
>
> *11. The contract shall be terminated during the period of currency on any one day on 15 days' notice from either side.*
>
> *12. The contractual services are initially upto 07.03.2020 and are purely temporary against the assigned project. In case the project is*

abandoned/discontinued, due to any reasons before the said period, the contractual services shall be terminated at fifteen days' notice. He/she will not be expected to leave employment during the contractual period without giving 15 days' notice before leaving the job failing which salary for shortfall in notice period shall be recovered.

15. The decision of the Director, NIELIT, Shimla Centre in all matters relating to this contract shall be final and binding on the contractor."

8. Even though, the project under which the petitioner was working is required to be implemented with effect from 17.06.2015 upto 31.03.2022, yet, respondent No.3 vide letter dated 12.05.2020 which was received by the petitioner on 01.06.2020 informed the petitioner that since his contract period had expired on 08.05.2020, he was not required to attend the office from the expiry date i.e. 08.05.2020 onwards.

9. It is vehemently argued by Shri Shrawan Dogra, Senior Advocate, assisted by Shri Ramesh Sharma, Advocate, for the petitioner that the action of the respondents is discriminatory as all other Experts including some retired Officers appointed under the same process at different intervals are still working with the respondents and it is only the petitioner, who has been singled out and thus the impugned orders are not only discriminatory, but are actuated by illegal malafides. In addition thereto, it is submitted that the action of the respondents is otherwise violative of the letter issued by the Ministry of Labour and Employment, New Delhi, on_20.03.2020 (Annexure P-14) whereby there is complete ban imposed by the Government on termination of services of any employee.

10. In the reply filed by respondents No.1 and 2, preliminary objection regarding maintainability of this petition has been raised. It is averred that the approval of the Government in filling up the post of Social Development Expert-CLTC under PMAY-HFA was only for one year which had expired on 07.03.2019 and no further approval of the Government was sought by respondent No.2/department. However, the contract of the petitioner was inadvertently extended upto 31.03.2020 by the department along with other Experts. So far as the other Experts under the Scheme are concerned, they were recruited as per the guidelines of the Scheme and the Mission Director i.e. respondent No.2 is competent authority to extend their contract. However, the case of the petitioner was different as he was engaged as Social Development Expert-CLTC (on outsource basis) under the Scheme as per the approval of the Government for one year. During the review of PMAY-HFA (Urban) by respondent No.2, it was observed that progress under PMAY-HFA

(Urban) was not satisfactory and targets were not being achieved. Moreover, the petitioner, who was engaged as Social Development Expert-CLTC (on outsource basis) under PMAY-HFA (Urban) Scheme was only looking after the work of Law Officer and the work under the Scheme was suffering. It was also observed that it was not warranted to appoint any person to perform the work of Law Officer and it was decided not to extend the contract period of the petitioner. In addition, it is averred that even this Court while deciding CWPIL No. 201 of 2017 titled 'Court on its own motion versus State of Himachal Pradesh and others' vide judgment dated 19.12.2017 has already settled the issue of re-employment of retired government servants and clearly directed that no employee shall be given extension or be re-employed beyond the age of superannuation.

11. On merits, the pleas taken in the preliminary objection have simply been reiterated by referring to Rule 22.4 of Chapter 22 of the Handbook on Personnel Matters, Volume-II, Second Edition.

12. At this stage, we may note that second respondent while filing reply to the application for interim relief has clearly averred that the applicant/petitioner has been removed from his post after due application of mind as his work, conduct and performance was unsatisfactory.

13. In its reply, respondent No.3 has simply averred that it was in the discretion of respondent No.2 to continue or not to continue with the services of the petitioner and once it decided not to continue with the services of the petitioner, therefore, replying respondent had no option, but to comply with the said instructions.

14. We have heard the learned counsel for the parties and have gone through the records of the case.

15. It is not in dispute that the Scheme in question against which the petitioner was appointed was valid upto 31.03.2022. It is further not in dispute that out of 34 Consultants, it is only the petitioner whose services have not been re-engaged on the ground that his contract or services have come to an end, though the contract of the other 33 Consultants had also come to an end.

16. Records reveal that before the contract of the petitioner could come to an end, a proposal had already been mooted by the department for continuing the services of

all the 34 Consultants including the petitioner for further period of one year, as would be evident from Note-31 of the file which reads as under:

> *"In view of above, the contract agreement of 34 Nos. consultants (as per the Annex-I) whose contracts are going to expire during on 31.03.2020 may be allowed to continue for another year or till the project lasts. A letter in this regard addressed to Director-In-Charge, NIELIT Shimla has also been drafted and placed below."*

17. This proposal was not accepted as it is as respondent No.2 was of the opinion that this could be decided only after the performance reviewed, as is evident from the Note dated 04.03.2020, which reads as under:

"Pl. discuss only after performance reviewed. Fix date for performance. Target given achieved etc."

18. The notings appearing in the file thereafter are as under:

-44-	While extending the contract of out-sourced or contract manpower it is imperative that the performance of the employed manpower has to be evaluated. The evaluation remarks are to be given by the immediate officers who are supervising the work of the immediate subordinate officials. These all are employed under the different projects and the project branch has to make an assessment subjectively. Mere job profile document is not sufficient to evaluate the performance rather the factual work assigned to the officials is required to be assessed. Hence may please put up accordingly. Sd/- 17.4.
-45-	P/O.
-46-	N-44-45:The working of experts working under various schemes are satisfactory. May consider pl. Sd/- 21.4.2020
-47-	Pl. put up with the Goals fixed and achieved. Sd/- 22/4/
-48-	Kindly see No.47 above-

	In this context it is submitted that no such individual goals were fixed by the Deptt. Pl. Submitted pl. Sd/- 27/4/
-49-	We have given them target to be achieved which were being received in the meetings for which PO is the nodal officer. Sd/- 28/4
-50-	N-49:-The required information w.r.t. PMAY is placed at flag–A pl. The annual target and achievement under NVCS is placed at flag-B pl. Sd/- 1.5.20 In reference of N-49 Pl. Sd/- 2/5.
-51-	Pl. examine and put up expertwise targets fixed and achieved on the file and gap in targets. Sd- 2/5
-52-	Accordingly Expert-wise targets UCB-wise and district-wise which were received is placed below for perusal please. Sd/- 4/5
-53-	The details of targets fixed and achieved, Nov.2019 to March, 2020, is placed on the file 'A'. As per version of PO earlier to it those were not targets fixed for the experts. Sd/- 4/5/2020 As discussed. Pl. put up Sd/-

	4/5/20
-54-	As per the details given on the sheet flagged 'A' except Smt. Rita whose overall target was fixed 57 has achieved less by 7 houses. But if assessed district-wise the targets of following districts are less: Name of Expert District Less Targets (i) Ms. P. Zinta Kullu 5 –do- Shimla 8 (ii) Sn. Anoop Mandi 3 (iii) Sh. Harinder Hamirpur 9 (iv) Sh. Vishal -- - (v) Smt. Rita Sirmaur 1 Solan 6 Sd/- 5.5.2020
-55-	
-56-	Since Mission time line is only upto March 2022. We have a target of 9093 houses to be completed. Last financial year 2018-19 about 951 houses constructed. In the recently closed fY 2019-20 only 935 houses completed. The seriousness of SLTC reflects from this data only. They were given a target of 2000 houses in the last FY 2019-20. Against with target achieved is 933 only. In this way it will require about 10 years for completion of target. Progress does not seem satisfactory. Ask them to show cause for such dissatisfactorily progress.
-57-	Meanwhile ask them to concentrate this year targets as well right from now without wasting any further time. Sd/- 5.5.20
-58-	N.54 to 57:- The details of Experts Manpower engaged under PMAY–HFA is placed below at flag 'A' for kind perusal please. In this context, it is submitted that Sh. Kanwar Singh Sharma Social Development Spl (SDS) who is retired Sr. Law Officer of this office have been engaged as Social Development SPl (SDS) (on out-source basis) through NIELIT, Shimla w.e.f. 8.3.2018.

-59-	(May see Flag B to E), as per approval of the Govt. dated 2.02.18 for the period of one year. The period of approval of the Govt. for one year has expired on 7.3.2019 and thereafter no further approval of the Govt. have sought by the Department.
-60-	Moreover, the contract in respect of above expert have also been expired on 31.3.2020 alongwith other 10 Nos. expert, please.
-61-	In view of the above, the file is submitted for favour of kind perusal and further directions in the matter, please. Submitted please. Sd/-08.05.2020
-62-	Supdt Gr.-II Supdt Gr-I Sd/-08/5/20.
-63-	As per N-59 the approval for one year of Govt. had come to an end on 31.3.2019 but under letter No. 5536 dt. 8.3.2019 of this Directorate the period was further extended for one year i.e. up to 31.3.2020. If approve, we may write to the AD for ex-post-facto approval for the last year and decision for further period as at present in this Directorate no Law officer to look after the legal matters going on in different courts will be available till some arrangement is made. Sd/- 8.5.2020
-64-	It is very strange incident. Since the progress under PMAY is not so satisfactorily, we have entered into the 2nd last year of the PMAY (U), which is going to be over by March 2022. By this date, we have to complete all the houses sanctioned by the Govt. of India i.e. 9093 no. At present we have constructed only 1852 houses and this year upto 31st March only 952 houses. At this place, we will require 10 years to complete the target houses. Therefore, to achieve this target we have fixed a target of construction of 6000 houses this year 2020-21 so that the mission target be achieved by March 2022.
-65-	This can be done by aligning all our resources sanctioned under PMAY (U) in the right direction. Also we have to fill up the vacant position immediately. To appoint under this scheme for other functions is not warranted by the MOH&UA. Hence, the proposal of Additional Director is in violation of the guidelines of the MOH&UA and nobody can be engaged to perform other functions under this Scheme.
-66-	So it is not warranted to appoint any person to perform the work of Law Officer

	under this scheme. Hence, we may not recommend the extension further. If required, we may send case separately to the Govt. of HP for appointment of Law Officer on 2ndment basis and not under this Scheme.
-67-	Hence, we may direct the NIELIT not to extend the period further after 8th May, 2020. Other experts who are performing the work of PMAY(U) be extended till one year from the date of expiry i.e. 31.3.2020 except above, which will be till 8th May, 2020 as already salary fixed till 30th April.
-68-	Issue necessary directions to the NIELIT as well all concerned. Also a new agreement be signed. Sd/- 8/5/2020.

19. It would be noticed that upto N-57, there was no discussion whatsoever regarding the petitioner nor his name figured in the list of Experts, who had not been able to achieve the targets. Yet, a note appears at N-58, where for the first time, it is pointed out that the petitioner has been engaged Social Development Specialist (SDS) through respondent No.3 with effect from 08.03.2018 and the approval of the Government is for a period of one year which has expired on 07.03.2019 and thereafter no further approval of the Government has been sought by the department. In the next noting, it is pointed out that the contract in respect of the petitioner has expired on 31.03.2020 along with ten other Experts. It is then that the notings of respondent No.2-Director appear at N-64 to 68. Admittedly, prior to this noting, there was no notice much less show cause notice issued to the petitioner regarding his work and conduct etc. being not satisfactory.

20. Records also reveal that it was the respondent-department itself which right from the beginning was keen to have the services of the petitioner, more particularly, as a Law Officer and that is why immediately after his appointment on 08.03.2018 at Sundernagar, the petitioner was transferred to the Office at Shimla and placed at the disposal of State Level Technical Cell, Directorate of Urban Development under "Pradhan Mantri Awas Yojna- Housing for all Project" and was made to look after the work of Law Officer in the Directorate. This is clearly evident from the documents appended by the respondents themselves with their reply.

21. Even prior to the retirement of the petitioner, respondent No.2 vide letter dated 25.11.2017 (Annexure R-1) had requested for extension of his services by one year.

The request was reiterated by another letter dated 23.12.2017 (Annexure R-II). Not only this, the petitioner had retired on 31.12.2017, respondent No.2 again sought extension of his services vide letter dated 18.01.2018, the relevant portion whereof reads as under:

> *"The post of Law Officer is of utmost-importance in this Department and in the absence of Law Officer, the work of this Department particularly court matters are suffering badly as there is no other official ripe enough to take over the job of Sr. Law Officer being technical in nature requiring Law Degree and knowledge/experience etc. Thus, this post of Law Officer cannot be kept vacant in the public interest as well as in the interest of the Department.*
>
> *It is further submitted that one post of Social Development Expert under City Level Technical Cell of PMAY-HFA (a Flagship Programme of MoHUA, Gol) is lying vacant in Municipal Council , Sundernagar. The qualification and experience for the post is Post Graduate/Graduate or Diploma in Social Science with practical experience of working with community of Urban areas, 3-5 years experience in undertaking social and community development activities. Experience in participatory methods/planning and community mobilization. As Sh. Kanwar Singh Sharma has recently retired from the post of Senior Law Officer of this Directorate is having diploma in Social Science and have a vast service experience, so the candidature of Sh. Kanwar Singh Sharma, retired Senior Law Officer is proposed for this post on outsource basis(copy of terms of references ToR enclosed), who will also look after the work of Law Officer of this Directorate and thus, the work of Legal Cell of this Officer will not suffer to some extent.*
>
> *In view of the above, it is requested to consider the matter at Govt. level and accord approval of the Govt. for engagement of Sh. Kanwar Singh Sharma, retired Sr. Law Officer of this Directorate on outsource basis against the post of Social Development Expert under SLTC PMAY-HFA at Sundernagar in the Directorate of Urban Development at fixed emoluments @ Rs.45,000/- p.m. in the public interest, please."*

22. It is not in dispute that another Social Development Specialist Ms. Poonam Sharma was appointed along with the petitioner and her services have been continued while the services of the petitioner have been dispensed with. Thus, there is gross arbitrariness and discrimination in the action of respondent No.2 and it is clearly a case of invidious discrimination of the petitioner vis-a-vis similarly situate persons that too without any rational basis.

23. The State has the duty to observe equality. An ordinary individual can choose not to deal with any person, but Government cannot choose to exclude persons by discrimination. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

24. The Government is a Government of laws and not of men. The petitioner was entitled to equal treatment with others, who were appointed in the same manner as the petitioner. Democratic form of Government demands equality and absence of arbitrariness and discrimination. There are limitations upon exercise of authority by the State and that is to act fairly and rationally without any way being arbitrary and thereby such a decision can be taken for some legitimate purpose. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure.

25. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. 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 largess, the Government cannot act arbitrarily as 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.

26. The power or discretion of the Government in the matter of grant of largess 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.

27. It is more than settled that where power is conferred to achieve a purpose, it has been repeatedly reiterated that the power must be exercised reasonably and in good faith to effectuate the purpose. And in this context “in good faith” means “for legitimate

reasons". Where power is exercised for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and the exercise of power is vitiated. If it is exercised for an extraneous, irrelevant or non-germane consideration, the acquiring authority can be charged with legal mala fides.

28. In ***State of Punjab*** *vs.* ***Gurdial Singh and others [1980] 1 S.C.R. 1071***, acquisition of land for constructing a grain market was challenged on the ground of legal mala fides. Upholding the challenge, the Hon'ble Supreme Court speaking through Krishna Iyer, J. explained the concept of legal malafides in his hitherto inimitable language, diction and style and observed as under:

> *"Pithily put, bad faith which invalidates the exercise of power-sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions- is the attainment of ends beyond the sanctioned purposes or power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested, the court calls it a colourable exercise and is undeceived by illusion...."*

29. In ***West Bengal State Electricity Board*** *vs.* ***Dilip Kumar Ray, AIR 2007 SC 976,*** the Hon'ble Supreme Court dealt with the term "malice" by referring to various dictionaries etc. as:

> *"Malice in the legal sense imports (I) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result.*
>
> *'MALICE' consists in a conscious violation of the law to the prejudice of another and certainly has different meanings with respect to responsibility for civil wrongs and responsibility for crime."*

30. Mala fides, where it is alleged, depends upon its own facts and circumstances, in fact has to be proved. It is a deliberate act in disregard of the rights of

others. It is a wrongful act done intentionally without just cause or excuse. (See : ***State of Punjab vs. V.K. Khanna & Ors., AIR 2001 SC 343; State of A.P. and others vs. Goverdhanlal Pitti, AIR 2003 SC 1941; Probodh Sagar vs. Punjab SEB & Ors., AIR 2000 SC 1684; and Chairman and MD, BPL Ltd. vs. S.P. Gururaja & Ors., AIR 2003 SC 4536***).

31. In ***Goverdhanlal Pitti's case*** *(Supra)*, the Hon'ble Supreme Court ruled thus:

> *"Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others". (See: Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989)"*
>
> *XXX XXX XXX*
>
> *"Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object."*

32. In ***Kalabharati Advertising*** *vs.* ***Hemant Vimalnath Narichania & Ors., AIR 2010 SC 3745***, the Hon'ble Supreme Court observed as under:

> *"25. The State is under obligation to act fairly without ill will or malice- in fact or law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill felling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts.*
>
> *26. Passing an order for an unauthorized purpose constitutes malice in law."*

33. Adverting to the facts, it would be noticed from the notings (supra) that respondent No.2. has not exercised reasonably and in good faith the power vested in him.

34. As observed by the Hon'ble Supreme Court, passing an order for an unauthorized purpose constitutes malice in law.

35. After analyzing the factual matrix, we have no hesitation in concluding that the exercise of powers by respondent No.2, more particularly, by introducing the name of the petitioner in the noting sheets and thereafter seeking justification for not continuing with the contract of the petitioner is goaded by extraneous considerations and it is a colourable exercise and is deceived by illusion.

36. In coming to the aforesaid conclusion, we are further supported by the fact that even though there was no complaint regarding working of the petitioner either as a Social Development Expert or as a Law Officer, yet, respondent No.2 was bent upon and rather determined to show the petitioner the door.

37. Additionally, the action of the respondents is bad in not renewing the contract of the petitioner in view of the instructions issued by the Central Government vide letter dated 20.03.2020 (Annexure P-14) through the Ministry of Labour and Employment, New Delhi, which read as under:

> *"In the backdrop of such challenging situation, all the Employers of Public/Private Establishments may be advised to extend their coordination by not terminating their employees, particularly casual or contractual workers from job or reduce their wages. If any worker takes leave, he should be deemed to be on duty without any consequential deduction in wages for this period. Further, if the place of employment is to be made non-operational due to COVID-19, the employees of such unit will be deemed to be on duty.*
>
> *The termination of employee from the job or reduction in wages in this scenario would further deepen the crises and will not only weaken the financial condition of the employee but also hamper their morale to combat their fight with this epidemic. In view of this, you are requested to issue necessary Advisory to the Employers/Owners of all the establishments in the State."*

38. In light of the aforesaid discussion, we find merit in this writ petition and the same is accordingly allowed and the disengagement orders dated 12.05.2020 (Annexure P-8) and dated 08.05.2020 (Annexure P-10) are quashed and set aside. The respondents are directed to re-engage the petitioner forthwith as Social Development Specialist on contract

basis on the same terms and conditions on which he was working earlier till the same is completed in 2022 and extend his contract period as has been done in the case of his counter-parts. However, since the petitioner has not worked for this period, therefore, he is not entitled for the salary of this period.

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

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

Satya Parkash ..... Petitioner

versus

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

CWP No.2729 of 2019
Date of Decision: 7.09.2020

Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973 (Code)**- Sections 433 & 433-A – Remission of sentence- Writ in the nature of Habeas Corpus or Certiorari- Factors relevant for grant of – Held, while considering prayer for remission of sentence, the Competent Authority must also consider (i) conduct of accused while in jail , (ii) his social and economic conditions, (iii) period spent by him in jail, (iv) possibility of his again indulging in crime and (v) possibility of rehabilitation of convict as a useful member of society – It must not be swayed away simply by gravity of offence committed by accused as he already stands convicted and sentenced for that. (Para 5 & 7)

Constitution of India, 1950- Article 226- **Code of Criminal Procedure, 1973 (Code)**- Sections 433 & 433-A – Remission of sentence- Denial by the State Sentence Review Board on basis of report of Trial Court- Held on facts, petitioner had already completed 20 years of imprisonment- As per Jail Manual , his conduct in jail was good- Other authorities recommending his premature release- Denial of relief simply on basis of report of Trial Court that petitioner was involved in serious offence without considering other factors is arbitrary- Order of Review Board set aside- Trial Court directed to consider case of petitioner expeditiously in the light of all relevant factors. (Para 4, 6, 7, 10 & 11)

Cases referred:

Laxman Naskar vs. Union of India and others, AIR 2000 SC 986;

Whether approved for report? Yes.

For the Petitioner : Mr. Sarthak Mehta, Advocate, through video-conferencing.

For the Respondents : Mr. Sudhir Bhatnagar, Additional Advocate General, through video-conferencing.

Sandeep Sharma, Judge*(oral)*

By way of instant petition filed under Article 226 of the Constitution of India, prayer has been made on behalf of the petitioner for quashing of order dated 8.7.2019, whereby Himachal

Pradesh State Sentence Review Board (hereinafter referred to as the 'Review Board') has declined to recommend his premature release.

2. Precisely, the facts of the case as emerge from the record are that the petitioner was convicted by learned Additional District & Sessions Judge, Mandi, H.P., under Sections 302, 307 of IPC and Section 27 of the Arms Act vide judgment dated 20.9.1999. Pursuant to aforesaid judgment, petitioner is undergoing life imprisonment at Model Central Jail, Kanda, Shimla, District Shimla, H.P. In the year, 2015, petitioner-convict after having spent more than 16 years in jail approached the respondent-State for remission of sentence, but till date, aforesaid prayer of him has been not acceded to. Now, when the petitioner has already spent more than 20 years in jail, Review Board without there being any cogent and convincing reason has refused to recommend the premature release of the petitioner vide order dated 8.7.2019 and as such, petitioner is compelled to approach this Court in the instant proceedings, praying therein for following main reliefs:-

> *"That writ in the nature Habeas Corpus or Certiorari may kindly be issued for quashing the minutes of meeting of the Himachal Pradesh State Sentence Review Board held on 08/08/2019 and information letter vide dated 31/08/2019 vide Annexure P-6 qua the petitioner dealt at Sr. No.1, not to recommend his premature release and further Himachal Pradesh State Sentence Review Board may kindly be directed to release the petitioner prematurely forthwith and justice be done."*

3. Perusal of order dated 8th July, 2019 passed by the Review Board, wherein case of the petitioner has been specifically dealt with at Sr. No.15, reveals that though all the District authorities concerned recommended premature release of petitioner, but since learned Additional District & Sessions Judge-I, Mandi did not give specific opinion qua premature release in favour of the petitioner and merely stated in his report that "***if the Director General of Prisons & Correctional Services, Himachal Pradesh and its Board, think it appropriate to release the prisoner Premature i.e without undergoing the life imprisonment, Board may release the convict premature sentence,"*** Review Board rejected the case of the petitioner on the ground that he has committed serious crime of murder and in the event of his being released, he may again indulge in such crime and as such, his prayer for remission of sentence cannot be accepted.

4. It is quite apparent from the decision of the Review Board that the opinion of learned Additional District & Sessions Judge-I, Mandi, weighed heavily with board while rejecting the prayer of the petitioner for remission of sentence, but if communication dated 3.11.2017 sent by Additional District & Sessions Judge-I, Mandi in reference to letter dated 29.8.2017 sent by Dy. Superintendent Jail, Model Central Jail, Kanda, Shimla, H.P., is perused, it nowhere suggests that learned Additional

District & Sessions Judge-I, Mandi has appreciated the facts and circumstances in which petitioner unfortunately committed offence under Section 302, 307 of IPC and Section 27 of Arms Act, rather he simply having taken note of the fact that petitioner committed offence under section 302 and 307 of IPC and under Section 27 of Arms Act, proceeded to conclude that since the petitioner stands convicted under aforesaid provisions of law, he does not deserves premature release.

5. Needless to say, authority concerned while considering the prayer, if any, made on behalf of the convict for remission of sentence is expected to consider various factors while recommending /refusing remission of sentence. Authority is not only required to see nature of offence committed by the person, rather it is expected to see conduct of the convict while he was in jail during his imprisonment. Since District authorities concerned having taken note of various factors, especially report of Jail Superintendent, recommended the case of the petitioner for remission of sentence, learned Additional District and Sessions Judge ought to have considered the matter in broad spectrum. Learned Additional District and Sessions Judge, Mandi, while considering prayer for remission of sentence made on behalf of the petitioner ought not have swayed with the nature of the offence allegedly committed by the convict, because for that he /she already stands convicted, rather prayer for remission of sentence is to be considered on other various factors as well i.e. (i) conduct of the accused while in Jail (ii) his /her social economic condition (iii) period spent by him/her in jail and lastly the possibility of his/her again indulging in the crime. However, in the case at hand, learned Additional Sessions Judge-I, Mandi appears to have dealt with the matter very casually and instead of shouldering responsibility, if any, has attempted to pass the buck to the Director General of Prisons & Correctional Services, Himachal Pradesh, especially by stating in his letter that "*convict has committed offence under Section 302,307 of IPC and Section 27 of Arms Act, and as such, he does not deserve to be released premature, but if the Board thinks it proper to release him prematurely, it may release the convict/petitioner.*"

6. If the order passed by Review Board is perused, it while rejecting the case of the petitioner, has completely ignored the recommendations made by other authorities and solely relied upon the opinion rendered by the Additional District and Sessions Judge, Mandi, which otherwise by no stretch of imagination can be said to be an opinion. While rejecting petitioner's request for grant of remission, learned Additional District and Sessions Judge has described the offences as serious crime, unfortunately without going into the facts and circumstances of the case, in which petitioner committed offence under Section 302 of IPC. True it is that petitioner stands convicted and sentenced for life for having committed offence punishable under Section 302 IPC, but authorities including Additional District and Sessions Judge while considering prayer for remission of sentence

is/was expected to take note of the fact that convict has already spent more than 20 years in jail and during this period, his conduct has been found to be good. Probation Officer as well as Jail Superintendant in their respective reports have nowhere given any adverse comments against the petitioner-convict.

7. According to the Jail Manual, case of premature release is to be considered provided the convict has maintained good conduct in jail and for this purpose good conduct means that he has not committed any jail offence for a period of five years prior to the date of his eligibility for consideration for release. While considering premature release, authorities are to be satisfied that in the event of release of the convict, there is no likelihood of the convict committing a crime of breach of peace in any way connected with the circumstances of the crime for which he was originally convicted. In the case at hand, there is no adverse report against the petitioner –convict and as such, learned Additional Advocate General before responding to the communication sent to him by the Review Board ought to have taken note of all the aforesaid factors. No doubt, the magnitude, brutality and gravity of the offence for which the convict was sentenced to life imprisonment are also to be taken into consideration but that does not mean that case of the person undergoing life sentence cannot be considered for pre-mature release. Though, there is no specific reason, if any, placed on record by the Review Board while rejecting the case of the petitioner, but since same is based upon so called opinion rendered by the learned Additional District and Sessions Judge, Mandi, it can be presumed that petitioner's case has been rejected merely on the ground that he has committed heinous crime, but as has been observed herein above, person allegedly having committed heinous crime is not estopped from claiming remission of sentence, especially when his conduct and behavior in jail is /was found to be good. Review Board has discretion to release a convict at an appropriate time in all cases considering circumstances in which the crime was committed and other relevant factors like a) whether the convict has lost his potential for committing crime considering his overall conduct; b) the possibility of reclaiming the convict as a useful member of the society; and c) Socio-economic condition of the convict's family. It is quite apparent from the material available on record that case of the petitioner has been recommended favorably for premature release taking into consideration his conduct inside the jail and all other circumstances by the Jail Superintendant and Chief Probation Officer. Chief Probation Officer, in its communication dated 12.5.2015 has submitted that life Convict Satya Prakash has an old father, wife and daughter in his family. Life Convict's father is 80 years old, who is not able to earn livelihood. Most importantly, in the aforesaid report, Chief Probation officer has reported that economic condition of Satya Prakash is not good and whole of his land is lying barren as there is none to look after the same. Besides above, it has been reported that there is no source of income in the family of life convict. As per statement of local

Pradhan, ward member and father of the convict, his behavior is cordial having good equation with the people of the area.

8. True, it is that Review Board before recommending the case is also required to take into consideration recommendation made by the Superintendent of Police and Chief Probation Officer besides having opinion of Judge, who had awarded the punishment, but while considering prayer for remission of sentence it is also required to take into consideration general principles of amnesty/remission of the sentence as laid down by the State Government or by the courts. The paramount consideration before the Review Board should be the welfare of the prisoner and the society at large. Ordinarily, premature release of the prisoner should not be declined on the ground that authorities recommended his/her release on certain farfetched and hypothetical premises, rather board is required to take into account the circumstances in which the offence was committed by the prisoner and whether he has the probability and is likely to commit similar or other offence again, if he is granted remission of sentence.

9. Their Lordships of the Hon'ble Supreme Court in ***Laxman Naskar vs. Union of India and others, AIR 2000 SC 986*** have held that rejecting prayer for premature release on extraneous consideration, i.e. on ground of objections by police is improper. Their Lordships have held as under:

> "3. It is settled position of law that life sentence is nothing less than lifelong imprisonment and by earning remissions a life convict does not acquire a right to be released prematurely; but if the Government has framed any rule or made a scheme for early release of such convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of the Constitution and if according to the Government policy instructions in force at the relevant time the life convict has already undergone the sentence for the period mentioned in the policy instructions, then the only right which a life convict can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Article 161 of the Constitution. When an authority is called upon to exercise its powers under Article 161 of the Constitution that will have to be done consistently with the legal position and the Government policy/instructions prevalent at that time.
>
> 5. All the "life convicts" before us have completed continued detention of 20 years including remission earned. From the counter filed by the State, we find that the Government has also framed guidelines for this purpose. To consider the prayer for premature release of the "life convicts" , police report was called for on the following points :-
>
> > (i) Whether the offence is an individual act of crime without affecting the society at large;
> >
> > (ii) Whether there is any chance of future recurrence of committing crime;

(iii) Whether the convict has lost his potentiality in committing crime;

(iv) Whether there is any fruitful purpose of confining this convict any more;

(v) Socio-economic condition of the convict's family.

6. Though the police report did not cover all the above points, the prayer of "life convicts" for premature release was rejected mainly on the ground of objections by police. The police had only reported about the chances of the petitioners committing crime again. It becomes apparent from the record that the Government did not consider the prayer for premature release as per the rules. The Government did not pay sufficient attention to the conduct-record of the petitioners while in jail nor did it consider whether they had lost their potentiality in committing crime. The relevant aspect, namely, that there is no fruitful purpose in confining them any more was also not considered nor the socio economic conditions of the convict's family were taken into account. Thus the orders of the Government suffer from infirmities and are liable to be quashed."

10. Learned Additional District and Sessions Judge, while responding to the communication sent by the Review Board has not bothered to consider the aforesaid aspects of the matter. Petitioner, who is 50 years of old, has already spent more than 20 years in jail in connection with offence allegedly committed by him meaning thereby, he has already lost his prime years of life, but keeping in view his age i.e. 50 years, he still can be said to have the potential and zeal to do something in the society if he is given chance. Besides above, petitioner, who on account of his being in jail was unable to attend/take care of his family, would be able to do something for his family as well, which is otherwise in pitiable condition, if case of the petitioner is considered sympathetically by the authorities concerned. Otherwise also, perusal of impugned order dated 8.7.2019, reveals that Review Board in similar cases where convicts aged between 50 to 60 years having committed offence under Section 302 IPC have been granted remission and as such, decision of Review Board appears to be arbitrary and discriminatory.

11. Consequently, in view of above, this Court finds merit in the present petition and accordingly, same is allowed and order dated 8.7.2019 is set-aside. Learned Additional District and Sessions Judge-I, Mandi, is directed to consider and decide the case of the petitioner afresh expeditiously within a period of one week from the date of receipt of the copy of the instant judgment. Needless to say, learned Additional District and Sessions Judge shall pass speaking order while considering the case of the petitioner afresh. Review Board after having received fresh opinion of Additional District and Sessions judge, Mandi, would consider the case of the petitioner afresh within a period of two weeks thereafter. Registry to apprise the learned Additional District and Sessions Judge with regard to passing of the instant order, enabling him to do the needful well within the

stipulated time. Learned Additional Advocate general undertakes to apprise the Review Board with regard to passing of the instant order so that necessary action is taken expeditiously after the receipt of opinion from the Additional District and Sessions Judge. In the aforesaid terms, present petition stands disposed of, so also pending applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL, JUDGE.

Dr. Rajesh Kumar Sharma and others

.....Petitioners.

Versus

Union of India and others .....Respondents.

CWP No.2369 of 2020.
Judgment reserved on: 15.09.2020.
Date of decision: 18.09.2020.

Constitution of India, 1950- Articles 14 & 226- Contractual appointments- Nature of - Petitioners praying for extension after expiry of contractual period of appointment on ground that their services are governed by National Institute of Technology Act, 2007- Scope of Court's intervention- Held, appointments of petitioners were purely contractual and with efflux of time as envisaged in contract itself, the same came to an end- Persons holding such posts can have no right to continue or renewal of service contracts as a matter of right- Contractual appointments cannot be equated with repeated ad-hoc employment- Action of respondents is not shown to be unfair, perverse or irrational- Petition dismissed. (Para 8, 11, 15 & 33)

Cases referred:

State of Haryana and others etc. vs. Piara Singh and others etc., AIR 1992 SC 2130;
Gridco Ltd. & Another vs. Sadananda Doloi & Ors, AIR 2012 SC 729;
Secretary, State of Karnataka and others vs. Uma Devi (3) and others (2006) 4 SCC 1;
Official Liquidator vs. Dayanand and others (2008) 10 SCC 1;
State of Rajasthan & Ors. vs. Daya Lal & Ors. (2011) 2 SCC 429;
State of H.P. vs. Suresh Kumar Verma and another (1996) 7 SCC 562;

Whether approved for reporting? *Yes*

For the Petitioners : Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates.

For the Respondents: Mr. Shashi Shirshoo, Central Government Counsel, for respondent No.1.

Mr. K.D.Shreedhar, Senior Advocate with Ms. Shreya Chauhan, Advocate, for respondents No. 2 and 3.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE.

Tarlok Singh Chauhan, Judge

The instant petition has been filed for grant of the following substantive reliefs:

"(i) That in view of the new Recruitment Rules of 29.05.2017 at Annexure P-8 and amended Statutes of NIT, 2017 at Annexure P-9, the condition of tenure of five years of the contract of the petitioners, may kindly be held to have been rendered infructuous and inapplicable and their appointment may kindly be directed to be governed by the provisions of the amended NIT Statutes, 2017 at Annexure P-9, instead of applying the Rules in the letter dated 15.01.2014 at Annexure P-7.

(ii) That in view of the NIT Statutes of 2009 at Annexure P-5 as were applicable at the time of recruitment of the petitioners, they may kindly be deemed to be in regular and continuous service of the NIT, Hamirpur."

2. Respondent No.2, the National Institute of Technology, (for short 'NIT') invited applications for different posts including the posts of Assistant Professors on contract basis. The petitioners being eligible applied for the said posts and were selected. The letter of appointment clearly envisages that the appointment of the petitioners was for a period of five years. However, it is averred by the petitioners that since their services are governed by the National Institutes of Technology Act, 2007, therefore, they had a right to continue beyond five years, more particularly, when the term of five years that was prescribed under the 4-Tier Flexible Faculty Structure has already been struck down by the Allahabad High Court.

3. The respondents have contested the petition by filing reply wherein the very maintainability of the petition has been questioned on the ground that the appointment of the petitioners was made purely on contract basis as categorically specified in the 4-Tier Flexible Faculty Structure (MHRD notification No. F.No.33-9/2011-TS.III dated 23.08.2013 even No. dated 15.01.2014 and F.No. 33-3/2014-TS.III dated 17.06.2015 (Annexure P-7). The Ministry of Human Resource Development vide its letter No. F.No.33-9/2011-TS.III dated 23.08.2013 forwarded the approved norms of four-tier flexible faculty structure wherein it was clearly mentioned that the post of Assistant Professor in PB-3 of Rs.15600-39100 with AGP Rs.6000 is on contract basis. Moreover, at Clause No.3 of Annexure-III of the above referred letter it was clearly mentioned that "Faculty, who are appointed on contractual basis, shall be for a fixed period not exceeding five years" (Annexure P-7). The agenda for the consideration and adoption of four tier flexible faculty structure, for the implementation in National Institute of Technology, Hamirpur, was placed on 23rd meeting of Board of Governors of the Institute vide item No. BOG/23/2013-10/12 and in its decision the Board of Governors considered and approved the adoption of MHRD notification (Annexure R-2/1). Therefore, the appointments of the petitioners are in consonance with the letter dated 15.01.2014 (Annexure P-7).

4. In addition to the aforesaid, the petition is opposed on the ground of estoppel as first representation against the appointment was made by petitioner No.1 only on 06.07.2020. Even though, a number of other objections have also been raised in the reply, however, we do not find it necessary to deal with those objections as they are not necessary for decision of this case, save and except, the additional ground raised for opposing the claim of the petitioners that they had applied under the Recruitment Rules, 2017, for the post of Assistant Professor in the respective departments and appeared before the Selection Committee, but were not recommended and, therefore, the petition is liable to be dismissed on the ground of *suppressio veri, suggestio falsi.*

5. We have heard the learned counsel for the parties and gone through the material placed on record.

6. Mr. Bhuvnesh Sharma, learned counsel for the petitioners, would vehemently contend that contract employees cannot be replaced by other contract employees and would place heavy reliance upon the judgment rendered by the Hon'ble Bench of three Judges of the Hon'ble Supreme Court in ***State of Haryana and others etc.*** versus ***Piara Singh and others* etc.**, ***AIR 1992 SC 2130***, more particularly, the following observations:

> *"25. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of ad hoc/temporary employees in government service.*
>
> *Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority."*

7. The aforesaid ratio is clearly not applicable to the fact situation obtaining in the instant case as it cannot be disputed that the petitioners herein were selected and thereafter appointed pursuant to an advertisement, which never envisaged appointment on permanent basis and were to be appointed only on contractual basis.

8. Once the appointments were purely contractual then by efflux of time as envisaged in the contract itself the same came to an end and the persons holding such posts can have no right to continue or renewal of contract of service as a matter of right, and therefore, such cases are clearly distinguishable from repeated and *ad hoc* appointments, which was adopted as a matter of practice by the State Government in case of *Piara Singh's* case (supra).

9. The difference in the fact situation obtaining in the instant case vis-à-vis *Piara Singh's* case (supra) is stark and clear. In the instant case, the petitioners were appointed on fixed term contract and after lapse of period of service are claiming continuity of the same, and therefore, their services cannot be equated with the *ad hoc* employment as was in the case of *Piara Singh* (supra). The *ad hoc* appointment against a vacancy by the State repeated with number of vacancies, one after another, was construed to be an unfair practice by the Hon'ble Supreme Court and it accordingly directed the State to frame a scheme for regularization of such employees consistent with the reservation policy, if not already framed. Therefore, the judgment in *Piara Sing*h's case cannot be blindly applied to the facts of the present case where the petitioners have been appointed on a fixed term contractual appointment and after lapse of the period of contract, are claiming the continuation of the term by excluding other persons from seeking similar term of appointment.

10. The fixed term contractual appointment as envisaged under the 4-Tier Flexible Faculty Structure is not to provide permanent employment, but the laudable object is to enable bright young scholars to teach and earn experience in premier institutions. This is clearly envisaged in the norms of 4-Tier Cadre Structure of Faculty Posts in the National Institutes of Technology (NITs) which reads as under:

Sr. No.	Designation, Pay Band and Academic Grade Pay	Essential Qualification and Relevant Experience
1.	**Assistant Professors (On contract)** PB-3 of Rs.15600-39100 with AGP of Rs.6,000/- p.m.	(i) Assistant Professors to be recruited on contractual basis are not part of the regular faculty cadre in NITs. Appointment at this level may be made on contract basis to enable bright young Ph.D.s scholars to teach and earn experience in premier institutions. (ii) At the entry level they may be placed in Pay Band PB-3 of Rs.15600-39100 with Academic Grade Pay (AGP) of Rs.6000/- p.m. with seven non-compoundable advance increments. (iii) To encourage fresh Ph.D.s to join the teaching system, at least 10% of the total faculty strength should be recruited at this level. However, relaxation in respect of educational qualifications could be given upto 25% of total Assistant Professors recruited. The reasons for such relaxations should be duly recorded and reported to the Board of Governors of the respective institutions. (iv) After one year of post Ph.D experience, these Assistant Professors shall be placed in the AGP of Rs. 7,000/- p.m.

11. Thus, once the avowed object is to engage employment to a large number of persons, therefore, the persons, who are given fixed term service contract cannot claim any right of renewal or continuity of employment after the period of contract is over. The same can neither be equated

with repeated ad hoc employment nor can it be termed as unfair practice. It lies best in the wisdom of the employer to grant such appointments on contract to various terms and unless the decision making process is established to be arbitrary on the face of it, the Court will be loath to exercise its extra-ordinary jurisdiction to quash such appointment of fixed term basis.

12. A careful reading of the letters of appointment as also the norms of 4-Tier Flexible Faculty Structure leaves no manner of doubt that the appointment offered to the petitioners was limited one. The respondents at any given time had never offered to the petitioners that they would continue in service till the existence of the 4-Tier Flexible Faculty Structure or till the time they did not attain the age of superannuation. It is not even the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents in so far as the tenure on the post to which they were appointed.

13. There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited in its scope. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.

14. However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer ***Gridco Ltd. & Another*** vs. ***Sadananda Doloi & Ors***, ***AIR 2012 SC 729***).

15. The petitioners have failed to place before this Court any material to show that the action of the respondents is either unreasonable or unfair or perverse or irrational. As observed earlier, the norms of 4-Tier Flexible Faculty Structure placed on record governing the service conditions of the petitioners make it abundantly clear that petitioners had been appointed on contractual basis.

16. Faced with this situation, learned counsel for the petitioners would then contend that the action of the respondents in terminating and re-appointing the petitioners was required to be avoided as the petitioners were entitled to be continued as long as the 4-Tier Flexible Faculty

Structure continued or till the time they did not attain the age of superannuation and as such the action of the respondents being contrary to the principles of service jurisprudence was liable to be quashed.

17. We are unable to agree with the aforesaid contention for the reason already set out hereinabove. Apart from that, it is beyond cavil that the petitioners are contractual employees, and therefore, would have a right to remain in employment only for the period mentioned in the contract, that too, subject to other conditions contained in the 4-Tier Flexible Faculty Structure, but in no manner would have a right to claim that their appointments now be treated as co-terminus with the Institute.

18. It may be noticed that the petitioners had voluntarily accepted the appointment granted to them subject to the conditions clearly stipulated in the 4-Tier Flexible Faculty Structure. These appointments subject to the conditions have been accepted with their eyes wide open, therefore, now the petitioners cannot turn around claiming higher rights ignoring the conditions subject to which the appointments had been accepted.

19. Indisputably, the 4-Tier Flexible Faculty Structure under which the petitioners have been appointed does prescribe a mode of selection but looking to the nature of appointment, more especially, the tenure thereof, it cannot be said that the best talent would apply, and therefore, even though such appointments may not amount to backdoor appointments yet nevertheless they would be side door appointments and depend upon the contract service.

20. It is more than settled that the State or its instrumentalities may be required to employ persons in posts which may be temporary or like in the present case on contract basis which are not regular faculty cadre so as to enable bright young Ph.D. scholars to teach and earn experience in premier institutions. The legitimacy of such appointments can be found in the judgment rendered by a Constitutional Bench of the Hon'ble Supreme Court in ***Secretary, State of Karnataka and others*** *versus* ***Uma Devi (3) and others (2006) 4 SCC 1***, wherein it was held as under:

> *"12.In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be*

recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

43……. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment.

…….It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right."

21. Similar reiteration of law can be found in a subsequent judgment of the Hon'ble Supreme Court in ***Official Liquidator*** *versus* ***Dayanand and others (2008) 10 SCC 1*** wherein after relying upon the judgment in ***Uma Devi's case*** (supra), it was observed as under:

"75. By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in Secretary, State of Karnataka vs. Uma Devi (supra) is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed by different two-Judges Benches for declining to entertain the claim of regularization of service made by ad hoc/temporary/ daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees - Indian Drugs and Pharmaceuticals Ltd. vs. Workmen [2007 (1) SCC 408], Gangadhar Pillai vs. Siemens Ltd. [2007 (1) SCC 533], Kendriya Vidyalaya Sangathan vs. L.V. Subramanyeswara [2007 (5) SCC 326], Hindustan Aeronautics Ltd. vs. Dan Bahadur Singh [2007 (6) SCC 207]. However, in U.P. SEB vs. Pooran Chand Pandey [2007 (11) SCC 92] on which reliance has been placed by Shri Gupta, a two-Judges Bench has attempted to dilute the Constitution Bench judgment by suggesting that the said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution and that the same is in conflict with the judgment of the seven-Judges Bench in Maneka Gandhi vs. Union of India [1978 (1) SCC 248].

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in UP State Electricity Board vs. Pooran Chandra Pandey (supra) should be read as obiter and the same

should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench."

22. It is also well settled that regularization, absorption or permanent continuance of an employee cannot be directed by a Court, unless the employees have been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process against sanctioned vacant posts. In taking this view, we are supported by the judgment of the Hon'ble Supreme Court in ***State of Rajasthan & Ors.*** *versus* ***Daya Lal & Ors. (2011) 2 SCC 429***, which reads as under:

> *"12. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:*
>
> > *(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized."*

23. Moreover, advertising the posts, as fixed term contractual appointment initially and thereafter permitting the incumbents so appointed to continue and making their appointments co-terminus with the 4-Tier Flexible Faculty Structure or permitting them to continue in service till the age of superannuation, would amount to playing fraud with those multitude of people, who would otherwise be eligible to apply and may have skipped the employment process thinking that it is only for a temporary period or a contractual period.

24. In addition to the aforesaid, in case the contention of the petitioners is accepted that their services be made co-terminus with the 4-Tier Flexible Faculty Structure or they be continued till the age of retirement, then this would amount to rewriting the contract by way of interpretation, contrary to the terms and conditions, that are agreed by the parties to the contract, besides substituting the very norms of 4-Tier Flexible Faculty Structure under which they have been appointed. Obviously, such a course is legally impermissible.

25. The learned counsel for the petitioners would then once again argue that it is settled law that a contract/temporary employee cannot be replaced by another employee and would rely upon the judgment rendered by a Co-ordinate Bench of this Court of which one of us (Hon'ble

Ms. Justice Jyotsna Rewal Dua) was a member, in ***CWP No. 3054 of 2019*** titled '***Dr. Meera Devi*** *versus* ***Himachal Pradesh University another'*** decided on 07.01.2020.

26. We have gone through the judgment and find that the issue therein was regarding termination and appointment of Guest Faculty/Teacher. It was in this background that the Court after relying upon the judgment of the Hon'ble Supreme Court in ***State of H.P.*** *versus* ***Suresh Kumar Verma and another (1996) 7 SCC 562*** held the action of the respondent-University to be bad and directed the continuance of the petitioner till regular appointment was made.

27. Clearly, the ratio laid down in the aforesaid judgment does not apply to the facts of the instant case as there are two categories of posts of Assistant Professors in the Institute. One is filled up on contract basis while the other is on regular basis. One filled up on contract basis, as observed above, is not a part of the regular faculty cadre and is made to enable bright young scholars to teach and earn experience in premier institutions.

28. The learned counsel for the petitioners would next rely upon the judgment delivered by one of us (Justice Tarlok Singh Chauhan) in ***CWP No. 4451 of 2013*** titled ***Dharam Pal Singh*** *versus* ***State of H.P. and others,*** decided on 26.03.2015, which again relates to a contractual employee being replaced by another contractual employee.

29. For the reasons stated above, even this judgment is of no assistance to the petitioners.

30. Lastly, learned counsel for the petitioners would rely upon the judgment authored by one of us (Justice Tarlok Singh Chauhan) in ***LPA No. 132 of 2014,*** titled '***Dr. Lok Pal*** *versus* ***State of Himachal Pradesh and others,*** decided on 18.12.2014, to contend that the respondents on the sheer strength of their bargaining power cannot take advantage of their position and impose wholly un-equitable and unreasonable condition of employment on their employees, who did not have any other choice but to accept the employment on the terms and conditions offered by the respondents.

31. We fail to understand as to how the ratio of this judgment is of any assistance to the petitioners. There is no gainsaying that the respondent-Institute i.e. National Institute of Technology is a premier institute running various institutes pan India and has consciously provided an avenue for Ph.D scholars to earn experience in teaching in the premier institutions under the norms of 4-Tier Cadre Structure of Faculty Posts as reproduced (supra). The avenue so provided by

the respondents is not a source of employment, but is only for the purpose of gaining teaching experience in a premier institute.

32. As already observed earlier, the appointment of the petitioners was limited one and the respondents had not at any given time offered to the petitioners that they would continue in service even after the tenure of five years has come to an end. In addition to the above, it is not the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents in so far as the tenure to which they were appointed.

33. The petitioners at the time of entering into the contractual employment were fully aware of the appointments being contractual and such persons cannot even invoke the theory of legitimate expectation for being continued in the post. The petitioners being appointed on contractual basis can have no right to claim higher right than what is envisaged in the contract of appointment and same would come to an end by efflux of time as entered in the contract. Moreover, the petitioners having accepted the offer of appointment with eyes wide open cannot turn around by claiming higher rights ignoring the conditions subject to which the appointments had been accepted.

34. Now, adverting to the contention of the petitioners regarding the 4-Tier Flexible Faculty Structure being struck down by the Allahabad High Court, suffice it to state that this contention if accepted would boomerang on the petitioners themselves as it would invalidate their very appointments.

35. Lastly and more-importantly, the petitioners after participating unsuccessfully in the process of selection to the regular posts of Assistant Professors are estopped from filing the instant petition as they very well knew that their appointments are on contract basis that too only for a maximum period of five years and that is why they participated in the selection process for the regular vacancy of Assistant Professors.

36. In view of the aforesaid discussion, we find no merit in this writ petition and the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Beli Ram ....Petitioner

Versus

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

CWPOA No.52 of 2019
Date of Decision: September 10, 2020

Constitution of India, 1950- Articles 14 & 226- **Central Civil Services (Pension) Rules, 1972 (Rules)**- Rule 13- Qualifying service for grant of pension- Period of service rendered in work charged establishment, whether to be considered towards qualifying service?- Held, period of service rendered by a person as work charged employee with any establishment of State of H.P. is to be counted towards qualifying service for pensionary benefits irrespective of fact whether Department is having work charged establishment or not- Petitioner being conferred with work charged status since May, 2002, is entitled for benefit of Pension Rules as well as GPF Rules- Government Notification dated 15.05.2003 stipulating for non-applicability of Pension Rules to employees appointed/engaged thereafter is not attracted. (Para 31 to 33)

Cases referred:

Punjab State Electricity Board and another v. Narata Singh and another, (2010) 4 SCC 317;
Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp. (2) SCC 316;

Whether approved for reporting? Yes.

For the Petitioner	**:**	Ms Ranjana Parmar, Senior Advocate, with Mr. Karan Singh Parmar, Advocate.
For the respondents	**:**	Mr. R.P. Singh, Deputy Advocate General.

Vivek Singh Thakur, Judge

Case of the petitioner herein is that despite having been conferred work-charge status since 13.4.2002, prior to Notification dated 15.5.2003, whereby CCS (Pension) Rules, 1972 (hereinafter referred to as Pension Rules) and GPF Rules were made inapplicable for all appointments made on or after 15.5.2003, respondents are depriving him from benefit of Pension Rules and GPF Rules.

85. It is undisputed that on 13.4.1994, petitioner was appointed as a Driver, on daily-waged basis, in Development Block, Jubbal, District Shimla, with the respondents-Department and in view of Regularization Policy, dated 9.6.2006, issued by Government of Himachal Pradesh for regularization of daily-waged employees, his services were regularized vide Office Order dated 16.11.2006 (Annexure A-1).

86. It is also an admitted fact that petitioner had approached this High Court by filing CWP No.5838 of 2010, titled as *Beli Ram v. State of Himachal Pradesh*, which was disposed of vide judgment dated 23.9.2010, directing the Director of Rural Development, Himachal Pradesh, to take appropriate action addressing the representation submitted by the petitioner, for conferment of work-charged status, on the basis of judgment dated 28.7.2010 in CWP No.2735 of 2010, titled as *Rakesh*

Kumar v. State of Himachal Pradesh, rendered by this High Court. Thereafter, the Director of Rural Development, Himachal Pradesh, after taking into consideration entire fact of the case, vide Office Order dated 15.3.2011, granted work-charged status to the petitioner on his completion of eight years' service, w.e.f. May, 2002 (Annexure R-1) till actual date of regularization, alongwith all consequential benefits.

87. It is also indisputable, rather admitted, that one Bahadur Singh, regularized, vide Office Order dated 16.11.2006 (Annexure A-1), alongwith the petitioner, had also filed a Writ Petition bearing CWP No.5898 of 2010, titled as *Bahadur Singh v. State of Himachal Pradesh*, for conferment of work-charge status upon him, on the basis of *Rakesh Kumar's* case *supra*, and the said petition was also disposed of by a Division Bench of this Court vide judgment dated 7.12.2010, with direction to petitioner Bahadur Singh to approach respondents-Department and further direction to the Department to consider his case on the basis of *Ramesh Kumar's* case.

88. Considering representation of Bahadur Singh, work-charged status was conferred upon him also, vide Office order dated 15.3.2011, on completion of eight years service, w.e.f. December, 2000, till actual date of regularization, i.e. 16.11.2006, alongwith all consequential benefits, like petitioner, on the very same day when work-charged status was conferred upon the petitioner.

89. In Para-6(vii) of the petition, it is claimed by the petitioner that similarly situated persons have been extended benefit of Pension Rules and GPF Rules and to substantiate this plea, he has placed on record communication dated 6.12.2012, sent from Director of Rural Development to concerned Block Development Officer, demanding certain documents pertaining to Bahadur Singh (retired) for his Leave Encashment and in the said list of documents, copy of Pension Payment Order (PPO), issued by the Accountant General, alongwith status of GPF/CPF of said Bahadur Singh, have also been requisitioned.

90. In reply, filed on behalf of respondents, in response to aforesaid Para-6(vii), contents of preliminary submissions No.1 to 9 have been reiterated. In preliminary submissions No.1 to 9, there is no response, muchless denial, to the aforesaid submissions of the petitioner, which is deemed admission of the claim of the petitioner on this count.

91. In opposing the claim of petitioner, respondents-Department has taken a stand that the petitioner was regularized w.e.f. 16.11.2006, on the basis of Policy dated 9.6.2006, issued by the Government of Himachal Pradesh and as he had joined regular establishment, after his regularization, which is a date subsequent to 15.5.2003, therefore, he is not entitled for benefits of Pension Rules and GPF Rules and further that Department of Rural Development does not have work-charged establishment and there is no category of work-charged worker in the Department and

further benefit of status of work-charged employee conferred upon the petitioner does not entitle him to count his service from the date of conferment of said status, bringing him within the ambit and scope of Pension Rules and GPF Rules.

92. It is also contended by the State that 'work-charged establishment' differs from 'regular permanent establishment' and thus these are two separate types of establishments and persons employed in these establishments form two separate and distinct classes, which are to be governed by separate set of rules and the rules, applicable to the employees working in regular establishment, are not applicable to the work-charged employees and, therefore, it is argued that petitioner is to be governed under Contributory Pension Scheme, which is also called National Pension System (NPS).

93. Material on record proves and establishes that petitioner is not only similarly situated but also identical to Bahadur Singh referred supra and, thus, he is entitled for identical treatment.

94. Two identically situated employees in a Department cannot be treated differently. State is expected to be a model employer and thus has to treat similarly situated employees in identical manner. Therefore, omissions and commissions on the part of the Department, depriving the petitioner from the benefits, which have already been extended by the department in favour of another identically positioned employee, is arbitrary, unreasonable, irrational, which is anti-thesis of Equality clause contained in Article 14 of the Constitution of India. Equals cannot be treated as unequally.

95. Issue that as to whether services rendered by a person as a work-charged employee, on regularization, are to be counted for pensionary benefits or not, is no longer *res integra*, as it stands settled by various pronouncements rendered by different High Courts, including this High Court, as well as the Supreme Court of India.

96. A Full Bench of Punjab and Haryana High Court in ***Kesar Chand v. State of Punjab*****,** reported in **(1988) 94(2) PLR 223 : 1988(5) SLR 27,** has held that an employee, holding substantively a permanent post on the date of his retirement, was entitled to count in full as qualified service the period of service in work-charged establishments for the purpose of calculating the pension and gratuity.

97. The Apex Court in ***Punjab State Electricity Board and another v. Narata Singh and another,*** **(2010) 4 SCC 317,** has considered the above referred judgment of the Punjab and Haryana High Court in *Kesar Singh's* case and has held that in view of settled position, there was no manner of doubt that work-charged service, rendered by an employee, was qualified for grant of pension under the rules of Government of Punjab and, therefore, Punjab State Electricity Board was

not correct in rejecting the claim of employee for inclusion of period of work-charged service rendered by him with the State Government for grant of pension, on the ground that service rendered by him in work-charged capacity, was outside PSEB and in the department of State Government, he was in a non-pensionary service.

98. A Division Bench of this Court in its judgment, rendered on 31.5.2012, in **CWP No.2240 of 2008,** titled as ***State of H.P. and others v. Tulsi Ram,*** has observed that the State of Himachal Pradesh is admittedly counting the service rendered on work-charged basis for calculating pension. In this pronouncement, ***Kesar Chand's*** case supra, has also been referred.

99. A Single Bench of this High Court in judgment dated 6.3.2013, in CWP No.6167 of 2012, titled as ***Sukru Ram v. State of Himachal Pradesh and others,*** considered the judgments in ***Tulsi Ram's*** and ***Narata Singh's*** cases, referred supra, and had issued direction to the State of Himachal Pradesh to count the service, rendered by a person as work-charged employee, towards qualifying service for calculating pension payable to him.

100. A Division Bench of this Court in its pronouncement dated 18.12.2018, in **CWP No.2384 of 2018,** titled as ***State of Himachal Pradesh v. Matwar Singh***, after referring judgments in ***Sukru Ram's*** and ***Kesar Chand's*** cases, referred supra, has affirmed the order, dated 31.7.2017, passed by the erstwhile H.P. State Administrative, in **OA No.6681 of 2016,** whereby employee's claim to count the work-charged service towards qualifying service for the purpose of pension and other retiral benefits, was allowed.

101. In **Civil Appeal No.6309 of 2017,** titled as ***Sunder Singh v. The State of Himachal Pradesh***, the Apex Court has observed that it is undisputed that post-regularization an employee, who has served for ten years, is entitled for pension for which work-charged service is counted. In this judgment, the Supreme Court has further directed that daily-waged service of five years will be treated equal to one year of regular service for pension and if on that basis, service is more than 8 years but less than 10 years, the service will be reckoned as ten years.

102. The Apex Court in ***Prem Singh v. State of Uttar Pradesh and others,*** reported in **(2019) 10 SCC 516,** has directed that service rendered in work-charged establishment is to be treated as qualifying service for grant of pension and that appointment of an employee working in work-charged establishment, for a long period, cannot be said against any particular project.

103. In present case also, stand of the Department that work-charged employee, appointed against a particular project, is not tenable, as the petitioner was appointed as a Driver not in the project but in the department against a post initially on daily-waged basis and thereafter on regular basis and lateron work-charged status was also conferred upon him on completion of eight years service till regularization. Petitioner was engaged against on existing post in the Department

and lateron regularized, in terms of Policy issued by the State, after completion of prescribed length of service. Job performed by the petitioner as a daily-waged and work-charged employee and also as a regular employee was identical and requirement thereof was existing from the date of initial appointment as daily-wager since 1994 not only till the date of conferment of work-charged status and regularization but continuously thereafter also.

104. A ground has been taken by the respondents-Department that Department of Rural Development is not having work-charged establishment and, thus, benefit of period of service as a work-charged employee cannot be extended to the petitioner. It is undisputed that in ***Mool Raj Upadhyaya vs. State of H.P. and others***, **1994 Supp. (2) SCC 316,** an affidavit was filed by the Chief Secretary to the Government of Himachal Pradesh, formulating a Scheme for granting work-charged status to all daily-waged employees, serving in the State of Himachal Pradesh, in all Departments, irrespective of the fact that Department is/ was having work-charged establishment or not.

105. In ***Gauri Dutt and others Vs. State of H.P.***, reported in **Latest HLJ 2008 (HP) 366,** it has been held that the scheme formulated in ***Mool Raj Upadhaya's*** case is applicable to daily-waged employees working in any department of the state of Himachal Pradesh and the employees, who are not governed by the directions given in ***Mool Raj Upadhaya's*** case, shall be governed by a Scheme framed by the State in this regard and it has also been observed that granting of work-charged status would mean that an employee would get regular scale of pay.

106. Term "work-charged", discussed ***State of Rajasthan v. Kunji Raman,*** reported in **(1997) 2 SCC 517,** is in different context, whereas this term, in Himachal Pradesh, is used in different context. A person, working on daily-waged basis, before his regularization, is granted work-charged status on completion of specified number of years as daily-wager and effect thereof is that thereafter non-completion of 240 days in a calendar year would not result into his ouster from the service or debar him from getting the benefit of length of service for that particular year. Normally, work-charged status is conferred upon a daily-wager, on accrual of his right for regularization, on completion of prescribed period of service, but for non-regularization is for want of regular vacancy in the department or for any other just and valid reason. Therefore, it is a period interregnum daily-wage service and regularization, which is altogether different form the temporary establishment of work-charge, as discussed in the judgment of the Apex Court relied upon by the State and, for practice in Himachal Pradesh, work-charged status is not conferred upon the person employed in a project but upon such daily-wage workers, who are to be continued after particular length of service for availability of work but without regularization for want of creation of post by Government for his regularization/ regular appointment. Therefore, work is always available in such cases and the

charge of a daily-wager is created thereon to avoid his disengagement for reasons upon which a daily-wager can be dispensed with from service.

107. Upholding the order passed by the erstwhile H.P. State Administrative Tribunal, a Division Bench of this Court, vide judgment dated 10.5.2018, in CWP No.3111 of 2016, titled as ***State of Himachal Pradesh v. Ashwani Kumar***, has pronounced that work-charged establishment is not a pre-requisite for conferment of work-charged status nor conversion of work-charged employee into regular employee would make such establishment non-existent.

108. On conferment of work-charged status, sword of disengagement, hanging on the neck of workmen, is removed on completion of specified period of daily-waged service, as thereafter instead of daily-wage, the employee would get regular pay-scale and would be entitled to other consequential benefits for which a daily-waged employee is not entitled.

109. In the given facts and circumstances of present case, judgment relied upon by the respondents reported in ***Kunji Raman*** case (supra), is neither relevant nor applicable.

110. At this stage, a communication dated 25.11.1975 sent from the Secretary (PW) to the Government of Himachal Pradesh, to the Chief Engineers, HPPWD, is also relevant for reference, whereby with concurrence of Finance Department, it has been clarified that all work-charged employees, including temporary industrial workers, are to be treated to be part of pensionable establishment. The said communication is reproduced as under, for convenience:

> "From
>
> The Secretary (PW) to the
> Government of Himachal Pradesh.
>
> To
>
> The Chief Engineers,
> H.P.P.W.D., Shimla-171001.
>
> Dated Shimla -171002, the 25th November, 1975
>
> Subject: Extension of Family Pension Scheme 1964 to the temporary work charged staff.
>
> Sir,
>
> I am directed to refer to your letter No.PWD-133-(Pension)/75-10844, dated 30/8/75 and this Department Office Ofder No.1-18/69-PWD(Part), dated 4/4/1973 and to say that in C.P.W.D., the temporary Work Charge staff having been given option either to join the pensionary establishment or to be admitted to or retain W.C. Provident Fund, w.e.f. 21-5-71, a question was raised that the benefits of Family pension scheme, 1964 may be extended to all the temporary W.C. staff of H.P.P.W.D. as admissible to their counterparts in C.P.W.D.
>
> In this connection, the matter has been carefully considered. There was and is no C.P.F. Scheme in operation in Himachal Pradesh. The Permanent W.C. staff under H.P.P.W.D. was extended the benefits of liberalized pension rules/gratuity, and family pension Scheme, w.e.f. 18.11.60 and 1.1.64 respectively. This was in accordance with the decision contained in Government of India, Ministry of Finance (Department of Expenditure) office memo. No. 17(5)-EV(A)/60, dated

18.1.60. The Government of India vide their office memorandum No.B.43(4)-EV(B)/71, dated 1.5.71, in modification of the orders dated 18.11.60 have extended the benefits to the temporary W.C. staff to join the pensionable establishment or be admitted to or retain Contributory Provide Fund benefits referred to above.

Since in Himachal Pradesh, the temporary W.C. employees, falling in the category of industrial were not enjoying concession of C.P.F. benefits, and permanent W.C. employees were already entitled to pensionary/family pension benefits which were extended to them with retrospective effect i.e. w.e.f. 18.11.60 and 1.1.64 respectively, it is clarified that all W.C. employees, including temporary industrial workers are to be treated to be part of the pensionable establishment.

This issue with the concurrence of the Finance Department obtained vide their U.O. No.FIN(C)-A(9)-6/75-2703, dated 21.10.75.

Jai Hind.

Yours faithfully,

Under Secretary (PW) to the
Government of Himachal Pradesh"

111. In present case, Division Bench of this Court in **CWP No.5838 of 2010,** preferred by the petitioner, had directed the Department to consider representation of the petitioner, on the basis of ***Rakesh Kumar's*** case supra and, thereafter, the Department had considered the facts of the case and had conferred the status of work-charged employee upon the petitioner. At no point of time, in the case of petitioner, the Department had raised the issue that it was not having work-charged establishment. Therefore, now, at this stage, for omission and commission on the part of the Department, this plea is not sustainable**.**

112. Once work-charged status has been conferred upon an employee by the Department, which is a limb of Government of Himachal Pradesh, then after doing so, the Department cannot take U-turn to deny the benefit of such status conferred upon the employee by the Department itself. Work-charged employee, in either of the Departments of Government of Himachal Pradesh, whether it is Public Works Department or Irrigation and Public Health Department or any other Department, like present one, constitutes same class, i.e. work-charged employee under the Government of Himachal Pradesh and when, as evident from the communication dated 25.11.1975, work-charged employees in Public Works Department, now bifurcated into Public Works Department and Irrigation & Public Health Department, are treated to be part of pensionary establishments, the respondents-Department cannot deny such benefit to employees conferred work-charged status by the department itself. Therefore, it does not lie in the mouth of respondents that work-charged employees in Department of Rural Development are not to be treated as part of pensionary establishment. Such a discriminatory treatment to its similarly situated employees, forming identical class, is not expected from a democratic welfare State, being custodian or protector of Fundamental Rights of its citizens, as such any discrimination, on this count, would be violative of Article 14 of the Constitution of India.

113. Despite having been bestowed status of custodian of rights of its citizens, State, since long, is adopting exploitative method in the field of public employment to avoid its liabilities, depriving the persons employed from their just claims and benefits by making initial appointments on temporary basis, i.e. contract, adhoc, tenure, daily-wage, work-charge, etc., in order to shirk from its responsibility and present case is also an example of such practice, where requirement of driver is very much in existence since beginning, but instead of employing/appointing a person on regular basis, appointment on daily-wage basis is made and for considerable long period, exploiting unemployment, person is forced to serve as such and, thereafter, he is converted as a regular employee and on approaching the Court work-charged status is also conferred upon him. When such department has conferred status of work-charged on an employee on its own, after due consideration, then such department cannot take U-turn for denying benefits of work-charged service of such employee, which is otherwise available to similarly situated work-charged employees in other departments of the State.

114. In the light of aforesaid discussion, particularly pronouncements as well as communication dated 25.11.1975, referred supra, it is held that the period of service rendered by a person as work-charged employee with any establishment of State of Himachal Pradesh is to be counted, as qualifying service for pensionary benefits, irrespective of the fact that the Department is having work-charged establishment or not. In addition, in terms of pronouncement of Supreme Court in ***Sunder Singh's*** case, daily-waged service of 5 years will be treated equal to one year of regular service for pension and if on that basis, service is more than 8 years but less than 10 years, the service will be reckoned as ten years.

115. In view of aforesaid conclusion, the petitioner is to be considered in the pensionary establishment with effect from conferment of work-charged status upon him, i.e. May, 2002, which is prior in time to the Notification dated 15.5.2003 and, thus, he is entitled for benefit of Pension Rules and GPF Rules and all other consequential benefits incidental thereto. In addition, in view of ***Sunder Singh's*** case, he shall also be entitled to treat daily-waged service of five years equal of one year of regular service for pension and if on that basis, service is more than 8 years but less than 10 years, the service will be reckoned as ten years.

116. Accordingly, the respondents are directed to extend all permissible benefits to the petitioner, in aforesaid terms, within eight weeks from today.

Writ Petition is allowed and disposed of, in the aforesaid terms. Pending application, if any, also stands disposed of.

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

Mukesh Kanwar .....Petitioner

Versus

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

CWPOA No. 709 of 2019
Decided on: 29.09.2020

Constitution of India, 1950- Article 226- Writ seeking directions to State/ respondents to complete selection process to post of constable and give appointment to petitioner against category of 'ward of freedom fighter'- Entitlement- Held, no post for the 'ward of freedom fighter' was advertised in the recruitment notice- He was not considered against general category seats either because of his low merit- No merit in the petition and is dismissed. (Para 2 & 3)

Whether approved for reporting? Yes.

For the petitioner: Mr. D.P. Chauhan, Advocate.

For the respondents: Mr. Desh Raj Thakur, Addl. A.G.

(Through video conferencing)

Vivek Singh Thakur, J. (Oral)

Present petition has been filed seeking direction to the respondents to complete the process of recruitment to the post of Constable under reserve category of ward of freedom fighter and issue appointment letter to the petitioner.

2. In response to the petition, it is submitted that the petitioner had applied for the post of Constable under general category and sub category IRDP. The petitioner had also marked the column depicting wards of freedom fighter in the application form, whereas, the fact remains that as per roster, no post for the ward of freedom fighter was advertised at that time. Further, the petitioner was not considered in general category as his merit stood very low and as per the rule of reservation the ward of freedom fighter can only be considered to a post advertised for the said category. Lastly, it is stated that the availability of a post which is not advertised by the Department does not confer any right on the petitioner to claim appointment and even after selection, a candidate has no indefensible right for appointment and, therefore, petitioner has no right to claim appointment against the post of ward of freedom fighter, which was not advertised at all in the recruitment process at that point of time.

3. Considering the prayer as well as response thereto, I find no merit in this petition and the same is accordingly dismissed.

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

CWPOA No. 5062 of 2019

Prem Sagar and others

.....Petitioners

Versus

State of H.P and others.

.....Respondents

CWPOA No. 5319 of 2019

Yashwant Singh

.....Petitioner

Versus

State of H.P and others.

.....Respondents

CWPOA No. 5062 of 2019 &
CWPOA No. 5319 of 2019
Decided on: 17.09.2020

Right of Children to Free and Compulsory Education Act, 2009 - Himachal Pradesh Elementary Education Department Trained Graduate Teacher, Class-III (Non-gazetted) Recruitment and Promotion Rules, 2009 (Rules) - Clause 11- Column No. 7- Essential qualifications for promotional post of TGT enhanced by way of amendment in Rules in 2012 i.e. 50% marks in graduation level and having passed Teacher Eligibility Test- Amendment in Rules making petitioners who were appointed as JBT earlier to 2012, ineligible for promotion- Challenge thereto- Held, Government in its wisdom has kept 15% quota for JBT teachers for promotion to post of TGT (Arts) provided they fulfill the minimum eligibility criteria laid in Rules for appointment to post of TGT (Arts) – Condition of having passed TET was incorporated in terms of statutory provisions of the Act- Condition not arbitrary as endeavour is to have more meritorious persons manning posts of teachers to impart education. (Para 12 to 14)

Constitution of India, 1950- Article 226- Promotional posts- Amendment in Recruitment and Promotion Rules changing eligibility criteria- Whether amended Rules would apply qua posts which fell vacant prior to amendment in Rules?- Held, it is the Rule in vogue at time of consideration of candidature of person for promotion, which is applicable- And not the Rule which was in vogue when the vacancy fell vacant. (Para 17)

Cases referred:
Rajasthan State Sports Council and another vs. Uma Dadhich and another (2019) 4 SCC 316;

Whether approved for reporting? Yes.

For the petitioners: Mr. Avneesh Bhardwaj, Advocate for the petitioners in CWPOA No. 5062 of 2019.

Ms. Sunita Sharma, Sr. Advocate with Mr. Dhananjay Sharma, Advocate for the petitioner in CWPOA No. 5319 of 2019.

For the respondents: Mr. Dinesh Thakur and Mr. Sanjeev Sood, Addl. A.Gs with Ms. Divya Sood, Dy. A.G for the respondent-State.
Mr. B.Nandan Vashisth, Advocate for respondent No.3 in CWPOA No. 5062 of 2019.

(Through Video Conferencing)

Ajay Mohan Goel, J. (Oral)

As common questions of facts and law are involved in both these petitions, they are being disposed of by a common judgment.

2. The controversy involved in these petitions is in a very narrow compass. The petitioners were appointed as JBT Teachers. The next promotional post from the post of JBT Teacher is TGT(Arts). Vide Notification dated 22.10.2009, the Elementary Education Department, brought into force the Himachal Pradesh Elementary Education Department, Trained Graduate Teacher Clause-III (Non-Gazetted) Recruitment and Promotion Rules 2009. In terms of Clause 11 thereof, the post in issue, *inter-alia,* was to be filled in 15% by way of promotion from amongst the in service JBTs possessing the educational qualification as prescribed in Column No. 7 thereof, who had at least five years regular service or regular combined with continuous *ad-hoc* service rendered, if any, in the grade. Clause 7 of the Recruitment and Promotion Rules, *inter-alia,* provided that minimum educational qualification for being appointed as a TGT Teacher was B.A.B.Ed/B.El.Ed with English as an elective subject. Clause 7 of the Recruitment and Promotion Rules, as stood incorporated in the 2009, is being reproduced here-in-below:-

Minimum educational and other qualification required for direct recruits:-	ESSENTIAL ACADEMIC & PROFESSIONAL QUALIFICATION:- TRAINED GRADUATE TEACHER (ARTS);- B.A.B.Ed/B.El.Ed. With English as an elective subject and any two of the following subjects in all the three years of Graduation:- I) Hindi ii) Economics iii) Mathematics iv) History v) Political Science vi) Geography vii) Sociology viii) Sanskrit ix) Public Administration. Or B.A.(Honours) in any of the above subjects with the condition that the candidate must have passed English as an elective subject and has taken any of the above subject as subsidiary subject in all the two years of Graduation and B.Ed. **TRAINED GRADUATE TEACHER (NON-MEDICAL):-** B.Sc.E.Ed./B.El.Ed. The B.Sc./B.El.Ed.Degree should have been with the following subject combinations- I) Pass course with Physics, Chemistry & Math as combination subject. Or ii) Honours course in Physics with Chemistry and Math as Subsidiary subjects or iii) Honours course in Chemistry with Physics and Math as subsidiary subjects or iv) Honours course in Math with Physics and Chemistry as subsidiary subjects **TRAINED GRADUATE TEACHER (MEDICAL):-** B.Sc.B.Ed./B.El.Ed. The B.Sc./B.El.Ed. Degree should have been with the following subject combinations:- I) Pass course with Chemistry, Botany & Zoology. Or ii) Honours in Botany with Chemistry & Zoology as subsidiary subjects. Or iii) Honours in Chemistry with Botany & Zoology as subsidiary subjects. Or iv) Honours in Zoology with Chemistry & Botany as subsidiary subjects. b) Desirable Qualification: **Knowledge of customs, manner and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh.**

3. These Rules were amended vide Notification dated 31st May, 2012 (Annexure A-2) appended with CWPOA No. 5062 of 2019. By way of amendment, which was now

carried out, a condition stood imposed in Column No. 7 to the effect that the essential academic and professional qualification for being appointed as TGT (Arts), which obviously included promotion also, was graduation with 50% marks as well as passing of Teacher Eligibility Test to be conducted by the H.P. Subordinate Services Selection Board. The petitioners are aggrieved by this amendment which stood incorporated in the Recruitment and Promotion Rules.

4. The contention of the petitioners is that though they are graduates, but because they are not having 50% marks in graduation, therefore, the amendment which has been carried out renders them ineligible for promotion to the post of JBT, as even for the purpose of TGT, candidate has to have 50% marks in graduation.

5. The petitioners have relied upon the Notification issued by the National Council for Teacher Education (hereinafter referred to as 'NCTE'), dated 23rd August, 2010, appended with CWPOA No. 562 of 2019 as Annexure A-5, which has been issued by the Ministry of Human Resource Development, Government of India, laying down the minimum qualification to be eligible for appointment as a Teacher in Class I to VIII in schools referred to in Clause (n) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009, with effect from the date of issuance of the said Notification. Clause 4 of the Notification reads as under:-

> "4. **Teacher appointed before the date of this Notification**:- The following categories of teachers appointed for classes 1 to VIII prior to date of this Notification need not to acquire the minimum qualifications specified in Para(1) above.
>
> (a) A teacher appointed on or after the 3rd September, 2001 i.e. the date on which the NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 (as amended from time to time) came into force, in accordance with that Regulation.
>
> Provided that a teacher class I to V possessing B.Ed qualification, or a teacher possessing B.Ed (Special Education) or D.Ed (Special Education) qualification shall undergo an NCTE recognized 6 month special programme on elementary education.
>
> (b) A teacher of class I to V with B.Ed qualification who has completed a 6 month Special Basic Teacher Course (Special BTC) approved by the NCTE;

> (c) A teacher appointed before the 3rd September, 2001, in accordance with the prevalent Recruitment Rules."

6. The stand of the petitioners is that the respondent-State is erring in not initiating the process for promotion in terms of provisions of Clause 4 of the Notification issued by the NCET, as they are not required to fulfill the eligibility criteria of possessing 50% marks in B.A or passing Teacher Eligibility Test and, thus, they are eligible for being promoted to the post of TGT. The contention of learned counsel for the petitioners is that to this extent, the Recruitment and Promotion Rules which now stand promulgated by the State, by way of amendment in the year 2012, are *ultra-vires* and liable to be quashed and set aside. Learned counsel for the petitioners have also relied upon Annexure A-2 appended with CWPOA No. 5319 of 2020, relevant portion whereof reads as under:-

> "I am directed to refer to your letter no.EDN-H(2)B(2)7/2014-Promotion dated 6th January 2015 on subject cited above and to say that the NCTE regulation itself seem to provide that teachers appointed before 3.9.2001 has certain exemption even for promotion hence it is appropriate that the same may be considered for inclusion in R&P Rules of TGT."

7. Another argument which has been put-forth by the learned counsel for the petitioners is that as the promotional posts were available before the amendment stood incorporated in the Recruitment and Promotion Rules by the State in the year 2012, therefore also, the petitioners had a right to be considered and promoted against those available vacancies in terms of the old Rules which were in force at the time when vacancies became available and their right could not have been marred by the amendment which has been so carried out in the year 2012.

8. The petitions stand opposed by the respondents. The stand of the State is that there is no infirmity in the Recruitment and Promotion Rules which have been framed by them or in the amendment which has been carried out by them in the Recruitment and Promotion Rules, because it is the prerogative of the employer to formulate the Recruitment and Promotion Rules and set the eligibility criteria, which a candidate has to fulfill in order to be appointed against a post.

9. Learned Additional Advocate General has argued that the Government has taken a conscious decision that the posts of TGT (Arts) should be manned by those candidates who have at least 50% marks in graduation level as well as have passed the

Teacher Eligibility Test because this will ensure merit *intra* the Teachers who are so selected for imparting education to the students. On this basis, he has argued that the amendment which has been carried out in the Recruitment and Promotion Rules, 2012 is not arbitrary and is reasonable as the same is in the interest of students because the Government has gone with merit. He has further argued that the reliance being placed on the Notification issued by the NCTE by the petitioners is totally mis-conceived because no protection is given to the incumbents like the petitioners vide said Notification.

10. Learned counsel appearing for the NCTE has also submitted that the Notification being relied upon by the petitioners is of no assistance to them because Clause 4 thereof only protected those Teachers who as on the date of issuance of the Notification stood engaged and were imparting education to the students from Class-I to VIII, but were not fulfilling the eligibility criteria laid down in the Notification.

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

12. In my considered view, there is no merit in the plea of the petitioners that the Recruitment and Promotion Rules which have been so promulgated by the State by virtue of amendment which has been carried out in the year 2012 are *ultra-vires* or, the State has erred in not appreciating that the petitioners were duly saved from possessing higher qualification for the purpose of promotion to the post of TGT(Arts) in terms of the Notification of the NCTE.

13. It is not in dispute that the petitioners stood appointed as JBT Teachers. Qualification of B.A is not required for being appointed as a JBT Teacher. However, graduation was a qualification envisaged by the State for making recruitment to the post of TGT(Arts). In its wisdom, the Government in the Recruitment and Promotion Rules, kept 15% quota for JBT Teachers also for promotion to the post of TGT (Arts), provided that they fulfill the minimum eligibility criteria which was laid down in the Recruitment and Promotion Rules for appointment to the post of TGT(Arts). The Rules as were originally framed in the year 2009, were not having the minimum bench-mark of 50% marks or the necessity of the candidate having to pass the Teacher Eligibility Test examination, however, in the year 2012, when the amendment was carried out in the said Rules by the Government, these conditions were imposed. That is to say, now in order to be eligible for appointment against the post of TGT (Arts), it was necessary for the candidate in issue ought to have 50% marks in the

graduation level and it was also necessary for the incumbent to have had passed the Teacher Eligibility Test. The petitioners, admittedly, were neither having 50% marks in graduation nor they had passed the Teacher Eligibility Test because it is the own case of the petitioners that they were not eligible to appear in the said examination on account of they are having less marks in the Graduation.

14. It is settled law that it is the prerogative of the employer to incorporate eligibility criteria for being appointed against the posts in issue and the Courts ordinarily are not to interfere in the said prerogative until and unless the eligibility criteria laid down by the employer is so arbitrary that it shocks the judicial conscious of the Court. Coming to the facts of this case, what the Government did in the year 2012 was that it imposed a condition of the benchmark of a candidate at least securing 50% for being eligible and appointed against the post of TGT (Arts) as well as the candidate passing the TET test. It is not in dispute that the condition of a candidate must having passed TET test, was a condition imposed in terms of the statutory of the statutory provisions of the Right of Children to Free and Compulsory Education Act, 2009. Even the condition of imposing 50% minimum marks as the bench-mark for a candidate to be eligible for appointment against the post of TGT cannot be termed to be arbitrary because as has been argued by learned Additional Advocate General, if the endeavor of the State is to have more meritorious candidates manning the posts of Teachers to impart education TGT (Arts) candidates, then this Court cannot hold such a condition to be arbitrary.

15. Coming to the Notification of NCTE, this Court concurs with the submissions made by learned counsel for the NCTE that the provisions of the Notification do not come to the rescue of the petitioners. The Notification in issue lays down the minimum qualification for a person to be eligible for appointment as Teacher in Class-I to Class-VIII in the schools referred to in Clause (n) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009 w.e.f. the date of Notification. This means that as from the date of issuance of the said Notification no incumbent is eligible to be appointed as a Teacher in Class-I to Class-VIII in the schools referred to in Clause (n) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009, who do not possess the qualification as prescribed therein. However, to safeguard, the interest of those incumbents who were serving in Schools as on the date when the Notification came in force and were imparting education to students studying in Class-I to VIII, but were not fulfilling the minimum qualifications contained in this Notification, protection was given by virtue of

Clause-4 to the effect that the categories of Teachers appointed for Class-I to Class-VIII prior to the date of said Notification need not acquire the minimum qualification referred to in para one. This Clause by no stretch of imagination can be said to protect the incumbents like the petitioners from possessing minimum eligibility criteria for being eligible for promotion to the post of TGT. All that this Notification protects is that assuming as on the date of coming into force of this Notification, if any of the petitioners who was serving as a JBT was not possessing qualifications prescribed in this Notification then, his services were saved and were not required to be terminated on account of want of qualification in terms of Notification dated 23rd August, 2010. Therefore, there is no merit in the contention of the learned counsel for the petitioners that the amendment which has been carried out in 2009 in the Recruitment and Promotion Rules 2012 is *ultra-vires* being in violation of the Notification issued by NCTE dated 23rd August, 2010.

16. The communication issued by the Officers or the officials of the State Government being relied upon by the petitioners is also of no assistance to them as the same cannot supplant the Notification. Same is apparently a result of misreading of Notification dated 23rd August, 2010 and, therefore, is of no consequence.

17. As far as the issue raised by the learned counsel for the petitioners that as there were certain posts which were lying vacant of TGT Arts before the the necessary amendment was incorporated in the Rules, therefore, the petitioners had a right to be appointed against those posts in terms of the Rules which were prevailing at the time when the posts fell vacant, all this Court wants to observe is that in terms of the law as it holds the field today, it is the Rule in vogue at the time when the candidature of a person is considered for the purpose of promotion which has to be taken into consideration by the DPC concerned and it is not the Rule which was in vogue at the time when the vacancy fell vacant. It is gainful to refer to the judgment of the Hon'ble Supreme Court in ***Rajasthan State Sports Council and another*** vs. ***Uma Dadhich and another (2019) 4 SCC 316***, in which Hon'ble Supreme Court has been pleased to hold that no vested right to promotion accrues upon a candidate and only a right to be considered accrues as it exists on the date when the case for promotion is to be taken up.

18. In view of the above findings, as this Court does not finds any merit in these petitions and the same are accordingly dismissed, so also the pending application(s), if any.

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

Kamal Kishor ..... Petitioner

versus

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

CWPOA No.330 of 2019
Date of Decision7.9.2020

Constitution of India, 1950- Articles 14 & 226- Non-selection of candidate to post of constable- Petitioner challenging selection of private respondent as a result of favouritism – Contending that though securing higher marks in written examination, he was intentionally given less marks in interview to exclude him- Held, mere securing higher marks in written test does not entitle a candidate to claim more marks in interview as well- All candidates secured more than 5 marks in interview except petitioner who secured 4.33 marks- Difficult to infer that less marks were given to petitioner to favour private respondent- In absence of material on record qua the allegations of malafides and wrong doings, expertise and wisdom of Members of Interview Board cannot be doubted- Court cannot substitute its own views for the wisdom of Selection Committee- No unreasonableness in decision of Board in awarding more marks to private respondent- Petition dismissed. (Para 6, 8 & 9)

Cases referred:
Central Board of Secondary Education versus Khushboo Shrivastava and others (2014) 14 SCC 523;

Whether approved for report? Yes.

For the Petitioner : Mr. T.S. Chauhan, Advocate, through video-conferencing.

For the Respondents: Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General, for the respondents-State, through video-conferencing.

Respondent No.6 in person.

Sandeep Sharma, Judge*(oral)*

Vide Recruitment Notice dated 28th February, 2010 (Annexure P-6), respondents invited application from the candidates (male and female) for filling up 1309 posts of constables in 12 Districts of Himachal Pradesh. Petitioner being ST candidate applied against one post belonging to ST category, falling in the share of Bilaspur District. The petitioner qualified the written as well as ground test and was called for an interview vide letter dated 21.9.2010, as is evident from Annexure P-8. Alongwith other six candidates, petitioner appeared for the interview, but fact remains that he was not selected, rather respondent No.6, namely, Sh. Rakesh Kumar was selected.

2. Being aggrieved and dissatisfied with the selection of respondent No.6, petitioner approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein following reliefs:-

"(i) That the respondent No.1 to 3 may be directed to place on record the appointment letter issued to the respondent No.6 on the basis of final result and same may be quashed and set-aside.

(ii) That a writ of mandamus may very kindly be issued thereby directing the respondents No.1 and 2 to constitute a separate interview board for interviewing the candidates under ST/UR category.

(iii) That respondent No.1 to 3 may be directed to consider the case of the petitioner for appointment him as Constable under Scheduled Tribe i.e. (ST/UR) category in the 6th Battalion."

3. Precisely, the allegation of the petitioner is that respondent No.6 was less meritorious than him, but since his father Sh. Dandu Ram was serving as Sub Inspector in the police Department at the relevant time, he has been unduly favoured by the Interview Board while awarding marks in the interview and as such, his selection deserves to be quashed.

4. Having heard learned counsel representing the parties and perused the pleadings adduced on record by the respective parties, this Court finds that out of 1309 posts of constables, 39 posts of constables (male and female) were to be filled up amongst the candidates hailing from District Bilaspur. Besides above, five seats were to be filled up amongst left out vacancies i.e. 5th IRBn (female). It is also not in dispute that out of aforesaid vacancies falling in the share of Bilaspur District, only one seat was reserved for ST candidate against which, petitioner, respondent No.6 and other four candidates qualified.

5. Reply filed on behalf of the respondents reveals that the petitioner had secured 48 marks in written test, whereas respondent No.6 secured 41 marks and as such, they both being qualified were called for suitability-cum- personality test. However, petitioner secured only 15 marks in the ground test, whereas respondent No.6 secured 21 marks and as such in total petitioner secured 68 marks, whereas respondent No.6 secured 67 marks. Besides above, both the petitioner and respondent No.6 were awarded two marks each being distinguished sportsmen.

6. The grouse of the petitioner is that since he had secured more marks than respondent No.6 in written test, he could not have been awarded less marks in the interview by the Interview Board. However, perusal of comparative merit list drawn in the case of ST category (Annexure P-9), itself suggests that it was not only respondent No.6, who was awarded more marks then petitioner in the interview, rather all the candidates save and except petitioner secured more than 5 marks, whereas petitioner secured 4.33 marks and as such, it is difficult to conclude that

Interview Board with a view to favour respondent No.6 purposely and intentionally granted less marks to the petitioner. Though, petitioner has stated that since father of respondent No.6 was serving in police department at the time of selection, respondent No.6, has been favoured by the members of the Interview Board, but mere such bald allegations leveled against the members of the Interview Board is not sufficient to conclude bias, if any, against the petitioner, rather petitioner with a view to prove bias/ mala-fides ought to have levelled specific allegations against the members of the Interview Board. Moreover, mere fact that father of respondent No.6 was serving in police at the time of selection is not sufficient to conclude that he with a view to get his son selected approached the members of the Interview Board, which thereafter ignoring the merit of the petitioner selected respondent No.6.

7. Leaving everything aside, comparative merit list drawn in the case of the ST category, as has been placed on record vide Annexure P-9, itself suggests that respondent No.6 though had procured less marks then petitioner in the written but he secured 6 marks more than petitioner in ground test. Otherwise also, deficiency/difference is not that much which could compel this Court to draw inference that petitioner was purposely not given adequate marks with a view to give undue benefit to respondent No.6. There is a deference of only one mark between the petitioner and respondent No.6 in marks awarded in written as well as ground test.

8. As has been observed hereinabove, no specific allegation, if any, against the members of the Interview Board has been leveled by the petitioner that they subverted the merit with a view to help respondent No.6 and as such, selection of respondent No.6 cannot be said to be bad mere on the allegations that respondent No.6 came to be appointed on the recommendation of his father, who at the relevant time was serving in the police department. Otherwise also, marks in interview are supposed to be awarded on the basis of overall personality of the candidate and his/her general awareness. Similarly, interview board is generally comprised of experts of various subjects and marks are awarded collectively but on the individual assessment of each members of the Board. Interview board is required to assess the suitability of a candidate taking into consideration various factors, having direct bearing on the work and conduct of the candidate which he/she can be assigned after his/her selection. Merely securing higher marks in written test does not entitle a candidate to claim more marks in the interview, especially in comparison to candidate, who may not have fared well in written but may have performed well in the interview. Leaving everything aside, expertise and wisdom of members of the interview board cannot be doubted unless the candidate while alleging mala-fides and wrong-doings, if any, on the part of the interview board, places such material on record which is sufficient to shock the conscience of the Court.

9. Though, this Court finds no unreasonableness in the decision of interview board in awarding more marks to respondent No. 6 but even otherwise, while exercising writ jurisdiction, court cannot substitute its own views for that of wisdom of Selection Committee possessing technical expertise and rich experience of actual day to day working of Police Department. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Central Board of Secondary Education versus Khushboo Shrivastava and others*** (2014) 14 Supreme Court Cases 523, wherein it has been held as under:-

> "29….. As has been repeatedly pointed out by this Court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grassroots problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded."

10. Leaving everything aside, this Court having carefully perused the comparative merit list drawn against the seat of ST category finds that petitioner is otherwise at Sr. No.3, meaning thereby, if appointment of respondent No.6 is held to be bad in law on the basis of the allegations levelled against him, even then petitioner would not be selected against the seat reserved for ST category being second in waiting list. Otherwise also, during the proceedings of the case, it has been informed that petitioner now stands selected in the police Department in subsequent recruitment.

11. Consequently, in view of the above, the present petition is dismissed being devoid of any merit alongwith pending application(s), if any.

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

Bhupinder Singh Thakur and Ors .....Petitioners

Versus

State of Himachal Pradesh and Ors. .....Respondents

CWPOA No. 4859 of 2019
Decided on: 21.9.2020

Constitution of India, 1950- Articles 14 & 226- Service jurisprudence- Whether benefit of judgment passed in previous litigation in favour of one set of employees can be extended to another set of similarly placed employees though they were not parties in previous writ?- Held, where judgment pronounced by Court is a judgment in rem and intention is to give benefit to all similarly situated

persons, it is obligatory upon authorities to extend benefit thereof to all similarly situated persons. (Para 9)

Constitution of India, 1950- Articles 14 & 226- Service jurisprudence-Judgment in rem or judgment in personam- Inference as to – Held, whether judgment of Court is a judgment in rem or judgment in personam can be inferred from the tenor and language of the judgment itself- Judgment dealing with pay anomaly between two cadres of service, is a judgment in rem. (Para 9)

Cases referred:

State of Karnataka and Ors v. C. Lalitha, (2006) 2 SCC 747;
State of Uttar Pradesh and Ors v Arvind Kumar Srivastava and Ors, 2015 (1) SCC 347;
Union of India and Ors v. Tarsem Singh, 2008 (8) SCC 648;

Whether approved for reporting? Yes.

For the Petitioners	**:**	Ms. Shalini Thakur, Advocate.
For the Respondents	**:**	Mr. Ashok Sharma, Advocate General with Mr. Sudhir Bhatnagar, Additional Advocate General, with Mr. Kunal Thakur, Deputy Advocate General, for the State. Mr. Rishi Tandon, Advocate, for respondent No.3.

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with order dated 7.8.2014 (Annexure P-11), passed by respondent No.3 i.e. Chief Executive Officer, Himachal Pradesh, Khadi and Village Industries Board, Shimla, H.P., whereby prayer having been made on behalf of the petitioners to revise their pay scales at par with Senior Assistants with effect from their appointments in the Board in terms of judgment dated 27.11.2012 passed by the Coordinate Bench of this Court in CWP(T) No. 11365 of 2008, came to be rejected, petitioners have approached this Court, praying therein for following main reliefs:-

> *"i) For directing the respondents to release the pay-scales to the present petitioners as Assistant Development Officers at par with that of Senior Assistants, in terms of directions contained in the judgment at annexure P-5 dated 27.11.2012 which have been implemented only qua the juniors of the petitioners who were petitioners in P-5.*
> *ii) For issuing directions to the respondents to release the arrears to the petitioners on account of implementation of the judgment at annexure P-5 w.e.f. the respective date of appointments of the petitioners as Assistant Development Officers in the respondent Board or in the alternative w.e.f. any other date this Hon'ble Court deems just and proper in the facts and circumstances of the case along with interest."*

2. Precisely, facts of the case as emerge from the pleadings adduced on record are that some Assistant Development Officers working in the respondent Board approached this court earlier by way of CWP(T) No. 11365 of 2008, seeking therein direction to the respondents to remove the

anomaly existing in the pay scales of Assistant Development Officers w.e.f. 1983. Coordinate Bench of this Court vide judgment dated 27.11.2012 allowed the petition and directed the respondents to revise the pay scales of the petitioners in that case at par with the Senior Assistants with effect from 1983 and to release the arrears to them along with interest @9% per annum. Petitioners herein being similarly situate to those of the petitioners in that petition (supra) filed representation dated 9.7.2014 (Annexure P-10) to respondent No.3, praying therein to extend benefit of revision of pay scale in their favour with effect from 1983 as has been done in the case of other Assistant Development Officers pursuant to judgment dated 27.11.2012 passed in CWPT No. 11365 of 2008. However fact remains that respondent No.3 rejected the aforesaid claim of the petitioners on the ground that judgment dated 27.11.2012, is /was applicable only to those petitioners, who had approached the High Court well within time and more so, for those, who being aggrieved with the anomaly in the pay scales approached the court by way of CWPT No. 11365 of 2008. Vide order dated 7.8.2014, respondent No.3 while rejecting the claim of the petitioners observed in the order that since petitioners being not aggrieved of anomaly, if any, in the revision in their pay scale, did not approach the court at that point of time, benefit of judgment dated 27.11.2012 cannot be extended in their favour being judgment in personam. In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein for reliefs as has been reproduced herein above.

3. Having heard learned counsel for the parties and perused material available on record, this Court finds that counterparts of the petitioners herein had approached this Court by way of CWP(T) No. 11365 of 2008, seeking therein direction to the respondents to remove anomaly existing in the pay scales of Assistant Development Officers with effect from 1983. Coordinate Bench of this Court having taken note of the pleadings adduced on record by the respective parties in that case arrived at definite conclusion that prior to year 1978, pay scales of three categories i.e. Assistants, Accountants and Assistant Development Officers were same i.e. Rs. 160-400. Same parity was maintained upto 1.1.1978 when these categories were placed in the pay scale of Rs. 570-1080. The anomaly occurred in the year 1983 when the Assistants were granted the pay scale of Rs. 600-1120, but the Accountants and Assistant Development Officers were left out. The grievance of the Accountants was redressed by the Board by granting the pay scale at par with the Assistants, but again, the Assistant Development Officers were left out. In the general revision of pay scales, the anomaly still persisted whereby the Assistants and Accountants were granted pay scale of Rs. 1800-3200, but the Assistant Development officers were placed in the pay scale of Rs. 1500-2640. Coordinate Bench of this Court having taken note of the material placed before it specifically observed in para-7 of the judgment dated 27.11.2012 that respondents permitted anomaly to occur

again when with effect from 1.1.1996, the categories of Assistants and Accountants have been granted the pay scale of Rs. 5800-9200 and the category of the Assistant Development Officers was granted the pay scales of Rs. 5000-8100/-. Aforesaid anomaly again was allowed to repeat in the general revision of pay scales with effect from 1.1.2006. In the aforesaid background, Coordinate Bench of this Court returned positive finding in the aforesaid judgment that it is quite apparent from the record that posts of Assistants, Accountant and Assistant Development Officers have been treated at par for the purpose of revision of pay scales upto 1.1.1978 and it is only in the year 1983 when the Assistant Development Officers were given the pay scale of Rs. 600-1120 but such benefit was denied to the accountants and Assistant Development Officers. Having taken note of the recommendations made by the Chief Executive Officer of the Board for revision of pay scale of the petitioners in that case, Coordinate Bench of this Court specifically concluded in its judgment that "*it is not understandable that when the grievance of the Accountants has been redressed in the year 1985 by granting them the pay scale of Rs. 600-1120, why the Assistant Development Officers have been denied the same pay scale."* Coordinate Bench of this Court further observed in its judgment that "there was further arbitrariness in the action of the respondent Board, whereby the pay scale of Rs. 1800-3200 has been confined to the Assistants and Accountants, but denied the same to the Assistant Development Officers." Case of the Assistant Development Officers came to be recommended for revision of pay scale by the respondent-Board as emerges from the various resolutions passed by the Board, which have been taken note of by the Coordinate Bench of this court in its judgment passed in CWPT No. 11365 of 2008.

4. After having perused judgment rendered by the Coordinate Bench of this Court in CWP(T) No. 11365 of 2008, which was filed by the counterparts of the present petitioners, this Court finds considerable force in the submission made by Ms. Shalini Thakur, learned counsel representing the petitioner that order dated 7.8.2014 (Annexure P-11) having been passed by the Chief Executive Officer is not sustainable because by no stretch of imagination, judgment dated 27.11.2012, passed by the Coordinate Bench of this Court can be said to be judgment in personam.

5. No doubt, Coordinate Bench of this Court while allowing the petition directed the respondents to revise the pay scales of the petitioners with Senior Assistants w.e.f. 1983, but as has been observed herein above, if the judgment is read in its entirety, it clearly suggests that court while dealing with the case of the petitioners, not only specifically dealt with the pay anomaly, if any, in the pay scale of the petitioners in that case, rather court specifically dealt with pay anomaly in the cadre of Assistant Development Officers and as such, petitioners, who at that relevant time were also working as Assistant Development Officers alongwith petitioners in that case are /were entitled for revision of their pay scales with Senior Assistants w.e.f. 1983 in terms of judgment dated

27.11.2012. It is not in dispute that judgment dated 27.11.2012, rendered by the Coordinate Bench of this Court has attained finality because appeal(s) having been filed by respondent stand rejected/dismissed by the Division Bench of this Court as well as Hon'ble Apex Court.

6. In the case at hand, perusal of order dated 7.8.2014, whereby claim of the petitioners has been rejected nowhere suggests that petitioners are not similarly situate to the persons, who came to be granted benefit of revision of pay scale in terms of judgment dated 27.12.2014, rather case of the petitioners has been rejected on the ground that they failed to approach the court of law and benefit of the judgment dated 27.11.2012, cannot be extended to them being judgment in personam.

7. By now it is well settled that all persons similarly situate should be treated similarly. Only because one person approached the Court that would not mean similarly situate persons should be treated differently. Reliance is placed on judgment dated 31.1.2006 passed by the Hon'ble Supreme Court in case titled **State of Karnataka and Ors v. C. Lalitha**, (2006) 2 SCC 747, relevant para whereof is reproduced herein below:

> *"29. Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well-settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I Post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."*

8. Reliance is also placed on judgment dated 17.10.2014, passed by the Hon'ble Apex Court in ***State of Uttar Pradesh and Ors v Arvind Kumar Srivastava and Ors, 2015 (1) SCC 347***, which reads as under: *"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:*

> *22.1. Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.*
>
> *22.2 However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did*

> *not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.*
>
> *22.3 However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India (supra). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."*

9. It is quite apparent from the aforesaid exposition of law laid down by the Hon'ble Apex Court that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Otherwise, it would amount to discrimination and such action would be violative of Article 14 of the Constitution of India. Hon'ble Apex Court in the aforesaid judgment has categorically held that this principle needs to be applied in service matters more emphatically because the service jurisprudence evolved by the Court from time to time postulates that all similarly situated persons should be treated similarly. It stands clearly ruled in the aforesaid judgment that normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently. Another ground raised by the respondents is that since petitioners herein approached the court after an inordinate delay, their claim deserves outright rejection being barred by delay and latches. No doubt in the aforesaid judgment rendered by the Hon'ble Apex Court in ***Arvind Kumar Srivastava's*** case (supra) has held that all similarly situated persons should be treated similarly but such principle would be subject to well recognized exceptions in the form of laches and delays as well as acquiescence. The Hon'ble Apex Court has held that those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons, rather they would be treated as fence-sitters. However it has been further held in the aforesaid judgment that aforesaid exception shall not apply in those cases where the judgment pronounced by the Court was judgment in rem with an intention to give benefit to all similarly situated persons, whether they approached the Court or not. Hon'ble Apex Court has held that with such a pronouncement, the obligation is cast upon the authorities to itself extend the benefit thereof

to all similarly situated persons and whether the judgment of the Court was in rem or personam, same can be impliedly found out from the tenor and language of the judgment. In the case at hand, as has been discussed herein above in detail, judgment dated 27.11.2012, passed in CWP No. 11365 of 2008 if read in its entirety, clearly reveals that coordinate Bench of this Court specifically dealt with pay anomaly existing in the cadre of the Assistant Development Officers. While granting benefit to the petitioners in the aforesaid case, coordinate Bench of this Court has specifically held /termed action of the respondent-board to be arbitrary and discriminatory, whereby it granted the pay scale of Rs. 1800-3200 to the Assistants and Accountants, but denied the same to the Assistant Development Officers and as such, submission having been made by the respondent-State cannot be accepted that since judgment dated 27.11.2012 is judgment in personam, no benefit can be claimed on the strength of the same by the petitioners herein. Since this Court is of the definite view that judgment dated 27.11.2012 is judgment in rem, claim of the petitioners cannot be denied on the ground of delay and laches. Otherwise also, principles underlying continuing wrongs and recurring/successive wrongs would be applicable in the case of the petitioners. So long petitioners are in service, a fresh cause of action arises every month to them when they are paid less salary on the basis of wrong pay scale, which otherwise stands corrected/rectified in the case of the counterparts of the petitioners in terms of judgment dated 27.11.2012. Normally, a belated service related claim deserves rejection on the ground of delay and laches, but one of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related case is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. However, if the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. Similarly, if the claim involved issues of seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation would be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring and successive wrongs will apply. In the case at hand, revision of pay scale at par with Senior Assistants in terms of judgment dated 27.11.2012 in no manner would affect the rights of third parties and as such, claim of the petitioners cannot be allowed to be defeated on the ground of delay and latches.

10. The Hon'ble Apex Court in case titled ***Union of India and Ors v. Tarsem Singh, 2008 (8) SCC 648*** has held as under:-

> *"4.The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. A `continuing wrong' refers to a single wrongful act which causes a continuing injury. `Recurring/successive wrongs' are those which occur periodically, each wrong*

giving rise to a distinct and separate cause of action. This Court in Balakrishna S.P. Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan - [AIR 1959 SC 798], explained the concept of continuing wrong (in the context of section 23 of Limitation Act, 1908 corresponding to section 22 of Limitation Act, 1963) :

> *"It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."*

5.In M. R. Gupta vs. Union of India [1995 (5) SCC 628], the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held :

> *"The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....."*

6.In Shiv Dass vs. Union of India - 2007 (9) SCC 274, this Court held:

> *"The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.*
>
> *In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay*

in filing the petition..... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances.

11. Consequently, in view of the above, present petition is allowed and Annexure P-11 is set-aside and respondent-Board is directed to revise the pay scale of the petitioners at par with Senior Assistants w.e.f. 1983 in terms of direction contained in the judgment dated 27.11.2012 passed in CWPT No. 11365 of 2008 by the Coordinate Bench of this Court along with all consequential benefits. Present petition stands disposed of so also pending applications, if any.

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

Swami Raj ....Petitioner

Versus

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

CWPOA No.5015 of 2019
Date of decision: 7.9.2020

Constitution of India, 1950- Articles 14 & 226- **Right of Children to Free and Compulsory Education Act, 2009 (Act)** – Appointment as 'Bhoti teacher' on part time basis- Petitioner seeking direction to State to regularize him against newly created post of Bhoti teacher- State objecting petition on ground that petitioner does not possess essential qualifications of elementary teacher as prescribed under the Act- And he cannot claim party with JBTs- Held, petitioner was initially engaged as Bhoti teacher on recommendations of Education Department in 2003 and working since then without interruption- Provisions of Act cannot be applied in case of petitioner as his services were engaged prior to its commencement – Only person with special knowledge and expertise in the

field can be appointed as 'Bhoti teacher'- He cannot be made to compete with persons having qualifications in other fields- Claim of petitioner cannot be denied on ground that he does not possess requisite qualification prescribed under the Act- Petition allowed- State directed to consider case of petitioner for regularization. (Para 7 to 9)

Cases referred:
Bhagwati Prasad versus Delhi State Mineral Development Corporation (1990)1 SCC 361;
Whether approved for reporting ? Yes.

For the Petitioner: Mr. Onkar Jairath, Advocate, through video conferencing.

For the Respondents: Mr.Sudhir Bhatnagar, Additional Advocate General, through video conferencing.

Sandeep Sharma, Judge(Oral)**:**

In the year 2003, the Government of Himachal Pradesh took a conscious decision to start the classes of "Bhoti Language" in the Government Schools located in tribal areas and pursuant to aforesaid decision, Block Elementary Education Officer, Pangi at Killar sent a communication dated 2.6.2003 addressed to the Head Teacher Government Primary School Parmar, Bhatori, asking him to recommend the names of suitable/eligible candidates for being appointed on the post of Bhoti Language Teacher in accordance with law (Annexure A-1). Pursuant to aforesaid communication dated 2.6.2003, the process for appointing the suitable incumbents in terms of the direction issued by Block Primary Education Officer came to be initiated. Name of the petitioner being fully eligible and qualified came to be recommended for appointment as Bhoti Language Teacher. Head Teacher concerned after completion of due formalities appointed the petitioner as Bhoti Teacher on contract basis vide officer order dated 2.9.2003 issued from the office of respondent No.2 and directed him to join at Government Primary School, Parmar Bhatori (Annexure A-2). Since 2.9.2003 petitioner has been regularly rendering his services as Bhoti Teacher on contract basis in the school concerned.

2. Having taken note of requirement/necessity of the Bhoti teacher in tribal area, Government of Himachal Pradesh vide communication dated 12.12.2003 created two posts of Bhoti Teachers after consultation with the Finance Department. One post of Bhoti Teacher was assigned to Government Primary School Parmar, Bhatori, as is evident from communication dated 23.12.2005 addressed to the Deputy Director Elementary Education by the Director of Elementary Education (Annexure A-3), against which petitioner was already working in pursuance to his appointment vide office order dated 2.9.2003, whereas second post was assigned to Government School, Hudan Bhutori.

3. Precisely, the claim of the petitioner is that since he has been continuously working without there being any interruption against sanctioned post of Bhoti language teacher in the school concerned for more than 17 years, respondent-State ought to have regularized his services as Bhoti

teacher in terms of the regularization policy. Since, aforesaid prayer made on behalf of the petitioner never came to be paid any heed by the respondents, he was compelled to approach the erstwhile H.P. Administrative Tribunal by way of O.A. No.206 of 2015, praying therein following relief:-

> "(i) That the Respondents may be directed to regularize the services of the Applicant form the date on which the applicant is entitled to be regularized on the post of Bhoti Language Teacher in the pay scale which is being paid to the JBT Teacher in the State of Himachal Pradesh."

4. After abolition of erstwhile H.P. Administrative Tribunal, aforesaid Original Application came to be transferred to this Court and stands re-registered as CWPOA No.5015 of 2019.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that respondent-State having felt need of promoting Bhoti language in tribal areas of Himachal Pradesh decided to create/sanction 43 posts of Bhoti teachers in Spiti area of Lahaul & Spiti District. In the year, 2003, Government created two more posts of Bhoti Teacher on part time basis to start teaching of Bhoti language in Pangi area of Chamba District and such teachers were to be appointed for two hours in the first year, for four hours in the second year and in the third year it was on Spiti pattern, as is evident from Annexure A-3. 45 Bhoti teachers appointed on part time basis are being paid honorarium at the rate 3000/- per month for 10 academic months in a year, meaning thereby they are not getting any salary during winter vacation.

6. Mr. Sudhir Bhatnagar, learned Additional Advocate General while referring to the reply filed on behalf of the respondents, contends that since petitioner alongwith other Bhoti teachers came to be appointed on requirement basis without fulfilling qualification criteria, he cannot claim any parity with the JBT teachers, who are admittedly appointed on the basis of the qualification as prescribed under the Recruitment and Promotion Rules. Besides above, learned Additional Advocate General contends that with the implementation of Right to Education Act, 2009, person aspiring to be appointed as teacher is required to possess minimum qualification and as such, prayer made in the instant petition for regularization cannot be accepted.

7. However, having carefully perused the pleadings adduced on record by the respective parties, especially reply filed by respondents No.1, 3 and 4, this Court finds that the petitioner was initially appointed in the year, 2003 on the recommendation made by education department, which having felt necessity to appoint Bhoti teacher in Schools of tribal areas, specially called upon school

Head Teachers to forward bio-data of a person having sufficient knowledge in Bhoti language. Since initial engagement of petitioner was made by school Head Teacher Government Primary School, Hudan Bhatori on the instructions of Deputy Director Elementary Education, this Court is not persuaded to agree with the contention of learned Additional Advocate General that since the initial appointment of the petitioner is dehors the rules, he cannot claim any regularization. No doubt, as per Right to Education Act, 2009, a person aspiring to be a teacher for class I to IV is required to possess minimum qualification i.e. Senior secondary (or its equivalent) with at least 50% marks and two years Diploma in Elementary Education or Senior Secondary (or its equivalent) with at least 45% marks and two years Diploma in Elementary Education or Senior Secondary (or its equivalent) with at least 50% marks and four years Bachelor of Elementary Education or Senior Secondary (or its equivalent) with at least 50% marks and two years Diploma in Education (Special Education) or Graduation and two years Diploma In Elementary Education and pass in the Teacher Eligibility Test to be conducted by the authority designated by the H.P. State Government, but such condition definitely cannot be made applicable in the case of Bhoti language that too in the case of the petitioner, whose services came to be engaged prior to implementation of Right to Education Act, 2009. Moreover, Bhoti language being a tribal language is only to be taught in tribal areas that too in the District of Lahaul & Spiti and Pangi area in Chamba District and as such, persons having special knowledge to teach such language cannot be made to compete or equate with the persons having qualification in other fields.

8. Though there is no material available on record suggestive of the fact that special diploma, if any, in “Bhoti language” is being imparted by Government or private institutions, but if it is so, it is not understood that why respondents in the year, 2003, directed the school Headmaster to send the name of persons having special knowledge in Bhoti Language. Learned Additional Advocate General on instructions informs this Court that since the year, 1987 H.P. University has been awarding diploma in “Bhoti language”. If it is so, it is not understood why respondent in the year, 2003 directed the school Head Teacher to send names of the persons having special knowledge in “Bhoti language”. By the aforesaid action of the respondent, this Court is compelled to presume/infer that though in the year, 1987 H.P. University had started awarding Diploma in “Bhoti language”, but since there was no qualified candidate, Deputy Director Elementary Education with a view to safeguard interest of the students studying in Tribal areas called upon Central Head Teacher concerned to recommend the names of persons having knowledge of “Bhoti language”.

9. Since the petitioner has been working continuously without there being any interruption against the post of Bhoti language teacher in tribal area of Pangi in Chamba, District, he

can be said to have acquired expertise by now and as such, his case cannot be allowed to be denied on the ground that he does not possess requisite qualification and his services cannot be regularized. Hon, ble Apex Court in ***Bhagwati Prasad versus Delhi State Mineral Development Corporation*** (1990)1 Supreme Court Cases 361 has held as under:-

> "6. The main controversy centres round the question whether some petitioners are possessed of the requisite qualifications to hold the posts so as to entitle them to be confirmed in the respective posts held by them. The indisputable facts are that the petitioners were appointed be tween the period 1983 and 1986 and ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications. In our view, three years' experience, ignoring artificial break in service for short period/periods created by the respondent, in the circumstances, would be sufficient for confirmation. If there is a gap of more than three months between the period of termination and re-appointment that period may be excluded in the computation of the three years period. Since the petitioners before us satisfy the requirement of three years' service as calculated above, we direct that 40 of the senior-most workmen should be regularised with immediate effect and the remaining 118 petitioners should be regularised in a phased manner, before April 1, 1991 and promoted to the next higher post according to the standing orders. All the petitioners are entitled to equal pay at par with the persons appointed on regular basis to the similar post or discharge similar duties, and are entitled to the scale of pay and all allowances revised from time to time for the said posts. We further direct that 16 of the petitioners who are ousted from the service pending the writ petition should be reinstated immediately. Suitable promotional avenues should be created and the respondent should consider the eligible candidates for being promoted to such posts. The respondent is directed to deposit a sum of Rs. 10,000 in the Registry of this Court within four weeks to meet the remuneration of the Industrial Tribunal. The writ petitions are accordingly allowed, but without costs.

10. Leaving everything aside, it is not in dispute before this Court that since the year, 2003 petitioner had been continuously serving the education department as Bhoti teacher in tribal area of Pangi in Chamba District and as such, his case for regularization deserves to be considered at par his counterparts in other departments as per the policy framed by the Government of Himachal Pradesh, especially when it stands duly established on record that at present there exist 43 sanctioned posts of Bhoti Teachers in the education department.

11. Consequently, in view of the above, the present petition is allowed and respondents are directed to consider the case of the petitioner for regularization in terms of the policy framed by the government of Himachal Pradesh. Having taken note of the fact that the petitioner is serving

department for more than 20 years, this Court hopes and trust that needful shall be done by the respondents expeditiously, preferably within a period of six weeks. Pending applications, if any, also stand disposed of.

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

Pitamber Sharma .....Petitioner

Versus

State of Himachal Pradesh and Ors. .....Respondents

CWPOA No. 5510 of 2019
Decided on: 1.9.2020

Constitution of India, 1950- Articles 14 & 226- Appointment on compassionate grounds- Entitlement- Held, petitioner is entitled for appointment on compassionate grounds only if his case falls within the parameters of the policy prevalent on the date of consideration. (Para 1)

Cases referred:
State of Himachal Pradesh and Anr. v. Shashi Kumar, (2019) 3 SCC 653;
Whether approved for reporting? Yes.

For the Petitioner : Mr. P.P. Chauhan, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General with Sudhir Bhatnagar and Arvind Sharma, Additional Advocates General.

Sandeep Sharma, Judge (oral):

By way of instant petition, prayer has been made on behalf of the petitioner for issuance of directions to the respondent-department to consider his case for appointment on compassionate grounds. Perusal of communication dated 8.7.2015 (Annexure A-1) reveals that case of the petitioner for appointment on compassionate grounds came to be considered by the Government, but same was rejected on the ground that the petitioner had crossed the maximum limit of income @ Rs. 1,25,000/- per annum with an individual limit of Rs. 31,250/- per annum per head. Since it is not in dispute that at the time of consideration of the case of the petitioner for compassionate appointment, Finance Department had fixed the maximum limit of income @ Rs. 1,25,000/- per annum with an individual limit of Rs. 31,250/- per annum per head, no fault, if any, can be found with the action of the respondent in as much as rejection of the case of the petitioner for appointment on compassionate grounds is concerned.

2. However, at this stage, Mr. P.P. Chauhan, learned counsel for the petitioner while referring to the latest judgment passed by the Hon'ble Apex Court in case titled ***State of Himachal Pradesh and Anr. v. Shashi Kumar, (2019) 3 SCC 653***, contends that now since State Governments have been directed to enhance the maximum limit of income, petitioner would be

content and satisfied, in case respondents are directed to consider his case for appointment on compassionate grounds afresh in terms of fresh guidelines, if any, framed by the Government of Himachal Pradesh pursuant to directions contained in the aforesaid judgment rendered by the Hon'ble Apex Court, relevant para of which is reads as under:

> ***"34. That leads the Court to the next aspect of the matter relating to the fixation of an income slab. In our view, the fixation of an income slab is, in fact, a measure which dilutes the element of arbitrariness. While, undoubtedly, the facts of each individual case have to be borne in mind in taking a decision, the fixation of an income slab subserves the purpose of bringing objectivity and uniformity in the process of decision making. The High Court was of the view that it was not open to the Finance Department to amend the Scheme. The circulars which are issued by the Finance Department cannot be construed to be an amendment of the policy. They are really clarificatory of the intent and purpose of the Scheme. The circulars are explanatory, since they are intended to guide the decision maker on the concept of indigency which is incorporated in the Scheme. In fact, as we have noted earlier, in the decision of this court in Shashank Goswami(supra), the Court was specifically dealing with a circular of the Comptroller and Auditor General of India which had imposed income limits respectively for Group 'B', 'C' and 'D' posts for the purpose of guiding the decision in the case of compassionate appointment. The fixation of income limits was not construed to be and is not an arbitrary exercise of power. However, what we find from the record of this case is that the income limit was fixed (as the High Court observed) on 29 September 2008 by the letter of the Finance Department. The income limit of Rs.1,00,000/- for a family of four persons has since been revised to Rs.1,50,000/- on 20 April 2011. Mr. P.S. Patwalia has, on instructions, stated before this Court that this ceiling has been reiterated on 27 July 2017. What should be the appropriate income criterion is undoubtedly a matter of policy for the State Government to determine. However, we would impress upon the State Government the need to periodically revise the income limits preferably at intervals of three years. Inflation and the increase in the cost of living have an important bearing on financial exigencies faced by families of serving as well as deceased employees. In fixing the income criteria for considering cases of compassionate appointment, it would be appropriate if the State revisits the income limit at periodic intervals, as we have indicated above. We clarify that it would be open to the State to revise the income limits at a frequency of less than three years, if the State is so advised."***

In the aforesaid judgment, the Hon'ble Apex Court has held that State Governments need to periodically revise the income limits preferably at intervals of three years. Besides above, the Hon'ble Apex Court in the aforesaid judgment has held that in fixing the income criteria for considering cases of compassionate appointment, it would be appropriate if the State revisits the income limit at periodic intervals and it would be open to the State to revise the income limits at a frequency of less than three years, if the State is so advised

3. Learned counsel for the petitioner further contends that pursuant to aforesaid judgment rendered by the Hon'ble Apex Court, State of Himachal Pradesh has revised the income limit, whereby maximum limit of income has been fixed @ Rs.2,25,000/- per annum. If it is so, case of the petitioner is required to be considered afresh by the authority concerned in terms of the latest policy.

4. Consequently, in view of the above, present petition is disposed of with direction to the respondents/competent authority to consider the case of the petitioner afresh for appointment on compassionate grounds in terms of latest policy framed by the Government of Himachal Pradesh in compliance to judgment rendered by the Hon'ble Apex Court in ***Shashi Kumar's*** *case* supra. Since case of the petitioner is hanging fire since 2015, this Court hopes and trusts that authority concerned would do the needful expeditiously, preferably within a period of four weeks from the date of production of certified copy of the instant order/judgment. Pending applications, if any, also stand disposed of accordingly.

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

Harish Kumar ...Petitioner.

Versus

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

CWPOA No. 5009 of 2019
Reserved on: 07.09.2020
Date of Decision: September 22, 2020

Constitution of India, 1950- Article 226- Selection to a public post - Old R&P Rules governing selection process stand replaced by New Rules- Whether petitioner can claim selection to post of PET on basis of old Rules on ground that he also belongs to 1998-99 batch and some persons of this batch were allowed to be appointed under old Rules- Held, expression "batch" necessarily means the date on which candidate qualifies examination and acquires mandatory educational qualifications- Petitioner though enrolled in 1998-99 batch for PET course but took examination in 2002- He belongs to 2002 batch and not of 1998-99 batch- Petitioner cannot claim selection/ appointment under old Rules- Petition dismissed. (Para 9 to 12 & 14)

Whether approved for reporting? Yes

For the Petitioner:	Mr.R.L. Chaudhary, Advocate, through Video Conferencing.
For the Respondents:	Mr.Shiv Pal Manhans, Additional Advocate General, through Video Conferencing.

Vivek Singh Thakur, J.

Grievance of the petitioner is that despite joining Certificate Course of Training in Physical Education for the Session 1998-99, he has not been considered for appointment to the post of Physical Education Teacher (PET) alongwith Batch of 1998-99 ignoring the fact that examination of his Batch in the Institute, Bhartiya Sharirik Shikshan Mahavidyalaya joined by him, was delayed on account of Court case and was conducted only in the year 2002 when he passed it in first attempt and there is no fault on the part of petitioner in delayed examination.

2. It is case of the petitioner that after passing Matriculation examination in the year 1995 with 45% marks, he had joined one year Certificate Course of PET in Bhartiya Sharirik Shikshan Mahavidyalaya, Amravati, however, due to Court case, as is evident from communications Annexures A-13 to A-16, examination of his Batch was delayed and was conducted in July-August 2002 and he had passed it in Second Class, as is evident from Certificate Annexure A-2 issued by Directorate of Sports and Youth Services, Government of Maharashtra, on passing of examination by the petitioner. Thereafter, on 16.01.2003, he got entered this qualification in the Employment Exchange in his registration dated 14.09.1995 as is evident from copy of Registration Card Annexure A-3. In the year 2014, petitioner had passed Senior Secondary Certificate from National Institute of Open Schooling, securing 36% marks, as is evident from Certificate Annexure A-4.

3. It is an admitted fact that prior to 10.01.2011, according to Recruitment and Promotion Rules (hereinafter referred to as 'R&P Rules') in vogue, essential qualification to the post of PET was Matriculation with one year Diploma in Physical Education from recognized Institute. However, vide Notification dated 10.01.2011, R&P Rules to the post of PET were amended, prescribing essential qualification to the post of PET as Senior Secondary (+2) or its equivalent examination passed with at least 50% marks and Diploma in Physical Education (E.P. Ed.) for a duration of two academic years from University/Board recognized by Himachal Pradesh Government or Bachelor Degree in Physical Education (B.P. Ed.) with 50% marks from the University recognized or Bachelor Degree with 50% marks in Physical Education with an elective subject from University recognized by Himachal Pradesh Government or Ex-Serviceman candidate having Senior Secondary (+2) or its equivalent examination with Pass Course of PTI from Army School of Physical Education Poona/Pune.

4. Admittedly, petitioner does not fulfill criteria of essential qualification under amended Rules. It is also undisputed that State Government in February 2011 had permitted

recruitment to the post of PET under old Rules as well as new Rules with rider that teachers, so appointed under old Rules, shall have to acquire academic qualification within five years from the date of their appointment.

5. Some persons, eligible under old Rules, had approached this High Court by filing CWP No.8022 of 2012, titled as *Saroj Kumar and others vs. State of H.P. & others,* which was decided on 09.01.2013 directing the respondents-State to consider cases of those persons for appointment to the post of PET in the light of decision of one time relaxation, so taken by the Government, based on the fact that Government had already given appointment to the similarly situated persons under the unamended Rules and this direction was made subject to acquiring educational qualification by petitioners therein within five years from the date of appointment.

6. Against the order passed by this High Court, respondents-State had approached the Supreme Court by filing Special Leave to Appeal (Civil) CC 17560/2013, titled as *State of Himachal Pradesh & others vs. Saroj Kumar & others,* which was dismissed vide order dated 17.12.2013.

7. In the year 2014, petitioners alongwith others similarly situated persons had preferred petitions bearing CWP Nos.4990 of 2014, titled as *Kusum Lata vs. State of H.P. & others;* 5006 of 2014, titled as *Hem Raj & others vs. State of H.P. and others;* and 5009 of 2014, titled as *Vivek Sharma vs. State of H.P. and others,* which were decided on 21.07.2014, directing the respondents-State to examine cases of petitioners and if it is found covered by the judgment in CWP No.8022 of 2012, to take decision within six weeks from the date of passing of the order.

8. In sequel to judgment passed in CWP No.5006 of 2014, titled as *Hem Raj & others vs. State of H.P. & others,* wherein petitioner was also one of the petitioners, representation dated 26.07.2014 (Annexure A-10) was preferred by the petitioner to the Secretary (Education) to the Government of Himachal Pradesh. The said representation was rejected by the Deputy Director Elementary Education Solan, District Solan, H.P., vide Memo dated 18.09.2014 (Annexure A-11) on the ground that petitioner had passed out examination in the year 2002. Whereas, in the interview conducted in his office to the post of PET, during 02.01.2014 to 04.01.2014, candidates of the Session up to 14.06.1999 were considered for appointment to the post of PET on merit basis. Present petition has been filed for rejection of claim of the petitioner vide this Memo.

9. Learned counsel for the petitioner submits that respondents-Department is committing an error by considering petitioner as a candidate of 2002 Batch, whereas, he has taken admission for the requisite Course for the year 1998-99 and conducting of examination was not in his hand and he has acquired necessary qualification by passing the course in first attempt by appearing in the examination held in the year 2002 for his Batch. He further submits that some of the persons of Batch of 1998-99 have been allowed by the State Government to be appointed under

old Rules with condition to complete their educational qualification within five years after their appointment and petitioner is being discriminated despite the fact that he is similarly situated being a candidate of 1998-99 Batch and is being deprived of appointment without any justifiable reason.

10. So far as determination of the Batch of petitioner is concerned, this issue is no longer *res integra.* Full Bench of this High Court in its judgment dated 21.09.2013 passed in LPA No.143 of 2013, titled as *State vs. Harbans Lal,* reported in Latest HLJ 2013 (HP)(FB)1157, has held as under:-

> "23. In our considered view, the expression "batch" necessarily would mean the date on which the candidate qualifies the examination and acquires the mandatory educational qualifications for consideration in accordance with the Rules. Any other interpretation would only do violence to the Rules/pre-existing practice and cannot be said to be just, fair, equitable and reasonable and would in fact result in absurdity. Admission of a candidate to an academic session on its commencement cannot be construed to be "batch" for the purpose of public appointment for the simple reason that as on the date for consideration, the candidate must have acquired the eligibility criteria, which is a *sine qua non* for consideration to any public post. "Batch" is only an identification of a group, which is fully eligible for consideration. Equality must precede any priority of seniority of a batch in public appointments, which is Constitutional mandate of Article 14.

11. In view of aforesaid settled position of law, petitioner is to be considered as a candidate belonging to '2002 Batch'. It may be his hard luck that examination in his Institute was not conducted in time but in the year 2002 only, for which petitioner may not be at fault, but at the same time respondents-State is also not responsible for that.

12. Claim of the petitioner that like others, including petitioners in *Saroj Kumar's case* and other similar cases, he should also be considered for appointment under old Rules, is also liable to be rejected for the reason that the said relaxation was given by the respondents-State as one time relaxation and as is evident from Memo dated 18.09.2014, candidates for the Sessions up to 14.06.1999 were considered for appointment to the post of PET, that too on merit basis and, as also stated by the petitioner in pleadings, even all candidates of 1998-99 Batch were also not appointed on the basis of old Rules. Petitioner, who has passed examination in the year 2002, cannot be considered for appointment on the basis of old Rules in pursuant to onetime relaxation granted by the respondents-State.

13. Though, petitioner has acquired qualification of Senior Secondary Education (+2), but he has passed the said examination obtaining 36% marks only and his Certificate for Physical

Education is also of one year instead of two years, as required under amended R&P Rules. Therefore, he is not eligible under existing R&P Rules.

14. Once new Rules have come in force, respondents-State cannot be directed to make appointment on the basis of old Rules. So far as directions of the Court issued in CWP Nos.8022 of 2012, titled as *Saroj Kumar and others vs. State of H.P. and others;* 4990 of 2014, titled as *Kusum Lata vs. State of H.P. & others;* 5006 of 2014, titled as *Hem Raj & others vs. State of H.P. and others;* and 5009 of 2014, titled as *Vivek Sharma vs. State of H.P. and others,* are concerned, those were based upon one time relaxation granted by the Government itself to avoid hardship to the candidates and in those petitions petitioner was also one of the petitioners in CWP No.5006 of 2014, but despite considering his representation, in compliance of order passed by this Court, he could not be appointed, as in that exercise, on the basis of merit, some candidates, but not all, up to Batch 1998-99 could only be accommodated in the year 2014 whereas, petitioner, for his bad luck, could pass out the Certificate Course in the year 2002.

15. In view of aforesaid discussion, I do not find any merit in the petition and accordingly same is dismissed. Pending application(s), if any, also stand disposed of.

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

The New India Assurance Co. Ltd. .....Appellant

Versus

Akhilesh and Ors. .....Respondents

FAO No. 592 of 2018
Decided on: 24.9.2020

Motor Vehicles Act, 1988- Section 166- Motor accident- Claim application qua bodily injuries and consequent permanent disability- Medical evidence- Appreciation of - Insurance Company seeking reference to third expert for ascertaining whether disability of claimant was permanent or not?- Held, in view of conflicting medical evidence qua disability of claimant, Tribunal had referred matter to Chief Medical Officer for his examination by a proper Medical Board- Said Board including an orthopedic surgeon examined petitioner and issued disability certificate- Disability certificate also proved by examining one of the medical officers of the Board- No evidence that disability certificate is contrary to medical record- There is no necessity to send matter to third expert. (Para 9 & 10)

Motor Vehicles Act, 1988- Section 166- Motor accident- Permanent disability- Loss of academic year of an engineering student on account of injuries- Assessment of income- Held, assessment of monthly income of an engineering student at Rs.15,000/- by the Tribunal cannot be said to be on higher side. (Para 12)

Cases referred:
Arvind Kumar Mishar v. new India Insurance Company and Ors, 2010 (10) SCC 254;
Whether approved for reporting? Yes.

For the Appellant : Mr. Praneet Gupta, Advocate.

For the Respondents : Mr. Dheeraj K. Vashishat, Advocate, for respondent No.1.
Mr. Pawan K. Sharma, Advocate, for respondent No.2.

Sandeep Sharma, Judge (oral):

Present appeal filed under Section 173 of the Motor Vehicles Act, 1988 (*in short "the Act"),* lays challenge to award dated 25.8.2018, passed by the learned MACT (I) Una, District Una, Himachal Pradesh, in MAC No. 371 of 2013, whereby sum of Rs. 14,80,700/- along with interest @ 9% per annum, from the date of filing of the claim petition till its deposit came to be awarded in favour of complainant respondent No.1. Since appellant Insurance Company being insurer came to be directed to pay the compensation, it has approached this Court in the instant proceedings, praying therein to set-aside the impugned award.

2. Briefly stated facts, as emerge from the record are that on 27.11.2012, respondent-claimant (herein after referred to as *"the claimant"*), who at that relevant time was going on his motor cycle bearing registration No. HP-19-3694 suffered multiple injuries after being hit by truck bearing registration No. PB-07-AF-2137 being driven by respondent No. 3 i.e. driver. After the aforesaid alleged incident claimant was taken to hospital at Gagret, from where he was referred to Regional Hospital Una. Record reveals that on account of serious injuries suffered by the claimant, he was referred to PGI Chandigarh, where he remained admitted w.e.f 28.11.2012 to 14.1.2013. In the aforesaid background, claimant, who, at the time of the alleged incident, was pursuing his engineering studies filed claim petition under Section 166 of the Act, praying therein compensation to the tune of Rs. 30 lac.

3. Claimant claimed before the Tribunal below that he spent approximately Rs. 7.00 lac on medical treatment and besides this, two attendants remained with him throughout. Claimant also claimed that since he has lost complete one year of studies, huge financial loss has occurred to him and as such, he is liable to be compensated. FIR No. 98 dated 27.11.2012, came to be registered at PS Gagret against respondent No.3. Respondent No.3 i.e. driver of the truck, by way of filing reply refuted the claim of the petitioner-claimant and alleged that accident took place on account of rash and negligent driving of the petitioner-claimant and as such, he is not liable to pay any compensation.

4. Respondent No.2 Balwinder Singh i.e. owner of the vehicle by way of separate reply claimed that respondent No.3 as well as his truck has been falsely implicated in the case. Appellant-Insurance company refuted the claim of the claimant before the court below on the ground that at the time of alleged incident respondent No.3 was not having valid and effective Driving License and

since offending vehicle was being driven in violation of terms and conditions of the insurance policy, it is not liable to indemnify the insurer. Appellant-Insurance company further alleged that the petitioner-claimant has filed claim petition in collusion with respondents No.2 and 3. On the basis of aforesaid pleadings adduced on record by the respective parties, following issues were framed by the Court below:

1. Whether the Akhilesh, petitioner-claimant sustained injuries on account of rash and negligent driving on the part of respondent No.1, on 27.11.2012, as alleged? OPP.
2. If issue No.1 is answered in affirmative, whether the petitioner is entitled for any compensation. If yes, to what extent and from whom? OPP.
3. Whether the respondent No.1 did not possess any valid and effective driving license to drive the truck at the time of alleged accident, as alleged? OPR-3.
4. Whether at the relevant time the vehicle bearing registration No. PB-01-AF-2137 was being plied in contraventions of the terms and conditions of the Insurance policy and provisions of M.V.Act, as alleged?OPR-3.
5. Whether at the time of the alleged accident the truck bearing No. PB-01-AF-2137 was not having any valid route permit, fitness certificate and registration certificate etc., as alleged ?OPR-3.
6. Whether the petitioner is bad for non-joinder of necessary parties, as alleged?OPR-3.
7. Whether the petition is not maintainable, as alleged?OPR-3.
8. Relief.

5. Subsequently, court vide award dated 25.8.2018, while allowing claim petition filed by the claimant held him entitled to the compensation to the tune of Rs. 14,80,700/- alongwith interest @ 9% p.a. from the date of filing of petition till its deposit. Since appellant insurance company came to be directed to deposit the aforesaid amount of compensation, it has approached this Court in the instant proceedings, praying therein to set aside the impugned order.

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

7. Having heard learned counsel for the parties and perused material available on record this Court finds that precise challenge to the award impugned before this Court is on two grounds, first, since there were two conflicting opinions with regard to disability suffered by the claimant in the alleged incident, court below before determining the compensation ought to have summoned third expert as was prayed for by the appellant insurance company; second, monthly income of Rs. 15,000/- assessed by the court below is on higher side, especially when no cogent and convincing evidence ever came to be led on record on behalf of the claimant. Besides above, appellant insurance company has alleged that interest awarded by the court below is on higher side.

8. Since there is no dispute with regard to accident as well as injuries suffered by the claimant, this Court needs not go into that aspect of the matter in the instant proceedings. Similarly, there is no dispute that accident occurred on account of rash and negligent driving of respondent No.3.

9. True it is, as per record of the court below, two conflicting opinions came on record with regard to extent of disability suffered by the claimant in the accident. PW4 Dr. Parveen Kumar,

who had examined the petitioner and issued MLC Ext.PW4/A specifically proved on record that in the alleged accident, claimant suffered grievous injuries, as a consequence of which, he has rendered disabled to certain extent. Dr. Munish Sharma, PW2 issued disability certificate dated 27.6.2015 and opined the disability to the extent of 25% with respect to the right hip/lower limb. It clearly emerges from the record that aforesaid witness explained to the court that pain of the claimant may subside or may remain on account of disability, which is temporary in nature, but he may not be able to do his day-to-day work normally. Since in cross-examination, the aforesaid witness stated that disability was temporary in nature and he cannot say about the today's condition of the patient, the Tribunal deemed it necessary to send reference to CMO Una for getting the petitioner's condition examined through proper medical officer/Board. Pursuant to aforesaid reference made by the court below claimant was examined by Orthopedic Surgeon, who after examining the claimant submitted disability certificate Ext.CW1/A. Court after having perused aforesaid disability certificate summoned Dr. Tajinder Bansal, who had issued aforesaid certificate for examination. Dr. Tajinder Bansal while proving disability certificate dated 3.1.2018, testified before the court below that on examination, he found that claimant was having locomotive disability having right side avascular necrosis of right hip joint with protrusion, which is post traumatic. He specifically stated before the court below that in future, patient may require hip replacement surgery. In his cross-examination, aforesaid witness admitted that while rendering disability certificate dated 3.1.2018, he had not seen the record. However, while answering to court question that whether this kind of injury will affect the matrimonial life, he answered in affirmative. Aforesaid witness in further cross-examination by the insurance company stated that disability in the case of the petitioner may worsen but same can be reduced to certain extent by way of surgery. This witness admitted that temporary disability is a disability which may cease to exist after treatment after certain period of time. After recording of statement of aforesaid witness, it appears that appellant insurance company filed an application under Section 151 CPC, praying therein for permission to call another expert witness on account of two conflicting opinions available on record. However, such request made on behalf of the appellant insurance company came to be rejected and court below accepted the disability certificate issued by the Dr. Tajinder Bansal, who was examined as CW1.

10. Having carefully perused version put forth by Dr. Tajinder Bansal, whereby he opined the disability suffered by the claimant to the extent of 30%, this Court finds no illegality and infirmity in the award passed by the court below in as much as it took into consideration the disability of the claimant to 30 %. Since in the case at hand, court below with a view to have more clarity with regard to disability of the claimant made reference to CMO Una, there was no occasion thereafter for it to further send the matter to third expert, especially when Insurance Company was

unable to point out that opinion rendered by Dr. Tajinder Bansal is contrary to the medical record and as such, no interference is called for as far as aforesaid aspect of the matter is concerned.

11. Similarly, this Court finds that in the case at hand, petitioner claimant specifically claimed before the court below that he is an engineering student and on account of accident, he has lost his complete one year. There is no iota of evidence led on record by the Insurance Company to rebut the aforesaid claim put forth by the claimant and as such, court below while assessing income of the petitioner claimant rightly considered him to be the student of engineering. Appellant insurance company claimed that since petitioner was student at that time, he had no income and as such, court below erred while assessing his monthly income to the tune of Rs. 15,000/- pm, however, aforesaid submission has no merit because it is well settled by now that computation of just and reasonable compensation is the bounden duty of the Tribunal while awarding compensation in those cases, where no specific income is proved. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***G. Dhanasekar v. Managing Director, Metropolitan Trnasport Corporation Limited, (2014) 14 SCC 391***, relevant para whereof is reproduced herein below:-

> ***"13. As noted above, appellant is a driver operating a tourist taxi. On account of the physical disability referred to above, it needs no elaborate discussion to hold that he would not be in a position to continue his avocation at the same rate, or in the same manner as before. He was aged 46 years at the time of accident. Therefore, we are of the view that it is a case where the appellant should be given just and reasonable compensation for his functional disability as his income has been affected. The court has to make a fair assessment on the impact of disability on the professional functions of the victim. In this case, the victim is not totally disabled to engage in driving. At the same time, it has to be seen that he cannot continue his career as earlier. In such circumstances, the percentage of physical disability can be safely taken as the extent of functional disability. In the assessment of the doctor, it is 35%. Since the appellant is compensated for functional disablement, he will not be entitled to any other compensation on account of physical disability or loss of earning capacity, etc. However, he is entitled to reimbursement towards medical expenses, etc."***

12. Hon'ble Apex Court in case titled ***Arvind Kumar Mishar v. new India Insurance Company and Ors, 2010 (10) SCC 254***, which has been otherwise relied upon by the court below, considered the annual income of Rs. 60,000/- per annum in case of engineering student, who had completed bachelor of engineering from Birla Institute of Technology and was yet to get the employment. In the case at hand, petitioner was student of engineering and definitely, after completion of his engineering degree, would have got good job either government or private, but certainly, on account of disability suffered by him and loss of complete one year, many opportunities, which he would have got, have closed in his case and as such, court below rightly assessed his monthly income to the tune of Rs. 15,000/- per month, which by no stretch of imagination, can be

said to be on higher side. Similarly, interest part awarded by the court below @ 9 % p.a. cannot be said to be on higher side.

13. Consequently, in view of the detailed discussion made herein above, this Court finds no illegality and infirmity in the impugned judgment passed by the court below and as such, same is upheld. Present appeal fails and dismissed accordingly.

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

Surat Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1528 of 2020
Date of Decision: Sep 24 , 2020

Code of Criminal Procedure, 1973- Section 439- Grant of bail in a case involving rape of minor girl- Held, during trial victim stating before Court of her having taken lift on the motorcycle of accused and staying with him- Also deposing that accused did not commit any rape or sexual intercourse with her- Without commenting upon evidentiary value of DNA profile, coupled with statements of other witnesses recorded, petitioner made out a case for bail- Further incarceration of accused is not justified and not going to achieve any significant purpose- Possibility of accused influencing witnesses or tampering with evidence can be taken care of by imposing stringent conditions- Petition allowed- Bail granted. (Para 3,10 to 13 & 15)

Cases referred:
Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565;
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42;
State of Rajasthan, Jaipur v. Balchand, AIR 1977 SC 2447;
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240;
Dataram Singh v. State of Uttar Pradesh, (2018) 3 SCC 22;

Whether approved for reporting? ***YES****.*

For the petitioner: Mr. Sudhir Thakur, Senior Advocate, with Mr. Karun Negi, Advocate.

For the respondent: Mr. Ashok Sharma, Advocate General with Mr. Nand Lal Thakur, Addl.AG, Mr. Ram Lal Thakur, Asstt. AG & Mr. Rajat Chauhan, Law Officer.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

The petitioner, incarcerating upon his arrest for alluring and raping a minor girl, has come up before this Court seeking regular bail on the grounds that during the trial, neither the victim nor the other material witnesses supported the case set up by the prosecution.

2. Based on a complaint, the police arrested the petitioner on Apr 26, 2020, in FIR No.126 of 2019, dated 22.4.2019, registered under Section 376 of Indian Penal Code, 1860 (IPC), and Section 4 of the Protection of Children from Sexual Offices, Act, 2012 (POCSO Act), in Police Station Paonta Sahib, District Sirmour, Himachal Pradesh, disclosing cognizable and non-bailable offences.

FACTS:

3. Briefly, the allegations against the petitioner are that on Apr 22, 2019 the brother of the victim informed the police that the victim was staying with him and on Apr 21, 2019, at about 8.00 a.m., she had left the house under the pretext of attending a village fair. However, she did not return till evening. On Apr 21, 2019, itself, at 7.00 p.m., his father informed him that he had received a phone call from Surat Singh, bail petitioner, that the victim is with him. Based on this information the police registered FIR mentioned above. After that the police recovered the victim and recorded her statement under Section 164 CrPC and also conducted her medical examination. After that the police also arrested the bail petitioner and got his medical specimen for the purpose of sending the same to the Forensic Science Laboratory. On the comparison of the genetic material obtained from the victim and the bail petitioner the DNA matched.

4. Earlier the petitioner had filed a bail petition under Section 439 CrPC before this Court which was registered as Cr.MP(M) No. 110 of 2020. Vide order dated Feb 17, 2020, this Court had rejected the said bail petition on the ground that as per the investigation the age of the victim was 12 years and the DNA profile had matched with that of the accused. After that the father of the victim got examined during trial.

PREVIOUS CRIMINAL HISTORY

5. The counsel for the petitioner states that the accused has no criminal history. The status report also does not dispute this assertion.

SUBMISSIONS:

6. Learned counsel for the bail petitioner submits that without conceding and admitting, the accused and the victim were unmarried. At the most, the allegations make out a statutory rape and not a forcible rape with a stranger.

7. On the contrary, the contention on behalf of the State is that the victim reiterated her allegations on oath in her statement under Section 164 CrPC, which is a sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions and accused be restrained from contacting the victim.

ANALYSIS AND REASONING:

8. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, (Para 30), a Constitutional bench of Supreme Court held that the bail decision must enter the cumulative effect of the variety of circumstances justifying the grant or refusal of bail. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, (Para 18) a three-member bench of Supreme Court held that the persons accused of non-bailable offences are entitled to bail, if the Court concerned

concludes that the prosecution has failed to establish a prima facie case against him, or despite the existence of a prima facie case, the Court records reasons for its satisfaction for the need to release such persons on bail, in the given fact situations. The rejection of bail does not preclude filing a subsequent application, and the Courts can release on bail, provided the circumstances then prevailing requires, and a change in the fact situation. In **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, (Para 2 & 3), Supreme Court noticeably illustrated that the basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, (Para 16), Supreme Court in Para 16, held that the delicate light of the law favours release unless countered by the negative criteria necessitating that course. In **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, (Para 6), Supreme Court held that the grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.

9. Pre-trial incarceration needs justification depending upon the offense's heinous nature, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, criminal history of the accused, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. After the rejection of the previous bail petition (CrMPM No. 110 of 2020), the father of the victim testified in the trial Court. In cross examination, he disclosed his age at that time to be 70 years and that of his eldest son as 34 years and also clarified that his younger son was 25 years of age. He further admitted that the victim was 8 – 9 years younger to his younger son. It would take the age of the victim in February 2020 between 16 to 17 years. The FIR is of April, 2019, so it would further reduce the age of the victim to be 15 to 16 years at the time of the alleged incident. Given this age the statement of the victim assumes importance. She appeared as PW-2 and testified that she had taken lift on the motorcycle of the accused and stayed with him. However, accused did not commit any rape or sexual intercourse with her. Despite evidence of DNA profile, appraisal at the present stage is only to decide further incarceration of the accused during the pendency of the trial. Without commenting on the evidentiary value of the DNA profile, the version of the victim, coupled with the other statements which stand recorded, including that of Laxmi Devi (PW-6) and other witnesses, the petitioner has made out at least a case for bail at this stage.

11. An analysis of entire evidence does not justify further incarceration of the accused, nor is going to achieve any significant purpose. Without commenting on the merits of the case, the stage of the investigation and the period of incarceration already undergone would make out a case for bail.

12. The possibility of the accused influencing the course of the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative conditions and stringent conditions.

13. Given the above reasoning, the Court is granting bail to the petitioner, subject to strict terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

14. Following the decision of this Court in **Abhishek Kumar Singh v. State of HP**, Cr.MP(M) No. 1017 of 2020**,** the petitioner shall be released on bail in the FIR mentioned above, subject to his furnishing a personal bond of Rs. Ten thousand only (INR 10,000/-), and shall either furnish two sureties of a similar amount to the satisfaction of the Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court exercising jurisdiction over the concerned Police Station where FIR is registered, **or** the aforesaid personal bond and fixed deposit(s) for Rs. Ten thousand only (INR 10,000/-), made in favour of Additional Chief Judicial Magistrate/ Judicial Magistrate, Theog, District Shimla, H.P., from any of the banks where the stake of the State is more than 50%, or any of the stable private banks, e.g., HDFC Bank, ICICI Bank, Kotak Mahindra Bank, etc., with the clause of automatic renewal of principal, and liberty of the interest reverting to the linked account. Such a fixed deposit need not necessarily be made from the account of the petitioner. If such a fixed deposit is made manually, then the original receipt has to be deposited. If made online, then the copy attested by any Advocate has to be filed, and the depositor shall get the online liquidation disabled. It shall be total discretion of the petitioner to choose between surety bonds and fixed deposits. During the trial's pendency, it shall be open for the petitioner to apply for substitution of fixed deposit with surety bonds and vice-versa. Subject to the proceedings under S. 446 CrPC, if any, the entire amount of fixed deposit along with interest credited, if any, shall be endorsed/returned to the depositor(s). The Court shall have a lien over the deposits until discharged by substitution, and otherwise up to the expiry of the period mentioned under S. 437-A CrPC, 1973.

15. The furnishing of the personal bonds shall be deemed acceptance of the following and all other stipulations, terms, and conditions of this bail order:

a) The petitioner to give security to the concerned Court(s) for attendance. Once the trial begins, the petitioner shall not, in any manner, try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).

c) The petitioner shall join investigation as and when called by the Investigating Officer or any Superior Officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree methods, indecent language, inhuman treatment, etc.

d) The petitioner shall cooperate with the investigation at all further stages as may be required, and in the event of failure to do so, it will be open for the prosecution to seek cancellation of the bail granted by the present order.

e) The petitioner shall not influence, browbeat, pressurize, make any inducement, threat, or promise, directly or indirectly, to the witnesses, the Police officials, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

f) In addition to standard modes of processing service of summons, the concerned Court

may serve the accused through E-Mail (if any), and any instant messaging service such as WhatsApp, etc. (if any). [Hon'ble Supreme Court of India in Re Cognizance for Extension of Limitation, Suo Moto Writ Petition (C) No. 3/2020, I.A. No. 48461/2020- July 10, 2020].

g) The concerned Court may also inform the accused about the issuance of bailable and non-bailable warrants through the modes mentioned above.

h) In the first instance, the Court shall issue summons and may send such summons through SMS/ WhatsApp message/ E-Mail.

i) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable Warrants through SMS/ WhatsApp message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable Warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper to achieve the purpose.

k) In case of non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner alone and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within thirty days from such modification, to the Police Station of this FIR, and also to the concerned Court.

m) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

n) Considering the apprehension expressed by the learned counsel appearing for the respondent, the petitioner should stay far away from the place of occurrence while on bail - (Vikramsingh v. Central Bureau of Investigation, 2018 All SCR (Crl.) 458).

o) The petitioner shall neither stare, stalk, make any gestures, remarks, call, contact, message the victim, either physically, or through phone call or any other social media, nor roam around the victim's home. The petitioner shall not contact the victim.

p) The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

q) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

r) During the trial's pendency, if the petitioner repeats the offence or commits any offence where the sentence prescribed is seven years or more, then the State may move an appropriate application for cancellation of this bail.

16. The learned Counsel representing the accused and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular and if not feasible, in Hindi or English.

17. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

18. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing bail bonds in the terms described above.

19. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

20. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

21. The SHO of the concerned Police Station or the Investigating Officer shall arrange to send a copy of this order, preferably a soft copy, to the complainant and the victim, at the earliest. In case the victim notices stalking or any violation of this order, she may either inform the SHO of the concerned Police Station or write to the Trial Court or even to this Court.

22. In return of the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

The petition stands allowed in the terms mentioned above. All pending applications, if any, stand closed.

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

Vicky Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 997 of 2020

Date of Decision: 3rd July, 2020

Code of Criminal Procedure, 1973- Section 439- Regular bail in a case involving kidnapping of minor girl and committing sexual intercourse with her- Grant of- On facts held, during trial victim denying of sexual relation between her and accused- Also stating that she voluntarily left home with accused and despite his asking her to return her home, she did not accede to his request- Accused permanent resident of Ludhiana and his presence can be ensured- It may be a case of elopement- Further incarceration of accused will not serve any purpose- He is in custody for more than year- Petition allowed- Bail granted. (Para 15 & 18)

Cases referred:

Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565;
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240;
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42;
Whether approved for reporting? Yes

For the petitioner : Mr. O.C. Sharma, Advocate.

For the respondent : Mr. Nand Lal Thakur, Additional Advocate General and Mr. Ram Lal Thakur, Assistant Advocate General, for theState.

Anoop Chitkara, Judge

The petitioner, who is under incarceration from 23rd May 2019, i.e., for more than thirteen months, for having been arrested for alluring a minor girl less than eighteen years of age, to elope with him and after that committing sexual intercourse with her, which amounts to statutory rape, the girl being aged about 17 years and 7 months, has come up before this Court, seeking regular bail.

2. Based on a First Information Report (FIR), the police arrested the petitioner on 23.5.2019, in FIR No.11/2019, dated 8.4.2019, registered under Sections 363, 366, 368, 376 of Indian Penal Code, 1860, (IPC) and Section 4 of the Protection of Children from Sexual Offices, Act, 2012 (POCSO Act), in Women Police Station, Solan, District Solan, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. Earlier, the petitioner filed a petition under Section 439 CrPC before Special Judge, Solan, HP. However, vide order dated 3.12.2019, the Court dismissed the petition, primarily because the prosecutrix was a minor being 17 years, 7 months and 13 days and that her DNA matched with the accused.

4. I have read the Police report(s) and heard Mr. O.C. Sharma, learned Advocate for the petitioner and Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State of H.P.

FACTS:

5. The allegations in the First Information Report and the gist of the evidence collected by the Investigator are:

a) That the father of the victim informed the Women Police Station, Solan thathis daughter who was a minor and student of Class-10, left from home on 8.4.2019. She had told the neighbours that she was going for picnic. On checking her luggage, the parents found her documents etc. missing. The informant further told the Police that even earlier she had left home and they had brought her back from Jammu. They suspected that Vicky @ Ankush, petitioner herein had taken her along. After that, the Police recovered the victim on 23.5.2019 from a rented premises in Jammu. Subsequently, the Police brought her to Solan where she was taken to Regional Hospital for her medical examination.

b) On 24.5.2019, Doctor at Regional Hospital, Solan conducted Medico Legal Examination of the victim, who noticed her hymen to be torn on multiple sites, but did

not notice injury anywhere on her person.

c) The Doctor also collected swabs from her privates and after preserving the same handed over to the Police , who sent the same for forensic examination.

d) Subsequently, after arrest of the accused, Dr. obtained DNA profile of the accused. The State Forensic Science Laboratory, on conducting DNA examination, opined that "Two autosomal STR DNA profiles, pertaining to a male individual and a female individual were obtained from Exhibit-10 (Underwear, Vicky Kumar Takia). Of these two DNA profiles; the DNA profile pertaining to a male individual Showed complete match with the autosomal STR DNA profile obtained from Exhibit-11 (blood on FTA, Vicky Kumar Takia), while the other Partial DNA profile pertaining to a female individual showed match at 16 loci with the autosomal STR DNA profile obtained from Exhibit-6 (blood on FTA, victim)."

PREVIOUS CRIMINAL HISTORY

6. The Counsel for the petitioner, on instructions, states that there is no previous criminal history, and the status report does not dispute it.

SUBMISSIONS:

7. The learned counsel for the bail petitioner submits that the allegations are false and concocted. He further submits that the victim did not support the case of the prosecution, while recording of her statement during the trial.

8. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contended that the victim reiterated her allegations on oath in her statement under Section 164 CrPC, which is a sufficient prima facie evidence. He further submits that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

ANALYSIS AND REASONING*:*

9. 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, probability of the accused fleeing from justice, hampering the investigation, and doing away with the victim(s) and witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows:

> "It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail."

11. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**, (1978) 1 SCC 240, Supreme Court in Para 16, holds:

> "The delicate light of the law favours release unless countered by the negative criteria necessitating that course."

12. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds:

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article
>
> 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

13. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes.

14. In the present case, a perusal of evidence taken on record so far leads to the following inference:

a) In the present case, trial has commenced and the statement of the victim stands recorded, on oath. After recording of the statement of the victim, the petitioner filed an application before the trial Court, which was dismissed as mentioned above.

b) Aggrieved by the rejection of the bail, the petitioner has come up before this Court, on the ground that the victim did not support the case of the prosecution and at that time when she made statement on oath, she had attained the majority.

c) Without discussing the evidence, it would be appropriate to mention the

statement of the victim, the relevant portion of which is extracted as follows:-

> "Stated that my date of birth is 26.08.2001. I was knowing the accused Vicky Kumar for last one and half years. We became friends through Facebook. Thereafter, we started exchanging telephone calls. On 8.04.2019, I went alone to Chandigarh. I met the accused Vicky Kumar at Chandigarh. Thereafter, we went together to Katra (J&K). We stayed for the night in room No.301 at New Vivek Hotel Main Bazar, Katra. On the night on 8.04.2019, we established sexual relations voluntarily. On next day morning, we visited Mata Vaishno Devi Shrine. We stayed together for 2-3 days at the Shrine. Thereafter, we went to the house of the accused

> Rajinder Kumar (father of the accused Vicky) at Jammu. We stayed there till 23.05.2019. The accused Rajinder Kumar was insisting to inform my parents about my presence in his house, but Irefused for the same. The accused Vicky Kumar did not establish sexual relations during the stay at Jammu."

15. While deciding bail, this Court cannot discuss the evidence threadbare. Without commenting on the merits of the case, the fact that the accused is in jail for more than one year coupled with the fact that the victim after attaining the age of majority, stated on oath that the accused did not establish any sexual relations with herand further stated in her cross-examination that she had voluntarily left her home and that the petitioner had asked her to return to her home, but she did not accede to his request, would make out a case for bail.

16. The petitioner is a permanent resident of Village and P.O. Logarh, Tehsil Dhillon, District Ludhiana, Punjab, therefore, his presence can always be secured.

17. Further incarceration of the accused during the period of trial is neither warranted, nor justified, or going to achieve any significant purpose.

18. Without commenting on the merits of the evidence collected so far, considering all the reasons mentioned above, the victim's credibility makes out a case of bail for the present petitioner. Given above, coupled with the fact that the accused isin judicial custody for more than one year, the petition is allowed.

19. The report under Section 173(2) CrPC does not restrict the police'spowers to investigate further by following the law. Needless to say, that the Prosecution has all the rights of further investigation under S. 173(8) CrPC, following the law. It is still open for the Investigator to recover the deleted photographs from themobile through Forensic expert and to investigate that who had answered the call at midnight by making an appropriate application before the concerned Court following the law, if she thinks appropriate.

20. To ensure that he does not get an opportunity to intimidate or stalk the victim, while on bail and the Court is putting the stringent conditions and this bail shall be subject to the strict terms.

21. Given the above reasoning, the Court is granting bail to the petitioner, subject to the imposition of following stringent conditions, which shall be over and above, and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC. Consequently, the present petition is allowed. The petitioner shall be released on bail in the present case, connected with the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), to the satisfaction of the Trial Court. The petitioner shall also furnish one surety for INR 5,000 (INR Five thousand only), to the satisfaction of the Sessions Court/Special Court/ Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court, which is exercising jurisdiction over the concerned Police Station where FIR is registered. Trial Court. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) The petitioner to give security to the concerned Court(s)/ Investigating Officer, for attendance on every date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

b) The Attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s)(if available).

c) The petitioner shall join investigation as and when called by the Investigating officer or any superior officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree treatment, indecent language etc.

d) The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.

e) The petitioner shall not make any inducement, threat, or promise, directly or indirectly, to the Investigating officer, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.

f) Once the trial begins, the appellant shall not in any manner try to delay thetrial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of Appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

g) There shall be a presumption of proper service to the petitioner about the date of hearing in the concerned Court, even if it takes place through SMS/ WhatsApp message/ E-Mail/ or any other similar medium, by the Court.

h) In the first instance, the Court shall issue summons and may inform the Petitioner about such summons through SMS/ WhatsApp message/ E-Mail.

i) In case the petitioner fails to appear before the Court on the specified date,

then the concerned Court may issue bailable warrants, and to enable the accusedto know the date, the Court may, if it so desires, also inform the petitioner about such Bailable warrants through SMS/ WhatsApp message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper.

k) In case of Non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture ofthe bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However,this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such

modification, to the police station of this FIR, and also to the concerned Court.

m) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

n) During the trial's pendency, if the petitioner commits any offence under where the sentence prescribed is seven years or more, then the State may move an appropriate application for cancellation of this bail.

o) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner, and even the concerned trial Court shall be competent to cancel the bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

p) The learned counsel for the petitioner, as well as the attesting officer, shall explain the conditions of this bail to the petitioner.

q) The petitioner shall neither stare, stalk, make any gestures, remarks, call, contact, message the victim, either physically, or through phone call or any other social media, nor roam around the victim's home. The petitioner shall not contactthe victim.

r) The petitioner shall surrender all firearms along with ammunitions, if any, along with the arms license to the concerned authority within 30 days from today. However, subject to the provisions of the Indian Arms Act, 1959, the petitioner shall be entitled to renew and take it back, in case of acquittal in this case.

22. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

23. The officer in whose presence the petitioner puts signatures on personalbonds shall explain all conditions of this bail order to the petitioner, in vernacular.

24. The petitioner undertakes to comply with all the directions given in this order. Furnishing of bail bonds by the petitioner is the acceptance of all such conditions.

25. On the reverse page of the personal bonds and the officer attesting the personal bonds shall ascertain the identity of the bail-petitioner, through these documents.

26. Consequently, the petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on her/his furnishing bail bonds in the terms described above.

27. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

28. The present bail order is only for the FIR mentioned above. It shall not be a blanket order of bail in any other case(s) registered against the petitioner.

29. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

30. The Court Master shall handover this order to the concerned branch of the Registry of this Court, and the said official shall immediately send a copy of this order to the District and Sessions Judge, concerned, by e-mail. The Court attesting the bonds shall not insist upon the certified copy of this order and shall download the same from the website of this Court, or accept a copy attested by an Advocate, which shall be sufficient for the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

31. The SHO of the concerned Police Station or the Investigating Officer shallsend a copy of this order, preferably a soft copy, to the victim, at the earliest.

32. In return for the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

33. While deciding the propositions of law involved in this matter, I have considered all the similar orders/judgments pronounced by me. Thus, this order is more comprehensive and up to date. Consequently, given above, all previous judgments/orders passed by me, where the proposition of law was similar, or somewhat similar, be not cited as precedents.

The petition stands allowed in the terms mentioned above. All pending applications, if any, stand closed.